



# LEGAL SERVICES CORPORATION REAUTHORIZATION

**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON ADMINISTRATIVE LAW  
AND GOVERNMENTAL RELATIONS  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FIRST CONGRESS

FIRST SESSION

---

JULY 19, 1989

---

**Serial No. 47**





**LEGAL SERVICES CORPORATION REAUTHORIZATION**

---

---

**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON ADMINISTRATIVE LAW  
AND GOVERNMENTAL RELATIONS  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FIRST CONGRESS  
FIRST SESSION

\_\_\_\_\_  
JULY 19, 1989  
\_\_\_\_\_

**Serial No. 47**



Printed for the use of the Committee on the Judiciary

\_\_\_\_\_  
U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1990

25-196 :z

## COMMITTEE ON THE JUDICIARY

JACK BROOKS, Texas, *Chairman*

ROBERT W. KASTENMEIER, Wisconsin

DON EDWARDS, California

JOHN CONYERS, Jr., Michigan

ROMANO L. MAZZOLI, Kentucky

WILLIAM J. HUGHES, New Jersey

MIKE SYNAR, Oklahoma

PATRICIA SCHROEDER, Colorado

DAN GLICKMAN, Kansas

BARNEY FRANK, Massachusetts

GEO. W. CROCKETT, Jr., Michigan

CHARLES E. SCHUMER, New York

BRUCE A. MORRISON, Connecticut

EDWARD F. FEIGHAN, Ohio

LAWRENCE J. SMITH, Florida

HOWARD L. BERMAN, California

RICK BOUCHER, Virginia

HARLEY O. STAGGERS, Jr., West Virginia

JOHN BRYANT, Texas

BENJAMIN L. CARDIN, Maryland

GEORGE E. SANGMEISTER, Illinois

HAMILTON FISH, JR., New York

CARLOS J. MOORHEAD, California

HENRY J. HYDE, Illinois

F. JAMES SENSENBRENNER, JR.,

Wisconsin

BILL McCOLLUM, Florida

GEORGE W. GEKAS, Pennsylvania

MICHAEL DeWINE, Ohio

WILLIAM E. DANNEMEYER, California

HOWARD COBLE, North Carolina

D. FRENCH SLAUGHTER, JR., Virginia

LAMAR S. SMITH, Texas

LARKIN I. SMITH, Mississippi

CHUCK DOUGLAS, New Hampshire

CRAIG T. JAMES, Florida

WILLIAM M. JONES, *General Counsel*

ROBERT H. BRINK, *Deputy General Counsel*

ALAN F. COFFEY, JR., *Minority Chief Counsel*

## SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

BARNEY FRANK, Massachusetts, *Chairman*

DAN GLICKMAN, Kansas

BRUCE A. MORRISON, Connecticut

HARLEY O. STAGGERS, Jr., West Virginia

BENJAMIN L. CARDIN, Maryland

DON EDWARDS, California

CRAIG T. JAMES, Florida

LAMAR S. SMITH, Texas

CHUCK DOUGLAS, New Hampshire

LARKIN I. SMITH, Mississippi

JANET S. POTTS, *Chief Counsel*

BELLE CUMMINS, *Assistant Counsel*

ROGER T. FLEMING, *Minority Counsel*

27-1075

# CONTENTS

## HEARING DATE

	Page
July 19, 1989 .....	1

## OPENING STATEMENT

Frank, Hon. Barney, a Representative in Congress from the State of Massachusetts, and chairman, Subcommittee on Administrative Law and Governmental Relations .....	12
---	----

## WITNESSES

Byron, Hon. Beverly B., a Representative in Congress from the State of Maryland .....	1
Dirting, Doug, American Farm Bureau Federation .....	494
Eckel, Keith, President of Pennsylvania Farmers Association and member of the American Farm Bureau Federation Board of Directors .....	312
Flaherty, Peter T., Legal Services Reform Coalition .....	485
Greco, Michael S., President of New England Bar Foundation, cofounder, Bar Leaders for Preservation of Legal Services for the Poor .....	154
Loines, Dwight, President, National Organization of Legal Service Workers, District 65, UAW .....	120
Powers, Lonnie A., executive director, Massachusetts Legal Assistance Corporation .....	135
Raven, Robert D., President, American Bar Association .....	103
Wallace, Michael B., Chairman of the Board, Legal Services Corporation, accompanied by Terrance J. Wear, President, Legal Services Corporation .....	13

## LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Byron, Hon. Beverly B., a Representative in Congress from the State of Maryland: Prepared statement .....	3
Cardin, Hon. Benjamin L., a Representative in Congress from the State of Maryland: Copy of the invoice from the firm of McGuire, Woods, Battle & Boothe, through April 30, 1989 .....	73
Dirting, Doug, American Farm Bureau Federation: Production data, Tri-County Growers, WV .....	499
Eckel, Keith, President, Pennsylvania Farmers Association and member of the American Farm Bureau Federation Board of Directors .....	315
Flaherty, Peter T., Legal Services Reform Coalition: Prepared statement .....	487
Greco, Michael S., President of New England Bar Foundation, cofounder, Bar Leaders for Preservation of Legal Services for the Poor: Prepared statement .....	158
Loines, Dwight, President, National Organization of Legal Services Workers, District 65, UAW: Prepared statement .....	123
Powers, Lonnie A., Executive Director, Massachusetts Legal Assistance Corporation:	
Letter to Hon. Barney Frank, with enclosure, dated July 26, 1989 .....	307
Prepared statement .....	138
Raven, Robert D., President, American Bar Association	
Prepared statement .....	107
Report on the San Antonio Study of Legal Services delivery systems, May 1989 .....	173

copy 90

IV

	Page
Wallace, Michael B., Chairman of the Board, Legal Services Corporation:	
Prepared statement .....	18
Submission response to the Hon. Larkin Smith's post-hearing questions ....	38
Wear, Terrance J., President, Legal Services Corporation:	
Prepared statement .....	54
Submission response to Hon. Lamar Smith's post-hearing question.....	89

APPENDIXES

Appendix 1.—Prepared statement of the National Council of Agricultural Employers .....	501
Appendix 2.—Letter to the Hon. Barney Frank from Paul B. Eaglin, dated August 11, 1989, and letter to Terrance J. Wear, from Paul B. Eaglin, dated August 11, 1989, concerning the Anti-Lobbying Restrictions Memorandum. A copy of the "Anti-Lobbying Restrictions on the Corporation" memorandum follows the letters .....	505
Appendix 3.—Letter to the Hon. Barney Frank from Richard C. Heffern, President and Philip T. Dunne, treasurer of the Legal Aid Society of North-eastern New York, Inc., dated November 1, 1989 concerning Mr. Wear's testimony on July 19, 1989.....	518

# LEGAL SERVICES CORPORATION REAUTHORIZATION

WEDNESDAY, JULY 19, 1989

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ADMINISTRATIVE LAW  
AND GOVERNMENTAL AFFAIRS,  
COMMITTEE ON JUDICIARY,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Barney Frank (chairman of the subcommittee) presiding.

Present: Representatives Barney Frank, Dan Glickman, Harley O. Staggers, Jr., Benjamin L. Cardin, Craig T. James, Lamar S. Smith, and Larkin I. Smith.

Also present: Janet S. Potts, chief counsel; Belle Cummins, assistant counsel; Cynthia Blackston, chief clerk; and Roger T. Fleming, minority counsel.

Mr. FRANK. The hearing will convene. We will have opening statements after we reconvene, but at this time, so Mrs. Byron will not have to make a second trip, we will hear from our colleague, Mrs. Byron.

Your statement will go in the record.

## STATEMENT OF BEVERLY B. BYRON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mrs. BYRON. Let me thank you for holding this hearing, because I think this opportunity to testify before the subcommittee on the reauthorization of Legal Services is a very important one from my perspective.

I am here this morning to relay what happened to a thriving fruit growing industry in my district in western Maryland as a result of over-zealous lawyers with the Maryland Legal Aid Bureau, a Legal Services Corporation grantee.

I would also like to explain two bills which I recently introduced to attempt to address those problems. Although I cannot bring back the orchardists, I hope that the situation in my district will not be repeated in your districts.

Let me state that I do not object to the existence of a publicly funded Legal Services Corporation. Legal counsel should not be contingent on who can pay for it. Unfortunately, in the case of western Maryland fruit growers, the unbounded enthusiasm of the State Legal Aid Bureau exceeded the public-spiritedness of the Legal Services Corporation.

Between 1983 and 1985, the Maryland Legal Aid Bureau began what I feel was an unprecedented attack on six orchards. Over 155 complaints and 15 lawsuits were filed against the growers. Visions of substandard housing, unfair compensation and worker mistreatment immediately may come to mind.

But those were not the problems. Instead, Legal Aid pursued the growers on claims of discriminatory preemployment tests and the growers' use of the Department of Labor's H-2 program.

For example, Legal Aid said that a ladder test was not a fair test. Since a ladder is needed to pick the fruit from the trees, I do not think it is unfair for a grower to see if a potential employee can carry and climb a ladder.

The effects of this legal assault were devastating to the fruit growers. The extensive legal bills and the promise of continued legal action ruined the industry. The once active Washington County Fruit Growers' Association is out of business. Maryland's apple production has gone from 2.5 million bushels in the early 1980's to less than 1 million bushels last year. Three hundred people are out of work, and one grower, simply unable to withstand the stress, committed suicide.

Again, I know I cannot bring back the orchards. But I tell you this to call your attention to what has happened to the spirit of the Legal Services Corporation.

On Monday, I introduced two bills which may return Legal Aid to its intended purpose: To represent those unable to afford a lawyer. One bill would encourage mediation and conciliation prior to bringing suit. The other bill would address the matter of attorney's fees if the judge determines the complaint is unwarranted.

The bills are deliberately narrow so as not to erode the strengths of the program. Yet, they offer some hope to the farmer interested in resolving the case without having to resort to bankruptcy in the process.

These are merely suggested remedies which I would ask you to consider during your hearings on Legal Services this year. I hope we can work together to resolve what I perceive and know from firsthand experience in my district is a real threat to the integrity of a program that I think is extremely worthwhile.

I would like to submit for the record three articles backing up what has happened to western Maryland, to the orchard industry—

Mr. FRANK. Without objection, they will be included.

[The prepared statement, with articles, of Mrs. Byron follows:]

HONORABLE BEVERLY B. BYRON  
TESTIMONY BEFORE THE JUDICIARY SUBCOMMITTEE ON  
ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

Room 2226 Rayburn House Office Building

July 19, 1989

Thank you for the opportunity to testify before the Subcommittee on the reauthorization of the Legal Services Corporation. I am here this morning to relay what happened to a thriving fruit growing industry in my district in Western Maryland as a result of over zealous lawyers with the Maryland Legal Aid Bureau, a Legal Services Corporation grantee. I would also like to explain two bills which I recently introduced to attempt to address those problems. Although I cannot bring back the orchardists, I hope that the situation in my district will not be repeated in your districts.

Let me state that I do not object to the existence of a publicly funded Legal Services Corporation. Legal counsel should not be contingent on who can pay for it. Unfortunately, in the case of Western Maryland fruit growers, the unbounded enthusiasm of the State legal aid bureau exceeded the public-spiritedness of the Legal Services Corporation.

Between 1983 and 1985, the Maryland Legal Aid Bureau began what I feel was an unprecedented attack on six orchards. Over 155 complaints and 15 law suits were filed against the growers.

Visions of substandard housing, unfair compensation and worker mistreatment immediately may come to mind. But those were not the problems. Instead, Legal Aid pursued the growers on claims of discriminatory pre-employment tests and the growers' use of the Department of Labor's H-2 program. For example, Legal Aid said that a ladder test was not a fair test. Since a ladder is needed to pick the fruit from the trees, I do not think it is unfair for a grower to see if a potential employee can carry and climb a ladder.

The effects of this legal assault were devastating to the fruit growers. The extensive legal bills and the promise of continued legal action ruined the industry. The once active Washington County fruit growers' association is out of business. Maryland's apple production has gone from 2.5 million bushels in the early 1980's to less than 1 million bushels last year. Three hundred people are out of work, and one grower, simply unable to withstand the stress, committed suicide.

Again, I know I cannot bring back the orchards. But I tell you this to call your attention to what has happened to the spirit of the Legal Services Corporation.

On Monday, I introduced two bills which may return Legal Aid to its intended purpose: to represent those unable to afford a lawyer. One bill would encourage mediation and conciliation prior to bringing suit. The other bill would address the matter

of attorney's fees if the judge determines the complaint is unwarranted.

The bills are deliberately narrow so as not to erode the strengths of the program. Yet, they offer some hope to the farmer interested in resolving the case without having to resort to bankruptcy in the process.

These are merely suggested remedies which I would ask you to consider during your hearings on Legal Services this year. I hope we can work together to resolve what I perceive as a real threat to the integrity of this worthwhile program.

Thank you.

# THE HERALD MAIL

Hagerstown, Md. Sunday, September 4, 1937

1937 Year No. 348

Amount, Pcs. 31  
Pounds 4  
Details in Reports, D1-05

## County growers soured by fruits of labor

### Glaze Orchard third to close in past year

#### By ARNOLD S. PLATON

INDIAN SPRINGS, Md. — Glaze Orchard, which has been one of the largest and most successful orchards in the county, has closed its doors for the third time in the past year.

The Glaze family has decided to sell the orchard to the county and the county has decided to sell it to the county. The county has decided to sell it to the county and the county has decided to sell it to the county.

The orchard is located in the county and is one of the largest and most successful orchards in the county. The county has decided to sell it to the county and the county has decided to sell it to the county.

The county has decided to sell it to the county and the county has decided to sell it to the county. The county has decided to sell it to the county and the county has decided to sell it to the county.



An apple tree in full leaf in the Glaze Orchard which has been the county's third to close in the past year.

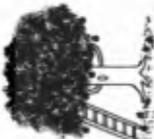
### Labor problems signal end of an era for orchardists

Orchardists who have been a source of income about the past year are beginning to look for a new source of income.

#### By ARNOLD S. PLATON

Washington County's big fruit crop is beginning to show signs of a decline in the past year, and there are many factors which may be responsible.

In recent years, the labor shortage has been a major problem for orchardists. The county has decided to sell it to the county and the county has decided to sell it to the county.



Crisis in the orchards

### Business and gripes

The uncertainty is a small part of the problem. The county has decided to sell it to the county and the county has decided to sell it to the county.

The county has decided to sell it to the county and the county has decided to sell it to the county. The county has decided to sell it to the county and the county has decided to sell it to the county.

Please turn to OVERLEAF, 14

# Orchards

Continued from A1

All went relatively smoothly here until 1963, when the Baltimore-based Legal Aid Bureau began filing complaints and suits against local growers, mainly on behalf of domestic workers. To date, orchards here have been hit with more than 150 complaints and about 15 suits.

The grievances alleged such things as hiring standards that favored foreigners and inadequate housing. While some charges were pressed in court, others were sent through a series of hearings at the Maryland Department of Employment and Training, and the U. S. Department of Labor.

Many of the cases have lasted years. One that began in 1977 is still pending and others still haven't been settled.

The growers who have lost most of the cases, have paid nearly \$300,000 in penalties and settlements. In addition, more than \$400,000 — much of it borne by a regional industry group — has been spent on defense attorneys.

## The hit list

Legal Aid officials say the annual has brought improvements. But others say it has nipped the industry.

The first to fall was the giant Fairview Orchards, which was the largest orchard in Maryland and produced at least 25 percent of the state's annual apple harvest.

The orchard's West German owners, who had invested \$70 million in the operation in the past seven years, blamed the closing on the legal battles and tree damage by deer. Fairview had employed about 200 seasonal pickers and 60 year-round workers.

Next to go was the 1,000-acre Hepburn Orchards near Hancock. Hepburn, the state's second-largest orchard, halted operations in April, but has leased its lands to two Virginia-based growers. Now, they are uncertain about continuing.

A smaller orchard, Glaze Maryland Orchards is planning to close its operation at Indian Springs when that year's apple harvest is over.

Orchardists like Rinehart are id-

ling more land. Others like Eagermont's Brian Jacques are cutting back as one way to survive.

Of all these, only Bromley Orchards near Smithsburg hasn't tied its woes to the labor problem. But the operation, which filed for bankruptcy protection in 1968, is expected to close eventually. Its new Nevada owners are planning to build more than 500 homes on the several hundred acres Bromley had here.

## Top of the heap?

On July 1, 1977, the Baltimore American newspaper bannered these headlines: "Hagerstown Population Jumps 70 Per Cent. Claims Largest Fruit Growing County in United States."

Growers agent Beard treasures the clipping and local orchardists mention it often. However, government records not yet clear as to the county's claim to No. 1.

In 1926, Maryland was among the top U. S. producers.

Its growers reaped 1.4 million bushels in 1971, 30,000 orchards covering about 52,000 acres. Washington County had 1,007 of the orchards, spread over 12,254 acres, according to the state Agricultural Statistics Service.

But among states, Washington state led the pack. Its 24.4 million bushels that year burst the harvest by any Maryland-area state. It is 9 million in Virginia, 14.5 million in Pennsylvania and 10.9 million in West Virginia.

By last year, Washington state's lead had widened considerably.

Its production had jumped out to 64.5 million bushels, while Maryland's had declined to 1.6 million. Pennsylvania's had fallen to 12.9 million, Virginia's to 9.5 million and West Virginia's to 4.7 million.

In Maryland, the number of orchards had shrank to just 667, covering 11,623 acres by 1982, according to the latest census data. Washington County accounted for 4,537 acres — more than half the state total — but only 72 of the orchards. They produced an estimated 1.05 million bushels, or roughly three-fourths of the state's entire harvest.

This year, the statistics service is predicting the statewide produc-

tion will drop to 1.0 million bushels, down \$11.6 million from 1980.

But the recent fall-out in Washington County should reduce the harvest even more, growers said.

Nov. 1, the backbone of the local industry is about 20 family-owned orchards, most of them near Smithsburg. Unlike the big orchards of old, each contains roughly 50 to 200 acres.

## Staying alive

Rinehart, 68, is the third generation owner of orchards that his family began around the turn of the century. The operation now encompasses about 60 acres.

To cope now, Rinehart has been cutting back.

Two years ago, he had 150 acres of peach trees. Now, he has 60 acres "and I'm going to take out 20 more acres next year," he said.

Two-thirds of his overall production is apples and when the time comes to decide whether to replant the older apple trees, he said, he may opt against doing so. "It'll be based on availability of labor," he said.

The labor problem and Legal Aid complaints have hit Rinehart Orchards hard, he said. The family is still litigating a 1977 case, for which it paid a fine years ago, and is now being pressed for the interest, according to Rinehart.

Rinehart, chairman of the Maryland Apple Commission and vice-president of the local growers association, voted with two other local orchardists last month to trash their request for H2 apple pickers.

The three, the only local growers still in the program, were disgusted by federal requirements — issued during the peach harvest — that they offer to visit several states to look for domestic pickers.

Out of the program, Rinehart and the others scrambled to find workers.

Rinehart said he has lined up the 40 pickers he needs, largely because his search began months ago. He said he had feared that federal officials might boot him out of the H2 program — as has happened to others — because of the lagging 1977 case.

Now that he has workers scheduled to come, Rinehart and he's

still not out of the woods. "You never know. You could have 30 coming and only 25 show up."

## To stay or not?

When Hepburn Orchards folded, Virginia growers Robert Sollesberger and Harry Byrd III stepped in and agreed to lease the big orchard and part of the neighboring Fairview for a year.

Orchard Ventures, the Hepburn partnership between the two men, is not having the best of years. Sollesberger said. Not only were some peach trees ruined by cicadas, which laid eggs, stamined and eventually killing the wood, but the summer drought has hurt the fruit.

"This is a very difficult year we're in because of the large apple crop nationwide. It's one of the largest on record," he said. "Normally this would indicate a fairly low market price, and it really hasn't been a good growing season."

An additional problem is that the Hepburn land is a thin shale soil, whereas his orchards in Virginia have "fairly deep, clay-type soil that tends to (let fruit) stay up better."

Nevertheless, Sollesberger said, it is "not going to be a bad season anywhere you go."

On the plus side, Orchard Ventures hasn't been hit with any Legal Aid complaints, he said. But "we're just starting to get into the time when you get those."

Also promising is that the orchard, which joined Rinehart and Denton Jacques in last month's H2 protest, has lined up the 15 to 100 apple pickers it needs. The workers are Fairview's former picking crew, Sollesberger said.

But in Virginia, he and other growers are still using H2 labor. They tried unsuccessfully to have the new federal rules overturned, but didn't withdraw their request for workers.

Sollesberger said he and Byrd haven't decided yet whether they'll try to renew their lease at Hepburn next year. He said they'll decide after the apple harvest is completed.

"It's hard to tell," he said of the decision. "That depends on what happens."





# Lawmakers angered, sympathetic

## Bills sponsored to help orchard industry stay alive

(Editor's note: This is the fourth in a series of stories about the problems plaguing local orchardists.)

By ARNOLD B. PLATOU  
Staff Writer

U. S. Rep. Beverly Byron, argued that costly legal fights have knocked out two Washington County orchards and endangered others, in asking Congress to help prevent more closings.

Byron, D-GA, said she wants migrants and their Legal Aid attorneys to try to resolve complaints before going to court and, in some cases, to foot growers' legal defense bills.

"The thing that bothers me almost more than anything is we have an industry that's going down. Legal Aid doesn't help anybody by having all these people out of work, and orchards going under," Byron said.



Crisis in the orchards

Other lawmakers are also unhappy. The Byron bills have six co-sponsors from other fruit-growing states including Pennsylvania, Virginia, North Carolina and

Texas. Senators from Delaware and Virginia have filed parallel measures.

The laws would

- Allow farm workers to file suits to federal courts only if their problems haven't been resolved in administrative hearings at state and federal labor agencies. At present, growers may have to deal with the same charges both at the agency level and in court simultaneously.

- Force workers or Legal Aid to pay growers' defense bills if they are found innocent and if a judge rules the complaint was frivolous, unreasonable or harassment.

The Legal Aid Bureau, a federally-funded, private group providing free legal service to the poor, has filed 15 suits and more than 150 complaints against local growers since 1982.

Please turn to ORCHARDS, A4

entertainment scheduled for the Great Hagerstown Fair, opening Sunday, Sept. 13

Moving forward 6-1 years 9/10/87

## Orchards

Continued from A1

The fights have cost orchardists about \$60,000 in attorney fees and nearly \$200,000 more in settlements. The expense was one of the main reasons cited when Fairview Orchards near Hancock shut down last year and the neighboring Hopburn Orchards halted operations this year.

Byron said others have been forced out, too. In the past six years, she said, Legal Aid has put a "great deal" of them out of business — not only here but on the Eastern Shore.

If approved, Byron's proposals would be welcome, said Joe Beard, agent for the Washington County Fruit Growers Association.

At present, growers are "forced into defending the same issues in two different jurisdictions at the same time. One was hard, but two were almost impossible," Beard said.

Help from Byron's other measure — forcing plaintiffs to pay for frivolous suits — might be limited, he said. "It might be difficult to proceed under because there has to be a demonstration of malice-mens. But even if we could demonstrate that in the past, we couldn't do anything about it."

Maryland's Legal Aid Bureau is opposed to both proposals.

"They are unnecessary and

impose a significant and unwarranted burden on those in our society least able to bear them, the migrant farmworkers who harvest our crops," Director Charles Dorsey Jr. told Byron in a recent letter.

Dorsey said his office has never brought frivolous complaints and, if it ever did, could be punished under existing law. In addition, he wrote, forcing workers to wait to file suits would "delay justice . . . and would undoubtedly discourage them from pursuing meritorious claims."

A better solution would entail discussing ways to handle upcoming harvests before problems occur, he said.

"We know what the law is and the communications between us and the orchardists we think would be helpful in handling as solving some of these problems upfront rather than litigation."

Such discussions have been tried. But so far, they seem only to have increased animosity, Byron said.

"I think we've gotten to the point now where it is in a very difficult position. People are in a gridlock," she said.

Byron said she is open to Legal Aid's request that she set up such a meeting. But "I'm not going to spend a lot of time spinning wheels," she said.

On another matter, Byron said she has tackled problems with the federal RE program.

The program, supervised by the U.S. Department of Labor, is designed to provide foreign pickers when growers can't find enough American workers. Local growers quit the program recently, saying it has too many requirements.

Byron said his efforts have hit fruit problems.

"We finally got things moving on

R, but then it got to the point where the Department of Labor refused to move until suits filed by Legal Aid were all resolved," she said.

With the "number of suits that Legal Aid has filed, I don't know how long it's going to take to get them resolved," she said.

Tomorrow: A look at the future of orchards in Washington County.

# Legal Aid is on pickers' side

## Lawsuits have cost county orchardists plenty

(Editor's note: This is the third in a series of stories about the problems plaguing local orchardists.)

By ARNOLD S. PLATOW  
Staff Writer

Charles Dorsey Jr. reckons his Maryland lawyers are the state's most aggressive in pressing cases against the fruit growing industry.

Orchardists in Washington County aren't likely to argue the point.

Dorsey's Legal Aid Bureau office has 34 cases with more than 120 complaints and about 15 cents, wringing out about \$26,000 in penalties, and costing the industry at least \$60,000 more for lawyers.

Dorsey, director of the private,



**Crisis in the orchards**

Federally-funded agency, said he regrets having to press such cases, but is proud of the returns that have resulted.

"I believe that because of our work, people who are disadvantaged all of their lives have more opportunity," he said. "They get a sense America offers something for them."

He credits the success largely to attorney Greg Schell, who manages Legal Aid's migrant unit statewide.

Schell is widely criticized among growers for his relentless attacks. Many blame his actions for the decline during the past year of Washington County's two largest orchards — Fairview and Hepburn.

He ignores the criticism. "Frankly, my clients don't give a damn if Terry Hepburn goes out of business, because they weren't ever going to work for him again,"

Schell said. "My clients say they were mistreated."

Legal Aid, founded 74 years ago in Baltimore as a law firm for the poor, has offices in every state. It represents people with complaints ranging from bad housing and consumer troubles to abused children and unfair farm labor practices.

In Maryland, the non-profit organization is funded by the federal and state governments, and United Way of Central Maryland. About 10 years ago, Congress began sending it funds — about \$14,000 this year — to pursue migrant labor cases.

With the backing, Legal Aid investigated and filed several complaints.

Please turn to ORCHARD, AS



Continued from A1

plaints against Eastern Shore growers. By 1983, migrant housing, social security withholding and other matters there were much improved, Dorsey said.

Spurred by Schell, who joined the Maryland team that year after working with Florida's Legal Aid, the agency focused on conditions in Western Maryland orchards.

The situation here "wasn't horrible, but the law wasn't being followed," Dorsey claimed. "Illegal violations included failure to provide housing, employment law requirements and a preference for foreign pickers over American workers," he said.

Dorsey, head of the state organization for 14 years, said he grew concerned the need for improvements with growers, but they refused to listen.

"Frankly, I think for as many years they have run things their own way and when we come in and say 'this is the law,' I think they want to fight that all the way down the line," he said.

So Legal Aid attorneys began filing pickers' complaints with the Maryland Department of Employment Security. At the same time, the complaints were pressed in court.

Frequently, the growers won in court-hearings, but lost at higher appeal levels. "The overwhelming number of them have been ruled in our favor," Schell said.

For a long time, he said, Legal Aid desisted why the growers refused to accept any claim, even those for less than \$100. "We were asking ourselves, 'Why are these guys fighting?' ... until we found out about FLEC."

The Farm Labor Executive Committee, an East Coast organization with more than 200 dues-paying growers, paid lawyers bills to fight the local cases in 1984 and 1985, because growers elsewhere didn't want the charges to set precedents, said Joe Beard, a FLEC accountant.

FLEC's costs were divided



**Joe Beard**

among all members, he said. Because Fairview and Hepburn were two of the largest, their share was probably 10 to 15 percent of the \$90,000 to \$400,000 in legal fees for those two years, according to Beard.

In addition, local growers had substantial costs prior to FLEC sharing in those costs and certainly after early 1986 when the full burden fell back on Maryland growers again. And that was the final blow," Beard said.

Decisions by Fairview and Hepburn to close "just would have happened sooner if FLEC had not shared the cost for awhile. That probably extended their life," he said.

Local orchardists have paid the fees and settlements themselves. So far, the penalties have totaled nearly \$26,000.

By fighting, Schell and Dorsey maintained, growers brought the high legal costs on themselves. "We know it's expensive to try cases, and when you stone-wall it and say, 'Well with it,' it costs money," Dorsey said.

Schell charged that the growers have legitimized the industry by trying repeatedly to pull political strings.

"They've had efforts to influence us, had hearings in Annapolis with

**The Farm Labor Executive Committee, an East Coast organization with more than 300 dues-paying growers, paid lawyers' bills to fight the local cases in 1984 and 1985, because growers elsewhere didn't want the charges to set precedents.**

—Joe Beard, a FLEC accountant

out giving us notice. That was the type of ambush they've done. When we have offered to meet with them and with (Gov. William Donald) Schaefter's people, they've refused," he said.

"So what can we do? Tell our clients to go home? You're a poor person. You're black. You don't have any political power!"

"... Because we're federally-funded, everybody thinks they have a right to tell us how to practice law. What I tell my clients is, the politicians don't matter."

So Legal Aid has pushed ahead. And the pushing has brought returns, Schell said.

"After '83 and '84, the orchards stopped doing a lot of the illegal stuff. For example, the ladder test was not given in '85," he said, referring to the apple picker test a judge declared irrelevant this year.

Another sign of success is that big orchards began hiring more domestic workers, he said.

Fairview, which had been the worst offender and which had fewer than a dozen American workers in '84, had more than 200 in '86. Hepburn in '86 had 10 Americans."

Schell even takes pride in the growers' recent decision to quit hiring foreign pickers through the federal H2 program because of increased regulations. "Because they dropped out of H2, all the

growers have apparently been able to find American workers," he said.

For growers, the especially aggressive side of Legal Aid's actions has been when told on their business. Two that faded blazed much of their troubles as Legal Aid.

The 1,500-acre Fairview Orchards near Hancock closed last November after paying \$26,000 to settle the remaining cases against it. The closing surprised Dorsey because he'd just received a Fairview letter granting Legal Aid's recent efforts to resolve problems, he said.

Hepburn Orchards, a 1,000-acre spread near Hancock, halted operations early this year. It has paid less than \$70,000 in penalties so far, Schell said.

The awards may seem high but when the money is split among his migrant clients, each gains little beyond the satisfaction of returns, he said.

"What's been paid to farmworkers? It's not very much. Yet look at the energy that has been devoted to (fighting) the situation and yet, in the end, the farmworkers have won."

Schell still sees problems, but Dorsey is optimistic peaceful solutions will come. A hopeful sign is that only one complaint was filed against local growers last year, and just one or two in 1986.

Dorsey's staff met recently with Virginia area growers to an effort to improve relations there. "The meeting was not as cordial as it could have been," he said, but was beneficial because both sides talked.

At his request, U.S. Rep. Beverly Byron, D-Md., is considering setting up a similar meeting here.

"Hopefully we can come up with some way that they will abide by the law and our clients will have no complaints," Dorsey said. "That's the ideal situation."

—*Times-News: U.S. Rep. Beverly Byron's efforts to help workers complaints out of court and orchardists business*

Mrs. BYRON. I appreciate the chairman's courtesy.

Mr. FRANK. We appreciate you truncating your testimony so we can vote. I appreciate this.

Mrs. BYRON. A very weighty vote.

Mr. FRANK. I wasn't able to guess the exact roll call schedule. We will be back in 20 or 25 minutes or so.

#### OPENING STATEMENT OF CHAIRMAN FRANK

Mr. FRANK. The hearing will come to order. We, as a result of a reorganization of the jurisdictions of the subcommittees of the Judiciary Committee this year, acquired jurisdiction over the Legal Services Corporation. For some time now, there has been no authorization of the Corporation. It has been dealt with by appropriations.

At the urging of members of the Appropriations Committee, particularly Mr. Smith of Iowa, the chairman of the relevant committee in the House, we are going to undertake an authorization process.

As is often the case in the House and in the Senate, no one can be sure how it ends. I should add that the practice of proceeding without an authorization is hardly confined to Legal Services. Foreign aid, other important governmental functions have proceeded that way.

It was last year or I believe the year before when we in fact proceeded without a defense authorization. So that there is nothing irregular about the process, but it has been the feeling of the Appropriations Committee, which I share, that we would be better served if we would at least begin an authorization process.

I must say that I am somewhat disturbed at present to have had no indication from the President of the United States or anyone within his ambit that he is aware of the existence of such an entity. I trust that someone in the White House will read the papers if we make them tomorrow, and it may be that they will become aware that there is a Legal Services Corporation.

We had a hard time trying to find out if they were in favor of any budget for the Legal Services budget. The President has the right to nominate people to serve on the Board. He could nominate the sitting people, nominate new people. He could do whatever he wished.

We sought the advice of the Justice Department in this matter, and we were informed that that wasn't their job. So Legal Services Corporation has been abandoned by the Bush administration, either positively or negatively. That seems to me to be frankly a grave error on the part of the President. He may well at some point feel that actions are taken which diminish the right of the executive to have an input, but we cannot subject the President of the United States nor will we try to get him to tell us what he thinks about Legal Services. He has had opportunities.

No one from the administration wanted to testify at this hearing. We urged them to do something about Legal Services. In particular, I should make it clear, while we are ready to go ahead with authorization, I do not think we will succeed in getting an authori-

zation statute nor will I be inclined to try if the President has not nominated people to serve on the Board.

The President has the right and the Senate has the right on confirmation, but I do not think that the House or the Senate will be moved to send the President a statute without some indication that there will be a duly appointed Board to run it.

So, we await some expression of interest from the White House in what is, it seems to us, a significant area of public policy. If others have—if Mr. James has an opening statement, Mr. Smith, do you have any opening?

Mr. SMITH of Texas. No comments except to say that in regard to the silence of the Corporation with regard to the Legal Services Corporation, from their point of view, no news may be good news.

Mr. FRANK. I am prepared to ignore the administration if that is their choice, but I did want to make it clear that we have invited input and have received none.

Mr. James.

Mr. JAMES. I am looking forward to the testimony of witnesses. I am delighted that they are here to assist us.

Mr. FRANK. Thank you.

We will begin with Mr. Wallace, who is the Chairman of the Board of Legal Services. Mr. Wallace, welcome.

Mr. WALLACE. Thank you. Glad to be here.

Mr. FRANK. After this, we will hear from the American Bar Association, the Massachusetts Legal Assistance Corporation and then the Bar Leaders for Preservation of Legal Services for the Poor and UAW-65, National Organization of Legal Service Workers.

**STATEMENT OF MICHAEL B. WALLACE, CHAIRMAN OF THE BOARD, LEGAL SERVICES CORPORATION, ACCOMPANIED BY TERRANCE J. WEAR, PRESIDENT, LEGAL SERVICES CORPORATION**

Mr. WALLACE. Thank you, Mr. Chairman. It is good to be here again. I want you to know that you are not alone in not having heard from the White House on this issue. I don't know whether I am part of the administration or not. That is one of the odd things about this agency. It is technically not a Government agency. But I don't know the President's position, and there is no way I can give you any insight into it.

I can tell you my position. This is a day that I have looked forward to for the 4½ years I have been on the Board. I was afraid that it would never get here. As you said, there hasn't been an authorization bill since 1977.

When I came aboard in 1984, I took over as head of our Regulations Committee, and I immediately got a ton of mail from Congress on what we ought to do on our regulations. I said then, and I say now, that weighing mail from Congress is no way to determine congressional intent. The Reauthorization Bill is the best way to determine congressional intent.

I wrote the gentleman from Massachusetts who now chairs this subcommittee over 4 years ago to ask for this bill to come up, and I truly hope that a bill will be produced from this process. I truly

hope that the President of the United States will support it and sign it. I am gratified that you are ready to undertake this task. Congress in the last 2 years has approached in principle some serious reforms, and I think now we can get on to apply the lessons of the last 12 years.

Those lessons seem to me to fall into two broad categories. First, the Federal provision of legal services to the poor is here to stay, and it should be.

Second, the Federal provision of legal services to the poor should be reformed, and it can be. I don't have to spend much time with this subcommittee on the first point. Your support for legal services is well known. I have reminded my fellow conservatives from time to time that while this program may have originated with the Great Society, the recognition of the need did not. Centuries ago, the prophet Amos warned in no uncertain terms of the consequences of public injustice to the poor.

From the best evidence we have available to us from our monitoring, many of the programs we fund are doing a fine job of fighting injustices as best they can. They deserve our support, and whether they believe it or not, they have mine.

Reforms are needed in the current system. I will not go over the reforms that I suggested during my testimony earlier this year, I would refer you to my testimony. I do think we ought to abolish the Board, both for management and for constitutional reasons.

The Legal Services program would be run better if it had one person in charge instead of 11 part-time people who try to run it on a part-time basis. I also urge that you make the usual Federal statutes governing waste, fraud and abuse applicable to the receipt and expenditure of LSC funds.

As the information we gave you after the last hearing indicates, we cannot get Federal prosecutors to deal with these matters, because they are unsure as to whether those statutes apply. This is Federal money; Federal officers ought to have the ability to enforce the laws.

And finally, I wish to reiterate my view that there is no demonstrated need for the continued direct funding of State and national support centers. Their history shows without doubt that they were originally established for the purpose of achieving "law reform" through lobbying and impact litigation. I see no evidence that they have changed their purpose over the years. My view is that "law reform" should be the province of Congress, not of Federal grantees and contractors. Such funds as Congress makes available for legal services should go directly to the local level to pay for the representation of poor individuals.

This morning I want to talk about the subject that engaged most of our time after the completion of my prepared testimony on our last visit. We discussed at some length the question of who should control the particular groups who receive Federal funds and deliver legal services at the local level.

Since my testimony, Congress, through the Supplemental Appropriations bill, has endorsed for the second year in a row the use of competition to select the recipients of Legal Services funds. I am persuaded, based on my 4½ years experience, that some sort of change is necessary. Our monitoring program has convinced me

that many of our local programs are conscientious in their efforts to follow the law, although a handful remain who are still devoted to the agenda of the late 1970's and early 1980's which led to the abuses uncovered during the first Reagan administration.

Too many programs, however, seem to simply rock along, knowing that their funding is secure under the act. I believe that competition will light a badly needed fire under local providers of legal services. Whether or not you have confidence in my judgment and experience, it appears that Congress for the last 2 years has intuitively realized that the current system of guaranteed funding is not doing the job.

Just as Justice Holmes noted that it is not a satisfactory defense of a rule of law to say that it was laid down at the time of Henry II, so, too, it is not a satisfactory defense of Federal funding to say that the programs now receiving the money were first in line at the time of Sergeant Shriver. We need a better system, and I think competition will provide it.

As I stated the last time I addressed this subcommittee, my own preference would be that the Legal Services programs be administered through Federal grants to State agencies, like many Federal aid programs. As far as I am concerned, anything that spends public money is political, and it ought to be run by politicians, whom I define as somebody the voters can remove from office. I understand the problems of potential conflicts of interest, which members of this subcommittee raised last time, but such problems are endemic in a democracy.

Any politician, including the Members of this House, has a certain amount of oversight over himself and his fellows. This House, I think, has done a good job of policing itself. I am not worried about State governments. I have as much confidence in them as I do in this House.

If you have reservations about the use of State governments, try State bar associations. I have suggested that to some of the bar critics who have appeared before us. I have asked them, would you take the money and run the program in your State? Nobody has taken me up on it. But this Congress obviously has confidence in bar associations.

The McCollum Amendment requires that bar associations appoint the majority of the members of a local program's Board. I would give them, or at least the committee should consider giving them, the responsibility to go with that right of representation.

It makes more sense to me to have one program in each of 50 States run by people in whom Congress has confidence than the mishmash of 300-some-odd programs we have now. I think we could do a better job of monitoring if we were auditing 50 Statewide programs than the present mishmash.

If you don't want to do those two things, it seems to me the only alternative is some sort of competition which has been in the Appropriations Bill 2 years now. It is in the Combest bill that was dropped in the hopper here in the last week.

The process of peer review of the applications which has been proposed by the LSC staff is similar to other agencies, Justice, and agencies that buy mind power instead of hardware. I feel confident

that the details can be filled in by our successors if the President appoints them.

We will be happy to do it if the Congress has confidence in us. But we think that the legitimate concerns can be addressed and we can be sure that new applicants have an opportunity for funding. I think the real objection, that people have to competitive bidding is that some people don't trust the members of this Board. I suppose there are a lot of reasons for that. Some did not trust the President who appointed us, although none of us agrees with his original position that the Corporation should be abolished.

There is also a structural problem. We speak with 11 voices. Any director can make enemies for the Corporation simply by stating his own personal views. The rest of us get stuck with them. We seem to multiply our enemies that way, even when those views aren't Board policy.

I think if we had a single administrator we could solve that problem. You would then have an administrator appointed by a President you trust and confirmed by a Senate you trust. Then that administrator could make commitments to the Congress and the programs and he could keep them.

There is no doubt that an administrator may make competitive awards that some Members of Congress will disagree with. Congress knows how to rifle shot particular grants that it wants to keep alive or particular grants that it wants to kill. It happens in the appropriations process every year. It can happen with legal services.

What we have now is a blanket grandfather clause that funds the bad programs along with the good. The system doesn't work. It is time for trust, and it is time for change.

Let me mention briefly before I close, some side benefits of competition. If we can choose the people we fund, we are going to have less need for regulations. I have heard complaints ever since I have been on the Board about the burden of regulations. I know that every rule involves some burden, and any burden is a nuisance for a good program that doesn't need the rule. But the regulations are designed to control the programs, the few bad ones that would otherwise get out of line. The nature of rules is that they fall on the just and unjust alike.

Given the opportunity, I prefer to manage people rather than rules. Coach Bryant said, "You win with people, and if you have the right people, all you need is the do right rule. Do good or be gone. If we can have some choice in the selection of our grantees, we don't need tons of rules that we have adopted over the last 4 years.

Competition overseen by Congress will move us in that direction. One rule is the statutory prohibition against the taking of fee generating cases. That was originally put in the statute, as I understand it, to protect the private bar from publicly subsidized competition. At our hearing on competition last month, a member of the private bar came before us.

He wants to bid for the service, and he takes the following position, with which I tend to agree. If the private bar is entitled to bid, entitled to compete for public grants, there is no reason to protect them from competition from whoever wins that competition. I

think that more private attorneys will be willing to compete for grants and to devote more of their resources to the task if they believe that doing good will help them to do well.

I endorse the testimony that we heard at our hearing on competition. It makes sense to me. And if we can get competition and if we do abolish the fee generating restriction in the statute, I would urge the Board to repeal its regulation on the capture of attorney's fees, since the whole point of that regulation was to enforce the "no fee generating cases" provision of the statute. Finally, we cannot forget that these local programs are federally funded entities, and one of the public sources of resentment against the Corporation is that people who become defendants realize they are up against the Federal Treasury.

It seems to me that the Legal Services program ought to be bound by the same protection Congress gives in the case of other expenditures of Federal money. We ought to apply the Equal Access to Justice Act to those who have been sued by Legal Services programs without substantial justification. I am glad to see that the Combest bill does that.

Another complaint is that it is not fair for one party to receive legal services because he doesn't have to pay his lawyer. That lawyer can work you to death while you are trying to pay your own. Some of the sting can be removed from that by a system of copayments requiring the client insofar as he or she is able, to make some contribution to his own defense. That not only expands resources and aids in the efficient allocation of resources, it also recognizes the client's own dignity, that this is my case, my lawyer, and I am contributing to my own welfare.

Many cannot afford anything. But under the current system, if you are at 124 percent of poverty, you don't have to pay anything. At 126 percent, you have to pay it all. There ought to be some room for a sliding scale of copayments in there some where.

I remind you these views are simply my own. They are not the Corporation's. You won't know the Corporation's views until you have all 11 of us here before you at once. But I encourage you to ask, to solicit the views of my fellow directors. We agree on more than you might think, and you would profit from the perspectives that all of us have.

As you go about your task, please feel free to call upon me or the LSC staff for information and assistance. After 12 long years, we want you to succeed.

Thank you, Mr. Chairman.

Mr. FRANK. Thank you, Mr. Wallace.

[The prepared statement of Mr. Wallace follows:]

PREPARED STATEMENT OF MICHAEL B. WALLACE, CHAIRMAN OF THE BOARD OF  
DIRECTORS, LEGAL SERVICES CORPORATION

Good morning, Mr. Chairman and members of the Subcommittee.

I am Michael B. Wallace, Chairman of the Board of Directors of the Legal Services Corporation. It is good to be with you again today.

This is a day to which I have looked forward throughout my four and one-half years on the Board, and it is a day which I had begun to fear would never come. As you know, there has not been an authorization bill for the Legal Services Corporation since 1977. When I assumed my membership on our Board and became Chairman of our Operations and Regulations Committee, I was bombarded with correspondence from Members of this House on all sides of every issue before us. It was apparent to me from the outset that the will of Congress is properly determined, not by counting my mail, but by the process of considering and adopting legislation.

I first wrote to the Gentleman from Massachusetts who now chairs this Subcommittee over four years ago urging that the Judiciary Committee report an authorization bill to the House floor. I am gratified by this Subcommittee's decision to undertake this task, and I am confident, especially in light of the reforms already approved in principle by this Congress and its predecessor, that there can now be agreement on the application of the lessons of the last 12 years.

Those lessons to me seem to fall into two broad categories. First, the Federal provision of legal services to the poor is here to stay, and it should be. Second, the Federal provision of legal services to the poor should be reformed, and it can be.

I need not take too much time to convince this Subcommittee of the first point. Your support for the legal services program is well known. I do have to remind my fellow conservatives from time to time that, while the Federal program may have originated with the Great Society, the recognition of the need did not. Centuries ago, the prophet Amos warned in no uncertain terms of the consequences of public injustice to the poor. From the best evidence available from our monitoring, many of our local legal services programs do a conscientious job of fighting those injustices. They deserve our support, and, whether they believe it or not, they have mine.

This morning, I will concentrate on the reforms needed in the present system. I will not dwell on the points I made in my testimony before the Subcommittee earlier this spring. I will merely remind you of my view that the Corporation should be converted to an ordinary Federal agency and our Board should be abolished. You are aware of my views on the constitutionality of the present structure. Of equal practical importance is the administrative difficulty of managing a \$300,000,000 Federal program with an 11-member Board, each or whom, to some extent,

thinks he or she should be running the show. Neither the Corporation's President nor I can come to Congress and make any commitments with any confidence, although many seem to think we can. Only the Board, in its meetings, can make final decisions that will stick. Congress, the local legal services programs, and their clients deserve more certainty in the conduct of our affairs.

I also urge that Congress apply the ordinary Federal statutes governing waste, fraud, and abuse to the receipt and expenditure of LSC funds, both by the Corporation and by the legal services programs. The information we submitted after our last hearing clearly establishes that Federal prosecutors will not undertake enforcement efforts because of their doubt that Federal statutes apply. That information also shows that we have been remiss in past years in failing to refer more matters to State prosecutors. Whatever our failings in this regard, it simply does not make sense that the Federal government should have to rely on State and local governments to police the use of Federal funds. Federal law and Federal law enforcement officers should be able to oversee the use of Federal money and to prosecute wrongdoing when it occurs.

Finally, I wish to reiterate my view that there is no demonstrated need for the continued direct funding of State and national support centers. Their history shows without doubt that

they were originally established for the purpose of achieving "law reform" through lobbying and impact litigation. I see no evidence that they have changed their purpose over the years. My view is that "law reform" should be the province of Congress, not of Federal grantees and contractors. Such funds as Congress makes available for legal services should go directly to the local level to pay for the representation of poor individuals.

I want to focus this morning on the subject that engaged most of our time after the completion of my prepared testimony on our last visit. We discussed at some length the question of who should control the particular groups who receive Federal funds and deliver legal services at the local level. Since my testimony, Congress, through the Supplemental Appropriations Bill, has endorsed for the second year in a row the use of competition to select the recipients of legal services funds. I am persuaded, based on my four and one-half years experience, that some sort of change is necessary. Our monitoring program has convinced me that many of our local programs are conscientious in their efforts to follow the law, although a handful remain who are still devoted to the agenda of the late 1970s and early 1980s, which led to the abuses uncovered during the first Reagan Administration.

Too many programs, however, seem to simply rock along, knowing that their funding is secure under the Act. I believe

that competition will light a badly needed fire under local providers of legal services. Whether or not you have confidence in my judgment and experience, it appears that Congress for the last two years has intuitively realized that the current system of guaranteed funding is not satisfactory. Just as Justice Holmes noted that it is not a satisfactory defense of a rule of law to say that it was laid down at the time of Henry II, so too it is not a satisfactory defense of Federal funding to say that the program now receiving the money was first in line at the time of Sargent Shriver or Jimmy Carter.

As I stated the last time I addressed this Subcommittee, my own preference would be that the legal services programs be administered through Federal grants to State agencies, like many Federal aid programs. Anything that spends public money is political, and it ought to be run by politicians, whom I define as somebody the voters can remove from office. I recognize the problems of potential conflicts of interest, which members of this Subcommittee raised last time, but such problems are endemic in a government of, by, and for the people. This House has potential conflicts of interest in adopting and enforcing its own ethics rules, but, based on my experience as a member of the staff here, I think the House generally does a good job. I see no reason to think that the people of the fifty States cannot do as well. Certainly, democracy is a flawed system, but, as Churchill said, it is better than all the others.

If Congress continues to have reservations about the involvement of State government in the delivery of legal services to the poor, it seems to have no such reservation about the involvement of State bar associations. Indeed, under the McCollum Amendment, bar associations representing a majority of the practicing lawyers in a program's service area have the right to appoint the majority of the members of the program's board of directors. Certainly, our administrative problems would be simplified if we could simply delegate to State bar associations the responsibility for the program along with the right to make board appointments. I have often asked State bar presidents who have appeared before our Board to criticize our policies if they would be willing to take one check from us and run the program in their States. No State bar president has yet accepted the challenge. Still, it makes more sense to me to have fifty programs, run by people that Congress trusts, instead of our present system of over 300 haphazardly arranged local programs. We could make immense administrative savings at the Federal level if we had only fifty programs to monitor and audit, instead of more than six times that number.

The only remaining alternative is to continue to use private contractors, but to introduce competition into the selection process. This is the system that Congress has now twice endorsed. The process of peer review of applications, which has

been proposed by the LSC staff, is similar to that used by other Federal agencies, such as the Department of Justice, the Department of Education, and the National Institute of Health; all of which buy mind-power, instead of hardware. There is no doubt that details need to be filled in, and I am sure they will be. I feel confident, however, that the competitive awards system adopted by our successors will address the legitimate concerns of current grantees while, at the same time, ensuring that new applicants have a real opportunity to obtain funding.

The real source of the fear of competition is that some people do not trust this Board. Some did not trust the President who appointed us and, although none of us agrees with President Reagan's initial view that the Corporation should be abolished, some people suspected a hidden agenda behind every Board action. There is also the structural problem that we speak with eleven voices. Any one director can make enemies for the whole Board simply by stating his own views, even when those views are not Board policy. As I have already noted, people can mistake communication from the Chairman or the President as a commitment from the Corporation, and they feel betrayed when the Board does not adhere to those supposed commitments. I think these problems have been more common than I would have liked over the last four and one-half years.

These problems can be largely alleviated by placing the

program under the control of a single Administrator, appointed by a President you trust, and confirmed by a Senate you trust. That Administrator can make commitments to Congress and to the programs, and he can keep them. There is no doubt that an Administrator will make particular awards to particular programs, and that Members of Congress will disagree with the awards. A Congress that, through its appropriations process, regularly second-guesses executive agencies on research grants for catfish farming is surely capable of exercising proper oversight over the procedures used in making legal services grants. The problem with the current system is that, in guaranteeing refunding for all programs, Congress protects the bad along with the good. That system just does not work. It is time for trust, and it is time for change.

Let me briefly mention some of the side benefits of conversion to a system of competition. If LSC can choose the programs it funds, it has less need for regulations. I know that every rule involves some burden, and I know that any burden is a nuisance for our good programs, but the regulations are designed to control the conduct of programs that would otherwise get out of line. The very nature of rules is that they fall, like rain, on the just and unjust alike. Given the opportunity, I prefer to manage people rather than rules. As Coach Bear Bryant said, you win with people. If you have the right people, all you need is Bear Bryant's do-right rule: Be good or be gone. Competition,

carefully overseen by Congress, will maximize the number of good people and minimize the need for rules.

One rule I believe we can discard is the statutory prohibition against the taking of fee-generating cases. The original purpose of that rule, as I understand it, was to protect the private bar from public competition. At our Committee hearing on competition last month, we heard from a member of the private bar who wants to compete for our funds. He said, and I tend to agree, that as long as the private bar can compete equally for LSC grants, it should not be protected from competition from LSC grantees. Indeed, more private attorneys will be willing to compete for our grants and to devote more of their own resources to the task if they believe that doing good will help them to do well. If the restriction on fee-generating cases is removed as part of the introduction of competition, then I would urge the Board to repeal its regulation adopted this year on the recapture of attorneys' fees, since the chief purpose of that regulation was to enforce the restriction on fee-generating cases.

Whatever the mode of delivery, we cannot forget that the local legal services programs are, in fact, Federally funded entities. One of the sources of public resentment against the programs is that their adversaries realize that they are not up against poor people; they are up against the Federal Treasury.

Congress long ago recognized that individual litigants should not be oppressed by the financial power of the Federal Treasury. I see no reason that the legal services program should be any different. It is time to apply the well-established protections of the Equal Access to Justice Act to those who have been sued by legal services programs without substantial justification.

The most common complaint I hear from the public is that it is not fair for one party to receive free legal services, because that lawyer can work you to death without his client having any concern for the cost. Congress can take some of the sting out of this complaint by initiating a program of co-payments by clients, insofar as they are able. A system of co-payments has the additional advantages of increasing the total resources available for legal services and of allocating those resources more efficiently; it would permit poor clients, like most Americans, to vote with their dollars. I realize that our poorest clients have too few dollars to participate, but surely there are many clients who can afford it and who deserve the dignity of helping to meet their own needs. It simply does not make sense for a client whose income is 124 percent of the poverty level to make no contribution to his own case, while an individual whose income is 126 percent of the poverty level must pay for it all.

I remind you that the views I express today are entirely my own. You will not get the Corporation's views on

reauthorization unless you have all eleven directors before you at once. Still, I encourage you to solicit the views of my fellow directors as you go about your task. We agree on more things than the press would have you believe, but we each have different perspectives which can be valuable to this Subcommittee. As you go about your task, please feel free to call upon me or any member of the LSC staff for information and assistance. After twelve long years, we want you to succeed.

Mr. Chairman, it has been my pleasure to appear before you today. I would be pleased to answer any questions you or the other members of the Subcommittee may have.

Mr. FRANK. I do not anticipate having all 11 members of the Board here—

Mr. WALLACE. I didn't think you would.

Mr. FRANK. We did ask Mr. Wear to testify. Your request was that we accommodate that. So we didn't think we were doing anything unforward. We thought we were accommodating you.

You talk about a sliding scale, that interests me. Would you have it that people would start paying who are now eligible or people now at the cutoff point, we would allow the Legal Services Corporation to begin to take some of them in on a sliding scale?

Mr. WALLACE. My own sense is that even below the 125 percent level, people are capable of making some contribution and probably should. They do it in the area of Medicaid. I don't see why they couldn't do it for legal assistance.

Mr. FRANK. How low would you go? I will tell you, 125 percent of the poverty level is still pretty poor, it seems to me. I like the idea of a sliding scale, but it depends on whether you use that to get money from people. Would you now say that we should go above, I gather, you said if you are at 126 percent, you get cut off. So you would allow people not eligible for any service to get some subsidy of service?

Mr. WALLACE. I would be willing to consider it, Mr. Chairman. I think that the British system does—you do the consideration, I am not 100 percent opposed to the idea.

Mr. FRANK. You said it is not fair at 126 percent to be cut off. I assume—I mean, I hope you are not proposing that people at 125 percent and below have to pay something, but the people above 125 percent don't pay anything?

Mr. WALLACE. I didn't come in here with details. I don't have details. But it seems to me that there might be some room for people over 125 percent.

Mr. FRANK. You also referred approvingly to the current language of the bill with regard to competition. Are you supportive of that language? I hadn't thought so.

Mr. WALLACE. As I said, I told you the other options that seemed to appeal to me more; but based on my testimony last time, they don't seem to appeal to the committee. I like competition better than what we have now.

Mr. FRANK. Now, the language about competition in the Appropriations Bill and the supplemental, you seemed to refer to that approvingly. Should we continue that when we do the appropriations? Pretty soon we are going to be doing the appropriations for the next fiscal year. Since you like it, I assume we should just keep it in there.

Mr. WALLACE. If you do reauthorization, you ought to try to give more attention to detail.

Mr. FRANK. Focus on my attention.

Mr. WALLACE. I am.

Mr. FRANK. You have had a chance to say what you wanted. Well, before we could do a reauthorization, there will have to be a fiscal 1990 appropriations. You have referred—there is no way we will pass an authorization between now and the first of October. I guarantee you.

The next question is what should be in the Appropriations Bill, say, with regard to competition? You just referred approvingly to the language that was in the appropriations part of Legal Services in the supplemental.

Mr. WALLACE. Yes.

Mr. FRANK. So I take it you would have no problem if we continued that forward?

Mr. WALLACE. There are two parts to that language, Mr. Chairman. One says, "we ought to have competition." I am for that. The other part says, "we ought to wait until there is a new Board." I don't know when that is going to come. I am here to tell you that we are not going to do anything crazy. I think you can trust us. If we are still here in October, we would like to be able to implement competition.

Mr. FRANK. So you don't like the Appropriations Act. You don't want us to continue. You would not be in favor of continuing it. You invoked the appropriations language as supportive of your position a little more enthusiastically than you feel. I would like to get the whole record out there.

Just a couple of other points. Equal access to justice. I think that there is a reasonable case for that, and I will be asking the people who testify after you to address that. I will also tell you that based on some of our conversations, I have asked the staff to begin developing language which would put criminal sanctions against any conversion to personal use of Legal Services funds. I don't want to criminalize what might be a legitimate jurisdictional dispute.

We have had questions about accepting older Americans' funds. If they were to accept that and spend it on older Americans, I don't think criminal sanctions would be appropriate to deal with that.

But to the extent that there have been instances of people converting the funds to personal use, enriching themselves and living in an inappropriate luxurious manner, that is appropriate for criminal statutes.

We don't want to say that it is only criminal under Federal law. We don't want to knock the States out of this altogether. I just want to tell you that based on your suggestions there, I have asked the staff to begin drafting such a statute. We will be glad to get your input on criminalizing this.

The last point, the opinion that Mr. Cooper rendered, how much did that cost us?

Mr. WALLACE. I will have to defer to the President on that.

Mr. FRANK. Mr. Cooper, I believe the former counselor, wrote an opinion, or was he the head of the Office of Legal Counsel of the Attorney General? He wrote an opinion saying that you were unconstitutional. How much did you pay him to tell you you were unconstitutional? How much did you pay him for the opinion?

Mr. WEAR. The total effort amounted to approximately \$77,000. The actual writing of the opinion amounted to \$29,000.

Mr. FRANK. And the rest was research?

Mr. WEAR. Some of it was research on other issues. We started our relationship with Mr. Cooper by looking at some other issues.

Mr. FRANK. What other issues?

Mr. WEAR. One of the issues was how independent was the Corporation.

Mr. FRANK. Of whom?

Mr. WEAR. Of both the Congress and the executive.

Mr. FRANK. And how much did you pay him to research that?

Mr. WEAR. I don't know.

Mr. FRANK. I would like a breakdown on that. Did he conclude that that wasn't finished?

Mr. WEAR. His conclusion—

Mr. FRANK. Let's take this issue. You said he was paid some amount of money to research how independent you could be of the Congress and the President, I gather. What was his conclusion with regard to that?

Mr. WEAR. His conclusion was that the Corporation was not independent of the Congress.

Mr. FRANK. Did he write that out?

Mr. WEAR. No. I didn't pay for a written opinion.

Mr. FRANK. You paid him to do the research, but you didn't pay him to write it down?

Mr. WEAR. No, it was clear to me at that point that we didn't need to proceed further.

Mr. FRANK. I asked you how much you paid for the opinion. You said \$29,000 to write the opinion, the rest you paid him you told me to do other stuff. One of the things you said he did was to do research on whether or not you were independent.

You did pay him to do that research; correct?

Mr. WEAR. Yes, I did.

Mr. FRANK. But you told him not to write it down? Why not?

Mr. WEAR. No. What happened was this: As we proceeded down that road, the law firm did some research on that question. It appeared that the Corporation was not independent of the Congress and—

Mr. FRANK. So you abandoned that?

Mr. WEAR. Yes.

Mr. FRANK. That route to accomplish your objective, you ditched it and went on to something else.

Mr. WEAR. I don't think that is accurate.

Mr. FRANK. How much did you pay him to tell you that you were supposed to follow the dictates of Congress? What other issues besides that and constitutionality? If you paid him \$29,000 to find out that you were unconstitutional—I assume that he ruled it was legal to pay him?

Mr. WEAR. I didn't ask him that question.

Mr. FRANK. I wonder if he decided whether it was constitutional to pay him. I would think that the result would be that you didn't have the authority to pay him.

Mr. WEAR. I didn't raise that question and to my knowledge, he didn't either.

Mr. FRANK. He accepted the money?

Mr. WEAR. As best I know.

Mr. FRANK. One issue was constitutionality, \$29,000. One issue was independence. Any other issues?

Mr. WEAR. There may have been one or two small things.

Mr. FRANK. If you paid him \$29,000 to do just the opinion or the research?

Mr. WEAR. That was to write the opinion. I think that there was some research separate and apart from that. The total bill was approximately \$77,000.

Mr. FRANK. We understand that. Now, \$29,000 was just to write the opinion?

Mr. WEAR. As I recall.

Mr. FRANK. What was the hourly compensation fee; do you remember?

Mr. WEAR. It varied. There were a number of people in the firm involved.

Mr. FRANK. How long was the opinion?

Mr. WEAR. We sent you a copy, Mr. Chairman. I don't know how many pages it was.

Mr. FRANK. Twenty-six pages. So \$29,000 just for the writing, it seems like. The research was separate. You don't know how much the research was?

Mr. WEAR. Mr. Chairman, I suspect that some of the research was included in that.

Mr. FRANK. That leaves us about \$48,000 unaccounted for, and the only research you can tell me that might have accounted for that was telling you whether or not you were independent. I mean, I am disappointed if you paid him \$48,000 to conclude that you should—that you weren't independent of Congress and the executive branch. You cannot remember any other issue that he researched? When did he complete this research?

Mr. WEAR. The opinion was delivered to the Corporation some time in April.

Mr. FRANK. The opinion only dealt with the constitutionality?

Mr. WEAR. Yes, sir.

Mr. FRANK. We have \$29,000 for the constitutionality. We have \$48,000 unaccounted for. One of the issues was that you had him check on whether or not you were independent. What other issues did he look into? This is not so long ago. You put out that kind of money, it would seem to me that you could remember. You paid him something, and you cannot remember the subject?

Mr. WEAR. No, I don't think that is accurate.

Mr. FRANK. What besides the constitutionality and the independence did you pay him for?

Mr. WEAR. I believe those were the primary issues that he looked at.

Mr. FRANK. What were the secondary issues?

Mr. WEAR. I would have to go back and look at the bill.

Mr. FRANK. You cannot remember any other issues other than whether or not you were independent and whether or not it was constitutional?

Mr. WEAR. I don't remember any other main issues.

Mr. FRANK. Any other secondary issues. If this were 10 years ago, I would understand your problem. But we are talking about the last 6 months. Can you remember what your lawyer told you on—whether there were any other secondary issues?

Mr. WEAR. Not of any great consequence.

Mr. FRANK. So you paid him \$77,000 for this. You paid him a lot of money to tell you that you weren't independent, and then didn't ask him to write it down. I think you should be more specific.

Is it your impression that the \$29,000 was most of what he paid on constitutionality? I am still unclear. Some of it was research? Was there an additional amount for research on constitutionality?

Mr. WEAR. I would need to go back and review the bill.

Mr. FRANK. I would ask you to do that; exactly how much did you pay him and for how much work on each subject. It seems to me in my oversight capacity rather a poor use of money, particularly that you paid him what must at least be tens of thousands of dollars to tell him that you weren't independent.

Why didn't you use your General Counsel?

Mr. WEAR. The General Counsel was very much involved in this. He was also involved in a number of other projects at the time. It was not possible to get all of it done in a time frame—

Mr. FRANK. Did he tell you that? I understand General Counsel disagrees with the decision.

Mr. WEAR. I believe that is accurate.

Mr. FRANK. Did he have time to review this? You can assure me that the reason that you asked Mr. Cooper and not the General Counsel is because you didn't think the General Counsel wouldn't give you the answer you wanted?

Mr. WEAR. That is not correct. He was involved in this early on. I got a draft opinion that I circulated to General Counsel and asked for his comments.

Mr. FRANK. What were his comments?

Mr. WEAR. He didn't have any at that time. He started to disagree with the opinion after the fact when some members of the Board began to criticize it.

Mr. FRANK. You think the General Counsel was unduly influenced by Board members in his conclusion?

Mr. WEAR. I don't know.

Mr. FRANK. Is that what you are suggesting?

Mr. WEAR. I don't know. I am not suggesting that. I note the connection between the events, that is all.

Mr. FRANK. OK.

Mr. James.

Mr. JAMES. As far as accountability, the last time you were here we were concerned about accountability. Have you made any headway on accountability of individual corporations to determine what quality and nature of cases they are in fact pursuing?

Mr. WEAR. We are making some headway on that, Mr. James. In response to your suggestions in our hearing in March, we are re-vamping what we call the CSR report, the case report that we use, to try to get more definitive information about what programs are actually doing.

In addition, as I mentioned in my prepared statement, we are looking at the issue of timekeeping, again, to try to determine what programs are doing and also in an attempt to measure the quantity of work that is being done and the amount of time.

Mr. JAMES. At this point in time, you have drawn no conclusions as to what the corporations are doing out there, percentage wise or time wise?

Mr. WEAR. That is accurate, Mr. James. We have not. I have not had enough time to develop that yet, but your point is well taken, and I do intend to get that result.

Mr. JAMES. I have heard both at this hearing and earlier in this conversation and in your testimony and Mr. Wallace's, in fact, I will address my question to Mr. Wallace, if I may, the issue of competitive bidding. I notice in this bill that there are some guidelines, but it still doesn't explain what standards you are going to use.

The bill gives you the elements that you were to consider, but does it set up in a perfunctory way or in dollar standards, time standards or experience standards in detail as to how you would submit this on a competitive bid? Instead it delegates that to a matter of rules or regulations. That is the way I read it.

What would you think the rules or regulations would say as far as getting competitive bids from corporations? What would be your guess or best estimate?

Mr. WALLACE. Mr. James, at this point I cannot give you a best estimate. We have had one committee hearing on this. I don't know to what extent it will be possible to have objective standards to which everyone can agree. I do not consider that an insurmountable obstacle because other Federal grant agencies that I cited in my testimony are capable through the peer review process of fairly distributing grants without having an objective, numerical sort of standard.

We may be able to obtain it, but I cannot tell you how we will do so.

Mr. JAMES. Is it a misnomer, then, to say how do you bid on something if you don't have standards?

Mr. WALLACE. Bidding may be a misnomer. I wouldn't anticipate it being bid in an area of dollars as you would if you were bidding for a paving contract. It is competition through the peer review process, as I say, is fairly common in the Federal Government.

Mr. JAMES. Well, I think it is common any time you hire an attorney, period. You select who you want, but you don't have to be subjected to standards, perhaps, but to no prescribed set of regulations. But does not that bill suggest that you have prescribed regulations?

Mr. WALLACE. I think the bill does make that suggestion. I saw it for the first time this morning when I got to Washington, so I have not read it in detail. I hope we can make it as objective as possible, but I don't think you will ever remove subjectivity from what is essentially a subjective process of choosing individual talents.

Mr. JAMES. That is one of the problems I have, and in that context, because it is a particular talent or service, that is hard to measure. As desirable as it may be to have these guidelines or rules, still you would be subject to an evaluation or—based on subjective standards.

Mr. WALLACE. Mr. James, if I may say, I think we can make it more objective than the original grants were. The original grants 10 years ago were entirely subjective and have been grandfathered in. We want to see if we can make it more objective and open things up. I cannot see any defense for the current system where a subjective, initial selection is grandfathered into place forever.

Mr. JAMES. In all fairness, do we have a model anywhere in the Federal Government whereby you would have competitive bidding for attorneys' fees?

Mr. WALLACE. I don't know the answer to that. I think attorney services are comparable to other services in scientific research, educational research, that are on the basis of talents of individual people. That is what you are buying here, the talents of individual people.

Mr. JAMES. My point is this, you don't have any guidance from looking at any other agency that has rules to hire attorneys; is that correct?

Mr. WALLACE. I don't know of any. The staff may, but I don't.

Mr. JAMES. When you hired your attorney to give you a specific report, how was he selected? Did you have rules or regulations as to how you were to select your own attorney that wrote this report?

Mr. WALLACE. I don't know how that was done. That was done before I became chairman, so I cannot tell you.

Mr. FRANK. Mr. Wear might want to answer that.

Mr. JAMES. I am not trying to be facetious.

Mr. WEAR. We selected Mr. Cooper because of his prior experience in the Federal Government. Prior to joining his law firm, he was head of the Office of Legal Counsel in the Department of Justice, the Division of Justice Department that passes on, among other things, the questions of constitutionality that are posed by the President with regard to various statutes.

Mr. JAMES. You wanted to get the most knowledgeable, best person you could?

Mr. WEAR. Yes, sir, I think that is right.

Mr. JAMES. So why don't we use that standard in this case of selecting corporations to render service for the poor?

Mr. WEAR. I think that that sort of standard would come out in the proposal that we are looking at. We hope to try to find the best providers for the money. The people who can give us the most bang for the dollar in those proposals. We have a draft proposal published in the Federal Register on Friday, May 26, it is volume 54, number 101, page 22787.

Mr. JAMES. How do you know that the Board initially didn't get the best bang for the dollar when they hired the Corporation?

Mr. WEAR. They may have in some cases. But I think by instituting this competitive system—this is not aimed at nor will it preclude the existing grantee from successfully competing for the grant. The grantee may, through the competitive process, be the one that is selected.

Mr. JAMES. How long will they have a contract, for example? Have you envisioned that? When you decide you have the best bang for the dollar.

Mr. WEAR. The proposals that we are looking at—

Mr. JAMES. Counsel said 3 years?

Mr. WEAR. I think it says up to 5 years. It gives the administrator some discretion in that. One of the things that came out of our hearing in Chicago was comment that perhaps a 3-year period was not long enough. The Corporation in its proposal on competition had suggested 3 years. We are certainly not wedded to that 3-year number. If there are good reasons to make it longer or good reasons to make it shorter, we could move in that direction.

Mr. JAMES. What bothers me is—in a sense we are talking about a different animal than going out and hiring an attorney. You are dealing with a corporation, they are not even attorneys, are they, the corporate officers who are hiring the young attorneys to do the job; is that correct?

Mr. WEAR. It varies program to program. Most of the executive directors of these programs are attorneys. I think—

Mr. JAMES. I am talking about the Corporation itself.

Mr. WEAR. Most of the programs are organized as nonprofit corporations. They are usually headed by an executive director who is a lawyer.

Mr. JAMES. But he is not accepted as an officer when he is hired. The nonprofit organization of directors, at least that is the way it is in Florida, as I recall.

Mr. WALLACE. Those boards must be 60 percent lawyers. There are nonlawyers on these boards also.

Mr. JAMES. Be that as it may, since it is not 100 percent lawyers, you are not in fact dealing with a legal entity, the Corporation is not a lawyer, per se. It is a nonprofit that is only partially directed and controlled by lawyers.

I have more than 5 minutes worth of questions, perhaps. I will just finish now and come back in a few minutes.

So you are not really dealing purely with a lawyer but with a corporation that hires lawyers?

Mr. WALLACE. That is correct.

Mr. JAMES. There is a question that I want to get into, suits involving agriculture. The concern that I have had or at least that has been expressed to me that you hire young competent attorneys and the Corporation has the best motivation at heart, let's assume that. They do an absolutely superb job for a particular corporation, let's assume that.

For the purpose of this question, let's say that is the case. What bothers me is the incentive situation for the attorneys who are hired in fact on the agricultural cases where you go out to a farmer, violation of a Migratory Workers Act. It is a fee producing case in the first place, the attorneys pay their own salary, and there is no risk factor.

You could win 1 out of 100, and it would not—it would not directly affect that attorney or the client. There is no negative impact on the client to lose. All to gain and nothing to lose, whereas the person accused has everything to lose because he has to pay attorneys' fees and devote his time and business to this undue leverage.

Unlike in a private case where the attorney is controlled by the mere fact that he will oftentimes lose his advance cost and waste time paying his overhead and the Government is not paying for any private practice. So you have the economic, at least an economic weight in the private sector whereas you don't in the public sector. That bothers me.

It seems to have caused in many cases—allegations of frivolous lawsuits, if not frivolous lawsuits. So all of a sudden we find ourselves funding what in many quarters is perceived to be harassment of the American farmer.

Now, it would seem to me that you might consider paying attorneys' fees to the loser, I mean, the loser paying attorneys' fees if

you are going to have it so that if the Government loses, the Government would have to pay the attorneys' fees to the man they sued and cost.

Mr. WALLACE. That is precisely what I have proposed in my testimony. You apply the Equal Access to Justice Act which permits recovery of attorneys' fees when a Government agency proceeds without substantial justification, I think, are the magic words.

Mr. JAMES. That is an arbitrary standard. I wouldn't—that won't work. It hasn't in my State where you have the right to file suit for having a—basically a frivolous suit. The judges never find that to be the case and award damages.

What I am suggesting is that you lose, you pay. Because the statutes they are using require the payment of attorneys' fees if he loses to the defendant.

So to keep it balanced, you might consider making attorneys fees automatically payable by the Government if the suit is lost.

Mr. WALLACE. I don't think this Board could do that, but Congress could.

Mr. JAMES. It seems to me that that would take perhaps much of the argument away from that type of suit or it might.

Mr. WALLACE. Yes, sir.

Mr. JAMES. Thank you. We have to go vote.

Mr. FRANK. Mr. Smith.

Mr. SMITH of Mississippi. I would like unanimous consent to submit questions to the panelists since I have a conflict in coming back.

Mr. FRANK. We will hold the record open and make it a part of the record.

[The information follows:]


**LEGAL SERVICES CORPORATION**

400 Virginia Ave., S.W., Washington, D.C. 20024-2751

 Terrence J. Wear  
 President

Wear's Direct Telephone

(202)

863-1839

August 15, 1989

The Honorable Barney Frank  
 Chairman  
 Subcommittee on Administrative Law  
 and Governmental Relations  
 Committee on the Judiciary  
 United States House of Representatives  
 Room B-351-A Rayburn House Office Building  
 Washington, DC 20515

Dear Mr. Chairman:

Please find enclosed the Legal Services Corporation's responses to post-hearing questions submitted to the Corporation by the late Congressman Larkin Smith of Mississippi. The Congressman asked that these responses be included in the record of the reauthorization hearing for the Legal Services Corporation Act before your Subcommittee on July 19, 1989.

If we can be of further assistance, please let us know.

Sincerely,

James M. Wootton  
 Director, Office of Policy  
 Development and Communications

JMW:em

cc: Office of Congressman Larkin Smith

**BOARD OF DIRECTORS -- William Clark Doran III, Chairman, Detroit, Michigan**

 Herminia Bonavides  
 El Paso, Texas

 LouAnn Borestein  
 Baltimore, Maryland

 Paul Engle  
 Fayetteville, North Carolina

 Pope J. Mendez  
 Denver, Colorado

 Loretta Miller  
 Detroit, Michigan

 Thomas F. Smagol  
 Piedmont, California

 Claude Catherine Swafford  
 South Pittsburgh, Tennessee

 Beale Joseph Ullie  
 New Orleans, Louisiana

 Robert A. White  
 Raleigh, North Carolina

 Michael B. Wilcox  
 Jackson, Mississippi

QUESTIONS FOR LSC

1. I understand that the Corporation jointly sponsored a study of a variety of models for the delivery of legal services in San Antonio, Texas. Were there significant differences in the quality of legal services provided by these models? If so, would a competitive grant awards system be one way to force legal services programs to maximize the quality of service provided?

A: During 1985-1988, LSC and the American Bar Association co-sponsored a study of the legal services provided in connection with certain family law cases in San Antonio, Texas. In this study, prospective clients were given a choice between two or more providers of legal services. As part of the study, the legal services that were dispensed were evaluated by three Texas State Bar certified family law experts. The study's project director concluded that, although each of the three service delivery models was sub-standard, the staff attorney model's performance was significantly below that of the other two alternatives -- the private contract and voucher models. However, the report noted that the presence of an outside review panel apparently had a positive effect on the performance of each of the delivery models. The report concluded that an external system for peer review of program performance should be utilized

in connection with any legal services program, whether or not it is competitively bid.

2. Are you aware of any studies that support the competitive bidding of Federal grants for legal services? If so, please explain.

A: Several recent studies of the Federal legal services program have identified problems that could be resolved through competitive bidding for legal services grants.

A forthcoming American Enterprise Institute study, conducted by Douglas J. Besharov, finds that the Legal Services Corporation lacks the "necessary management tools" to ensure efficient use of taxpayer funds. AEI analyzed the case closure data of legal services programs from 1975 to 1984 and discovered a substantial decline in productivity, even as the funding for legal services programs was climbing.

The same data also indicate that the priorities of the legal services programs, in terms of cases accepted and closed, vary considerably from the priorities and needs of their indigent clients. For example, the AEI study reports that the percentage of cases devoted to family law issues, including child support, actually declined from 35 percent of total caseload in 1975 to 29.2 percent in 1984, a 17 percent decline. According to the AEI report, "at a time when the poverty caused by family breakdown

is at an all-time high, LSC programs seem to be expending less time on family matters."

The AEI report also states that the current system of legal services funding, under which grantees who currently receive LSC grants are guaranteed future funding, provides little incentive for legal services programs to improve their performance or even to be responsive to the needs of their clients. For these reasons, AEI concludes: "The LSC should develop a politically neutral plan to competitively fund grants...." Competition, AEI says, is "a major way to encourage the adoption of more efficient and innovative practices."

Another recent study, cosponsored by the American Bar Association and the Legal Services Corporation and conducted by Steven R. Cox, compared three legal services programs in San Antonio, Texas, to assess their relative cost efficiency and quality effectiveness. The three programs included a voucher program, a competitive-bid contract program, and the traditional staff attorney program. The ability of each of these programs to provide accurate and professional legal services was evaluated by a peer review panel composed of local attorneys experienced in the kinds of cases handled by the programs. The study found that, of the three programs, the staff attorney program was the most costly and was rated lowest in terms of quality of performance by the peer review panel. The report concluded that without the stimulus provided by competition, "there is no guarantee of maximum cost efficiency and quality service."

The author of the report, Dr. Cox, recently testified before the Provisions Committee of the LSC Board of Directors on his findings. He said, "the current funding allocation system creates monopoly markets with a single seller being a staff program." The best means of achieving the objective of providing quality service to as many poor people as possible, according to Cox, is "by creating as much competition between two or more service providers as possible."

Both these studies show that many of the problems inherent in the current funding system, such as lack of quality or responsiveness to clients' needs, could be remedied by competitively awarding grants for legal services.

3. Has the Corporation's recent announcement of competitive bidding elicited any interest among members of the private bar or other groups that might seek funding to provide legal services to the indigent?

A: In response to a single announcement (in the premiere issue of the Corporation's newsletter, The LSC Record) LSC has received over 420 requests for information about the competitive awards system and how to participate. These requests have come from practically every part of the country and from a variety of groups and individuals; such as LSC recipient programs, private attorneys and law firms, law schools, pre-paid legal plans already serving clients, nonprofit groups, and legal

corporations. The Corporation continues to receive requests for information daily.

This response demonstrates that there are many members of the private bar and other legal groups that are interested in obtaining grant funds to pay for the provision of legal services to the indigent.

4. Have any other federal agencies successfully instituted competitive bidding?

A: Most federal grants are competitively awarded and the grant process is governed by an extensive body of federal grant law. At a conference sponsored by the American Enterprise Institute in 1986 on the subject of "Maximizing Access to Justice for Poor Persons," one participant reported on the Department of Education's successful initiation of competitive grantmaking and the benefits derived from it. Robert Preston, former Deputy Assistant Secretary, Office of Research and Improvement of the Department of Education, reported on the experience of implementing competition for the National Institute of Education (NIE) grants.

According to Preston, research grants to non-profit organizations similar to legal services grantees were originally awarded on an annual basis by the National Institute of Education without scrutiny or adequate evaluation of the past performance of prior grant recipients.

The National Institute of Education decided to open the process to competition, despite opposition from the then grantees and their Congressional supporters. NIE, however, established a series of blue-ribbon panels of educators and created a two stage peer review. The competitive process disclosed that some existing programs were very good, while other programs were not, and some were, in the words of Mr. Preston, "worthless, almost corrupt." These latter programs were not funded because their own peers rated them very poorly in comparison to more worthwhile programs. Mr. Preston reported there were no complaints about the competition or the partiality of the decisions.

NIE's experience with competition allowed it to weed out those existing programs that abused or wasted taxpayer funds. Preston concluded that it "is vitally important, that [a program]..., however institutionalized and entrenched it is, ought to come up for review every so many years as a scheduled and expected thing."

5. What changes would have to be made in the LSC Act to accommodate competition for grant funds?

A: The Legal Services Corporation Act itself would require several minor amendments to implement competition. The Act should be amended to make clear that current recipients do not have refunding rights under Section 1011 of the Act, 42 U.S.C.

§2996j, during a competitive award process. Any new grantee that may be selected would also not have refunding rights.

The current appropriations Act, Pub. L. 100-459, contains restrictions on LSC's authority to award grants under the Legal Services Corporation Act. As an example, under the Legal Services Corporation Act, LSC is authorized to make grants to State and local governments. The current appropriations Act, however, precludes LSC from exercising this authority in that it authorizes the award of grants or contracts only to attorneys or to nonprofit corporations.

6. What purpose would a nominal copayment for legal services serve? Are copayments required for any similar programs?

A: A copayment mechanism for legal services clients would serve at least two purposes. A required copayment, even if nominal, would help to improve client self-esteem, making the client a partner in the legal action.

A copayment would also help to decrease frivolous requests for representation when cases lack merit. Copayments would thus assist programs in concentrating their resources on those most in need. In case of emergency (spouse abuse, etc.) or dire financial need, a copayment could be waived.

The federal government currently allows States to impose nominal levels of cost-sharing (copayments) for some selected services, for example, in Medicaid. There are also legal aid

programs in operation, such as the Community Law Center in California, which routinely and successfully use a copayment arrangement with clients.

7. The Massachusetts, Maryland, and a recent national study of the legal needs of the indigent all estimate that roughly 85% of the legal needs of the poor are going unserved. How do these studies demonstrate this unmet need? According to your analysis, what percentage of the needs of the poor are currently being met by the Federal legal services program?

In 1986, the Massachusetts Legal Assistance Corporation conducted a study of the "legal needs" of the poor in that State. The study was designed to fulfill three tasks. First, it was to quantify the legal needs of the poor in Massachusetts. Second, it sought to take an inventory of the existing resources available for meeting those needs. Finally, the study made recommendations for a "Plan for Action" to be implemented by State, local, and Federally funded providers of legal assistance to help satisfy the "unmet" legal needs of the poor. The study concluded that less than 15 percent of the legal needs of the poor was currently being met.

The study, which reports the results of a telephone survey of 1082 households, divides legal need into two categories: recognized legal needs and unrecognized legal needs. Recognized legal needs are defined as instances in which the respondent or

a member of the respondent's family had either taken someone to court, been taken to court, or had a problem at some point in time during the five year period covered by the survey that the respondent felt required legal assistance. Unrecognized legal needs are defined as those problems respondents did not realize an attorney might be able to resolve. While the survey for recognized needs appears to have some merit, the attempt to quantify "unrecognized legal needs" raises a number of questions about the design of the survey questionnaire and the validity of its results. Sample questions asked for purposes of identifying unrecognized needs included:

- Bought something that didn't work when you brought it home?
- Ever pay for repairs that you felt were not done right?
- Were unable to get credit cards, loans or insurance?
- Had a problem where heating and plumbing did not work?
- Had a problem with roaches, rats, or other pests?
- Have not gone to a doctor or hospital because you couldn't afford it?
- Been discriminated against in getting loans or credit?
- Owed money to anyone you could not pay?

These questions alone were used to identify 1,076 unrecognized legal problems, or 21 percent of the total problems reported. Among the "most serious unrecognized legal needs" were:

- 215 households, or 19.9 percent of the households surveyed, answered that they had experienced situations in which they "Owed money that could not be paid".
- 15.4 percent of those surveyed reported having experienced utility cutoffs.
- 7.5 percent of the households surveyed experienced problems with rats, roaches, or other pests.
- 11.3 percent of the households surveyed had a problem with getting or remaining eligible for food stamps.

The results of the survey of "unrecognized legal problems" indicated that 10 percent of the respondents reported no "unrecognized needs." The average number of unrecognized needs for the five year period was 4.7 per household, which on an annual basis equals .94 unrecognized legal problems per household per year, under the design of the study.

The .94 figure derived from the survey sample was then multiplied by the 1980 census of poverty for the Commonwealth of Massachusetts, or 340,250, to arrive at roughly 320,000 unrecognized or unmet legal needs per year.

While one might agree with the "recognized needs" portion of the survey, the "unrecognized needs" component renders the study meaningless as a measure of "unmet" legal needs of the indigent.

Consider the differences in results if we analyze the question another way. We know that the respondents in the study reported 173 recognized legal problems for which, for a variety of reasons, they did not obtain legal assistance. To generate a relevant number, we divide the 173 recognized but untreated legal problems by the 1,082 respondents to get a figure of .16 recognized but untreated legal problems per household over five years. We then divide .16 by 5, in order to annualize, and get .032 recognized but untreated legal problems per household per year. Finally, to put this into real case terms, as the study does for its version of the measure of unrecognized problems, we multiply .032 by 340,250 (the poverty population) to get 10,880

recognized but untreated legal problems, significantly smaller than the 320,000 unmet needs reported by the study.

It should be noted, however, that of the total "unmet" needs, respondents reported that they would have been better served with the assistance of an attorney in only 66 percent of the cases, reducing the actual number of total unmet needs actually reported by survey respondents to 7,186, versus the 320,000 reported by the study.

8. Does the current grantmaking system provide the most efficient and effective legal services to clients?

A: Current LSC recipients enjoy "presumptive refunding," regardless of how well or how poorly they provide services to their communities. This monopoly on available funds means that prospective providers who do not currently receive LSC grants are essentially precluded from obtaining funds to serve the poor. Even in cases where actual waste or abuse of federal funds is demonstrated, LSC administrators possess limited remedies. Defunding a program is so expensive and time-consuming that it is impractical in most cases. In one single defunding action, the Corporation was forced to spend over \$340,000 and a very large number of staff hours to effect the denial, even though, at each stage of the preceding, the grantee was shown to have produced minimal work with its millions of dollars in grants.

9. Did Professor Cox have any recommendations as to how a competitive system should be designed? If so, what were they?

A: At a June 13, 1989 meeting of the LSC Committee on the Provision for the Delivery of Legal Services, Professor Steve Cox made three specific recommendations concerning the design of a successful competitive system. First, in order to create as much competition as possible in a service area, two or more service providers should be funded in the area. Second, performance evaluations should be required to facilitate meaningful choices for future funding. Finally, less ambiguity in the definition of impermissible uses of Federal funds is essential in order to ensure proper accountability for taxpayer monies.

10. The Wall Street Journal recently published an article by Douglas Besharov of the American Enterprise Institute that reports declining productivity in LSC programs. Does the Corporation have evidence of a decline? What effect, if any, would a competitive award system have on the productivity of legal services providers?

A: Mr. Besharov's statements in The Wall Street Journal represent the findings of the American Enterprise Institute study discussed above. The AEI study analyzed LSC case service data

from 1974 to 1985. AEI reports that LSC recipient cases closed without litigation<sup>8</sup> fell by almost 42% between 1980 and 1984. During the same period, cases closed in negotiated settlement with litigation also declined, by over 14%. This decline in productivity occurred during a period when LSC grants to legal services programs reached an unprecedented high.

Mr. Besharov concludes from the data that "most LSC resources go to cases in which relatively little time is spent helping clients with serious problems..... If so, this is a matter of potentially great programmatic and policy significance."

Competition would allow the Corporation to award funding to those programs that can demonstrate that they can effectively and efficiently provide legal services to the indigent. Programs whose case service data and other indicators show that they are less productive than other programs or less responsive to their clients' requests would be regarded less favorably in a competitive process. Grant applicants would therefore have more incentive to make the best use of their resources to serve the poor population in their service area.

A competitive system would also permit other prospective legal services providers, many of whom have established records of cost efficient delivery of legal assistance, to apply for grants to provide legal services.

11. What, if anything, has LSC done in the way of designing a workable and efficient process to administer a competitive grant awards system?

A: LSC has begun research and staff review associated with a system for the competitive award of legal services grants and contracts in order to lay groundwork for a Board of Directors appointed by President Bush and confirmed by the Senate. This research includes an analysis of other Federal and State programs that use a competitive award process. LSC published an advance notice of proposed rulemaking and received forty-three written comments in response. Further, the first of a series of hearings on the competitive award system was held in Schaumburg, Illinois in June, 1989. Sixteen witnesses, including LSC staff, testified before the Corporation's Committee for the Provision of Legal Services.

12. Under a system of competitive bidding, would current programs enjoy a built-in advantage over prospective new providers?

A: Under the competitive award system envisioned by LSC, all applicants will be treated equally; there is no intent to "stack the deck" for or against any applicant. Current providers may have an advantage if they can demonstrate efficiency in the provision of legal services.

13. Can LSC ensure that the implementation of competition will not result in the disruption or dislocation of services to the poor?

A: LSC does not believe there will be any material disruption in service. In those cases in which a change in providers is made, a transition period will be established to prevent disruption of representation. Such a transition is similar to those put into place when a recipient is defunded, and could be handled in a similar manner. Even if it is necessary for a client to change attorneys because of the competitive award, the client's wishes as to who should represent him or her will be taken into account and the clients' interest will continue to be represented.

Mr. GLICKMAN. Why don't we go ahead and start. Is Mr. Wear still here?

Mr. WALLACE. He is here.

Mr. GLICKMAN. I think he wanted to submit an opening statement for the record. All right.

Without objection, his entire statement will appear in the record. I would yield to Mr. Cardin. You may start.

[The prepared statement of Mr. Wear follows:]

PREPARED STATEMENT OF TERRANCE J. WEAR,  
PRESIDENT, LEGAL SERVICES CORPORATION

Good morning, Mr. Chairman and members of the Subcommittee. I am Terrance J. Wear, President of the Legal Services Corporation. I appreciate the opportunity to appear before you again and to participate with the Subcommittee in the reauthorization of the Federal legal services program. As you know, the program's authorization expired in 1981. Subsequently, the program has been operated on annual appropriations and a series of appropriations "riders" that have made long range planning difficult. The uncertainty prevalent in this environment should be resolved through the reauthorization process.

As I noted in my testimony before this Subcommittee in March, I believe that a reauthorization bill must contain reforms in order to insure the integrity of the Federal legal services program. A bill that provides for program accountability will greatly improve both the image and the acceptability of the legal services program among a large number of Members of Congress, as well as the large numbers of Americans who pay for the program with their tax dollars.

When I testified previously, I referred to several instances of abuse identified by the Corporation's staff and by the programs themselves, under the terms of a grant condition requiring that such activity be reported to the Corporation when

it becomes known to the program. Subsequently, the Corporation submitted additional examples of waste, fraud, and abuse to the Subcommittee in response to inquiries made during and after the March hearing. The Corporation's submission covered 16 cases in which employees of programs were either alleged to have, or found to have, committed fraud, embezzled program funds, or abused the public trust in some other way. Several of these matters are pending with the Department of Justice. Others were referred to DOJ, but prosecution was declined for lack of an applicable Federal law. Until Congress clarifies the ambiguities in the statutory language that lead to these interpretations, I do not believe we will be able to rein in the fraud.

#### WASTE, FRAUD, AND ABUSE

Mr. Chairman, I would like to update the instances of waste, fraud, and abuse that have come to light since the Subcommittee's March hearing and offer my thoughts on what is needed in a reauthorization bill to eradicate such activities. As one might expect, most of these cases involve individuals who are paid with LSC funds, rather than program wide conspiracies. However, we have found that these instances might have been avoided had program management put into place the financial controls necessary to discourage or detect the misappropriation of these funds.

One program, California Rural Legal Aid, reports in a memo to its Directing Attorneys that, during 1987, it suffered three incidents of misappropriation of client trust funds, resulting in the theft of up to \$13,400. California Rural Legal Aid dismissed the parties responsible for these thefts and sought their prosecution by local authorities. As the Executive Director noted in his memo, California law requires that "once CRLA obtains knowledge of the actual commission of a crime, it becomes 'conspiratorial' to agree to nonprosecution and subjects the agency to punishment under criminal law." The Executive Director also noted that the program would take immediate action to establish a policy to deter future thefts of client trust funds. The policy change was to be followed up with selective audits of client trust funds program wide.

This represents responsible action on the part of the California program and the program's Executive Director should be commended for his efforts. The key, I submit, is the incentive provided through the California statute referred to above. A similar provision at the national level could be used to punish, and thus deter, instances of fraud and abuse.

Just last month, Western Nebraska Legal Services, Inc. advised the Corporation of an apparent theft, loss, or embezzlement of LSC funds that was uncovered during a fraud audit conducted by a special committee of its Board of Directors. The

audit revealed that the program's former Executive Director allegedly filed false travel claims and claims for expenses already covered by per diem payments that the program had made to him. In addition, the audit disclosed that the former Executive Director maintained an "outside law practice" in which he represented clients eligible for legal services and charged them fees and also represented criminal defendants and collected fees, both in direct violation of LSC's regulations. The Board's special committee is investigating the false claims allegations; but has already substantiated the "outside law practice" allegations with cancelled checks made out to the former program director for immigration work done on behalf of eligible clients and court pleadings showing the former Executive Director's involvement in criminal proceedings.

Again, the Nebraska program's new Executive Director assures the Corporation that the program will turn over its findings to the local authorities and seek prosecution. Again, this is responsible action on the part of the Nebraska program, but it is not clear whether the former Executive Director's actions, while reprehensible, amount to violations of criminal law. I am also sorry to report that the former Executive Director of the Nebraska program has been hired as the Executive Director of another legal services program. A recent unannounced investigation of this individual by LSC staff suggests that the same pattern of activity is occurring at his new location. In

fact, during the interviews with the individual, the staff found evidence that he was continuing his outside law practice from his new location.

In another case involving Legal Aid Society of Northeastern New York, LSC found that the program's bookkeeper had paid himself an extra \$12,000 over the period 1986-1988. Documents retrieved during a visit to the program in early June indicate that the bookkeeper took advantage of the program's lack of financial controls to misappropriate these funds. The misappropriation was detected during an examination of the bookkeeper's W-2 forms in his personnel file. Further examination revealed that the program had not maintained vendor files, that its auditor had not conducted a 1987 audit, and that the program has no fiscal records for calendar year 1989. The program reports that it has now entered into an informal agreement with the bookkeeper to repay the stolen funds. I should also note that the Legal Aid Society of Northeastern New York was required to report this misappropriation to LSC under the terms of a grant condition that has been in place since January 1, 1989, but failed to do so.

This case is an example of the stark contrast in anti-abuse policies across legal services programs. While CRLA appears to take these matters seriously and is implementing procedures to minimize the likelihood of their recurrence, the Legal Aid

Society of Northeastern New York appears to be in fiscal chaos. To remedy situations like this, this Subcommittee should make the criminal and civil laws that now apply to grant recipients receiving other Federal funds also apply to legal services programs that receive funds from LSC. Only this action will ensure the integrity of the legal services program throughout the nation.

During the March hearing, I spoke of my aversion to abuses that leave the Federal legal services program poorer. While we need institutional reforms that would streamline program information transmission and assimilation, our monitoring efforts on this front appear to be improving. In fact, the increased professionalism of our staff appears to have alarmed the Executive Director of one program who, in a letter to Mr. Bucky Askew of the National Legal Aid and Defender Association, noted that the LSC staff who had just visited his program "were very well prepared and very focused in their work...they have the potential for doing great damage with these visits as they get better prepared...." To the extent that fraud and abuse exist, I expect we will do some damage. After all, it is our job to root it out. (Note: A copy of the letter to Mr. Askew is appended to this testimony.)

ROLE OF THE LEGAL SERVICES PROGRAM

A new authorization bill for the Federal legal services program must address a most basic question: What is the proper role of a legal services program? Originally, the Federal legal services program was established to enable individuals, who were too poor to afford to pay for an attorney, to obtain the legal assistance they needed. For many poor persons who may be facing bankruptcy, eviction, divorce, or the lack of child support, this need is critical. Several studies demonstrate that only a small percentage of the demand for legal assistance is met, yet our limited resources are not used to their best effect. Consequently, it is important to establish the provision of day-to-day legal assistance as the priority of the Federal legal services program. Other activities serve only to siphon resources away from the essential purpose of the program.

Lobbying and involvement in political issues are examples of activities that siphon away resources. Redistricting and reapportionment are also examples of inherently political actions that absorb extensive staff time and effort that could be used to provide basic legal assistance. Redistricting is an activity that affects an entire political community, with necessarily partisan implications; redrawing political boundaries involves many interests not peculiar to the poor. Moreover,

there are many public interest law firms and groups that actively pursue such activities as redistricting. It is a mistake to permit limited legal services resources to be used by a program to pursue these matters, or to promote its own particular view of politics. A new authorization for the Federal legal services program should clarify and strengthen prohibitions on redistricting litigation, lobbying, and other political activities.

One recurring problem with the current structure of LSC is that even though there are clear restrictions in the LSC Act and regulations against many of these political activities, those restrictions are easily evaded by the legal services programs. The programs are able to exploit loopholes in the statutory language that are wide enough to render restrictions on political activity meaningless. If a program wants to lobby against, for example, the nomination of Judge Robert Bork, the program simply claims it is using non-LSC funds. The program may be using telephones, desks, and offices paid for by the taxpayers, and using funds raised on staff time paid for by the taxpayers; but for purposes of evading the restrictions on the use of taxpayers' funds, the program claims the activities are funded with non-LSC funds. It is impossible to sort out this kind of shell game played by the programs.

The Corporation has made several efforts to close this

loophole by clarifying regulatory language concerning the use of non-LSC funds. Congress should require that any program seeking LSC funds must agree not to use other funds for purposes proscribed by the LSC Act and regulations.

#### TIMEKEEPING

I believe that both the poor and the American taxpayers would be well served by the implementation of a standardized system of timekeeping for legal services programs. The objectives of such a system are twofold. First, a system of timekeeping will identify, on a contemporaneous basis, legal assistance funded by LSC versus legal assistance funded through non-LSC sources. Second, the system would provide information on the allocation of funds across the various service dimensions--including direct services to clients, overhead, and administrative functions. In short, a timekeeping system would provide a far more accurate picture of day-to-day operations than currently exists and would be an effective yardstick to measure program performance and to compare one program with another.

Timekeeping provides benefits to programs, to the Corporation, and to Congress. Timekeeping encourages programs to provide services to clients in the most effective and economical manner. A meaningful record of efficient and responsive service could increase opportunities for legal services programs to

obtain funding from non-LSC sources. The Boards of Directors of Legal services programs could use time data to assess program effectiveness and to make allocations of funds to specific field offices within their programs. Program managers would also be better informed on staff efforts and better able to make recommendations to their Boards of Directors as to the allocation of scarce funds.

The Corporation would benefit from timekeeping in many ways, not least of which would be in its ability to "insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance..." as is required by Section 1007 (a)(3) of the LSC Act. At the present time, without a system of timekeeping, the Corporation is unable to make this assurance. Appropriate systems of timekeeping would yield meaningful information about program performance and would enable the Corporation to measure a given program's performance against an objective standard and to compare one program with another.

Finally, a system of timekeeping would provide a statistical mapping of program characteristics, from casetypes to clients served, allowing the Corporation to reduce its expenditures on costly, laborious on-site visits. This information is vital to ensure that clients across the nation receive the services to which they are entitled in the most efficient and effective

manner.

Information gleaned from an effective system of timekeeping could benefit Congress by enabling the Corporation to respond to diverse Congressional inquiries in a more timely, comprehensive manner. A more accurate picture of field operations could also have an impact on Congressional funding decisions. Finally, timekeeping information could give Members of Congress an indication of the extent to which the legal services program is meeting goals established in legislation.

#### CLASS ACTIONS AND POLITICALLY MOTIVATED LITIGATION

Any reauthorization measure should also provide stronger language that would require legal services programs to consider more carefully whether or not to bring class actions or to engage in politically motivated litigation. Two cases which I will outline here suggest that ideology plays a role in the decisions made by local legal services programs as to which cases and clients are accepted for legal representation.

Consider a case involving California Rural Legal Aid now in its tenth year. The program brought suit against the University of California at Davis in 1979 for engaging in agricultural mechanization research. On behalf of 19 agricultural workers, CRLA maintained in its suit that the university's research would

replace workers with machines, eliminate the small farm, concentrate production and harm consumers, reduce the quality of life by raising the scale of farming, and "thwart the efforts of farmworkers to act and bargain collectively concerning their working conditions." The program has spent over \$1 million on a case that many would agree is an ideologically motivated, misguided effort to reverse the course of technological progress. I personally believe we could have accomplished much more by spending the \$1 million to help poor women and children obtain child support from absent fathers.

On April 18 of this year, I received a complaint from Congressman Huckaby about a suit filed by Florida Rural Legal Services against the Northern Louisiana Growers Association. The Congressman's complaint alleges that the suit was brought to harass a group of growers who had fulfilled all their obligations under the migrant worker laws, but who had failed to provide work for a number of H-2 workers who had arrived unannounced several weeks before their services were required. The complaint notes that an on-site inspection by the Department of Labor found no violations of the Migrant and Seasonal Agricultural Worker Protection Act or pertinent regulations. Congressman Huckaby asks how an attorney in Southern Florida is "more qualified than the Department of Labor to know what regulations may have been violated thousands of miles away, two years ago, in another state?" That I cannot answer. I would agree, however, that LSC

funds could be more effectively used to help poor people who truly need legal assistance. Unfortunately, under the current structure, I am unable to give the Congressman any relief.

I do have several suggestions, however, on structural reforms that could encourage legal services programs to be more responsive to individual clients, rather than abstract notions of the class effects of agricultural mechanization and other similar things.

With respect to class actions, a reauthorization should prohibit the filing of a class action lawsuit unless the Board of Directors of the program filing the suit has reviewed the complaint and has approved it for filing. This will cause the program's Board of Directors to focus on the suit, on the amount of resources needed to support it, and on the kinds and numbers of cases that the program will be precluded from handling if the suit is brought. Second, the Board of Directors should also be able to demonstrate that the alleged policy or practice that is the subject of the class action lawsuit will continue to adversely affect eligible clients. Third, the program should insure that all class members to be affected by the suit are eligible clients. Finally, the program should ensure that class relief is sought solely for the benefit of eligible clients. These provisions would have the effect of narrowing the representation for class action lawsuits to those persons who are

eligible clients.

With respect to other litigation, such as agricultural or housing cases, legal services programs should not be allowed to pursue a complaint or settlement until all administrative and alternative dispute resolution remedies have been exhausted. Second, the programs should be required to identify all plaintiffs and enumerate all facts underlying the claim in an affidavit attached to the complaint. Under this rule, it is unlikely that a case such as that cited by Congressman Huckaby would have been filed.

#### CONCLUSION

In addition to the reforms outlined by Mr. Wallace in his testimony, the reforms I discussed here today, combined with the application of Federal antifraud and anti-abuse laws, should help redirect the legal services program for the benefit of the individual clients for whom it is intended. I look forward to working with the Subcommittee in the coming months as it considers these matters in the context of reauthorization for the Federal legal services program.

Mr. Chairman, it has been my pleasure to appear before the Subcommittee today and I would be glad to answer any questions you or the other Members of the Subcommittee may have.

**GEORGIA LEGAL SERVICES PROGRAM  
CENTRAL OFFICE**

PEACHTREE WEST BUILDING  
161 SPRING STREET, 5th FLOOR  
ATLANTA, GEORGIA 30303  
(404) 658-6021  
GIST 221-6021

April 14, 1989

JOHN L. CROMARTIE, JR.  
EXECUTIVE DIRECTOR

PHYLLIS J. HOLMES  
DIRECTOR OF LITIGATION

NANCY B. LINDALOOM  
M. AYRES GARDNER  
ROBERT W. CULLEN  
RACHAEL S. HENDERSON  
KAT Y. YOUNG  
PAUL RAUFFMANN  
TORIN S. TOUTT  
WILLIAM TRAYLOR  
VICKY KIMBRELL

LINDA B. LOWE  
NON-ATTORNEY  
HEALTH POLICY SPECIALIST

**BOARD OF DIRECTORS**

MARY A. BUCKNER  
PRESIDENT  
RONITA STANLEY  
VICE PRESIDENT  
CARL BRYANT  
VICE PRESIDENT  
MARY FLATZ  
SECRETARY  
CHARLES LESTER  
TREASURER

**NON-ATTORNEY MANAGEMENT STAFF**

ROBERT O. DAVIS  
ASSOCIATE DIRECTOR  
JACK W. WEBB  
ACCOUNTING MANAGER  
BETTY M. DIXON  
ADMINISTRATIVE ASSISTANT

Bucky Askew  
National Legal Aid & Defender Association  
1625 K Street, N.W.  
8th Floor  
Washington, D.C. 20006

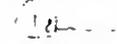
Dear Bucky:

Attached please find the completed monitor information forms concerning our recent LSC monitoring visit. I may have further comments when I receive the plenary monitoring report. Some times appearances can be very deceptive in this process.

Please let me know if you have questions. The information you provided to us was extremely valuable in terms of understanding the process as well as in knowing something about what to expect from the particular monitors. I do get the distinct impression that we are entering into a new phase in the monitoring visits. I got the distinct impression that Terrance Wear was in the background of some of what we were hearing. It was clear to me that they were attempting to find areas that could be labeled "potential fraud". Moreover, I expect to see an increasing use of allegations in the monitoring visit which irrespective of whether they are supportable by the facts can be used as a basis for subtle changes against legal services programs in general.

I was impressed with the way in which most of the monitors were very well prepared and were very focused in their work. I think that they have the potential for doing great damage with these monitoring visits as they get better prepared for them. I expect the next six to nine months to be very difficult ones in terms of some of the monitoring visits. Please let me know if you have further questions about our monitoring visit, and once again thank you for all of your help.

Very truly yours,

  
John L. Cromartie, Jr.  
Executive Director

JLC/sa  
attachment

GEORGIA INDIGENTS LEGAL SERVICES, INC./GEORGIA LEGAL SERVICES PROGRAMS, INC.  
Offices in Albany, Atlanta, Augusta, Augusta, Brunswick, Columbus, Dalton, Dublin,  
Geneville, Marietta, Savannah, Valdosta, Waycross, Waynesboro and Tifton (Migrant Farmworkers Division)

Mr. CARDIN. I have some questions, Mr. Wear, but I will start with Mr. Wallace on some other points.

Let me start on the competitive bidding that you are talking about trying to implement. Some of the concerns that we have—and I would invite you to perhaps address these issues and maybe assure us that my concerns are not well founded—that, as you know, competitive bidding does not always provide the cheapest legal services, the best legal services.

We have developed expertise in providing legal services to poor people in our community. The continuity of providing those services is absolutely essential to the type of work being done in the various communities in this Nation. One of our concerns about the competitive bid, is that the cheapest bidder, who may provide an inferior service, will be awarded a grant without regard to continuity and expertise.

Mr. WALLACE. My best answer would be to assure you that the promise from which you proceed is faulty. I don't think we are looking for the cheapest bid. We are looking for the best bid. Certainly—certainly the efficiency and economy with which a lawyer can do the job is something you ought to look for.

If two lawyers can do the same job and one can do it cheaper, you go with the cheaper. You wouldn't go to a lawyer at all if he couldn't do the job just because he was cheapest.

The only assurance I can give you is that I think the program will be administered by people of goodwill under careful congressional oversight and the peer review process has worked in other parts of the Federal Government. I think it can work here, but cheapest isn't always the only thing you look for.

Mr. CARDIN. Would you be building into the bidding process certain pluses for a grantee that had prior experience or was already providing the service? How are you going to—I mean, it is nice to hear what you have to say, but how do you propose—you are ready to go to implementing the competitive bid system but for some action here on Capitol Hill. I hope you have thought this over. How do you assure that quality will be built into the process?

Mr. WALLACE. At the Board level, I don't know the answer to that. We have had one hearing so far, most of which I missed because I had pneumonia. But Mr. Wear has pursued it at a much greater detail at the staff level. Maybe he can give you more specific answers than I can, Mr. Cardin. I am sorry.

Mr. CARDIN. Mr. Wear.

Mr. WEAR. Mr. Cardin, the intent of this proposal is not to stack the deck one way or another for or against existing programs or for or against new people. There are a number of grantees that have experience in this area. There are other entities that have shown an interest in bidding on these grants that have similar experience. The most comparable experience is that relating to prepaid legal plans and the representation of members of prepaid legal plans.

This question that you raised about whether or not there is going to be some bonus points for existing grantees was brought up in our hearing in Chicago. I have asked the staff to look at that, as well as a number of other points raised in our hearing in Chicago, and we hope to develop another proposal that can be circulated, if

this Board is still in business, and that the committee that is handling this can hold another hearing and get further comment on it.

Mr. CARDIN. Can I ask that you supply to this committee information on how you intend to look at competitive bidding, assuming that it has moved forward, to carry out at least Mr. Wallace's stated objective, and that is to provide the best, not necessarily the least expensive, legal services, mindful of the need for preserving the expertise and continuity of providing legal services in a community?

Is that a fair request for me to make?

Mr. WEAR. I will be glad to do that, Congressman. I don't know how soon we will have that done, though.

Mr. CARDIN. You don't have to do it at all if you don't go through with a competitive bidding process. Is that a fair request that we be advised as to how you intend to carry that out?

Mr. WEAR. Yes. It would be my intent to advise the committee of the whole competitive process.

Mr. CARDIN. I would like to hear about it as you formulate how you intend to implement such a program .

Mr. WEAR. There isn't any problem with your request.

Mr. CARDIN. I am not suggesting that you move forward rapidly in that area.

Let me move to a second issue, if I might, and that is the requirement for negotiation in class actions. I take it that you all support the position that there should be some requirement for negotiations?

Mr. WEAR. I believe that that is a provision in the Combest bill with regard to class actions. I think that that is a good idea. I think it is one that would be helpful. I know that in a situation in Pennsylvania there was some negotiation of an action before it was filed, and as it turned out, my recollection is that they were able to settle their differences. So I think that sort of thing would be helpful.

Mr. CARDIN. Well, let me again raise the other side of the issue and ask if you have given thought to how you would protect against those people who would use the requirement that may be contained in Federal law to delay action, particularly when it relates to a legal matter where delay could be tantamount to no justice at all. For example, migrant workers might leave their employment before the issue could be resolved or there may be a history of employers taking action against people who make complaints?

Do you envision that there would be flexibility here so that an attorney can try to properly represent his client as he would be able if it were a private arrangement?

Mr. WEAR. I believe that those things can be worked out within the context of the Combest bill. In the current situation in representation of migrant workers, as I understand it, the Legal Services program continues to represent that migrant when he or she leaves the area anyway. So the fact that you have some negotiation of the complaint or you flesh out what exactly the nature of the complaint is ahead of time, I don't think is going to preclude the filing of an action if indeed such an action is necessary, if they determine that through this discussion process.

Mr. CARDIN. I understand that, but I think you would agree that if there were a requirement for negotiations, there would be the temptation at least in some cases by an attorney on the other side to use that as part of a strategy for delay.

Mr. WEAR. Well, I assume that there is good faith on both sides in these actions.

Mr. CARDIN. Then why do we need a requirement for negotiations? If it makes sense to negotiate, wouldn't a lawyer negotiate, if you believe there is good faith and goodwill on all lawyers representing their clients?

Mr. WEAR. I would hope that there is. I must tell you, though, that I have had some experience when I was a member of the staff of the Senate Agriculture Committee, that would lead me to believe that there is not always good faith on the part of those who are filing actions in the migrant worker area.

Mr. CARDIN. Wouldn't that be true on the other side, also, or you think that is not true on the other side?

Mr. WEAR. I am not aware of any instances where the persons being sued exercised bad faith or moved to intimidate those individuals who were filing complaints. I know that a number of growers have been interested, and a number of them from Maryland, in learning exactly what the nature of the complaint was.

In the past it has been difficult to tell from looking at the pleadings exactly what the basis for the complaint is. One of the things that the Combest bill would require is that an affidavit be filed with any complaint spelling out what the nature of that complaint is and—so that people would be aware of that.

Mr. WALLACE. Mr. Cardin, if I may comment on that. Again, your premise gives me a little trouble. You are—you say negotiation is bad in situations where there may be an emergency situation, have to move quickly.

Mr. CARDIN. Mr. Wallace, let me qualify that. I am saying that a trained attorney knows when negotiations are good and when negotiations are bad for their clients. Sometimes it is absolutely to your advantage to sit down and negotiate. Sometimes it is not. If one side has the requirement and the other side does not, one side has an advantage.

Mr. WALLACE. So if that is—so if that is your broader objection, then the comment that I was about to make about the emergency situation, I guess, goes by the board. I think that every defense lawyer has an incentive to negotiate. I don't think that you need a statutory requirement that a defense lawyer negotiate.

I think you create a equality, if that is your objective here, by giving an incentive to both sides to negotiate. I have heard the complaints from growers from your State that were repeated by your colleague from Maryland this morning. I haven't been out in the field. I haven't been out in the orchards.

I do have a little experience in judging the credibility of witnesses, and these people really believe they are being treated in bad faith. It doesn't prove that they are right, but they really believe it. I can tell that much. And I think that this statutory provision is something that Congress ought to do to try to require people to get together.

Again, it is only in class action situations. Anybody who has an emergency isn't going to waste time with rule 23 certification anyway. If you have got the time to take a classwide approach to a problem, you ought to have the time to sit down and talk about it first.

I think it is a reasonable requirement, and I think it evens up the odds a little.

Mr. CARDIN. Are you aware in the specific case that you mentioned, the growers in western Maryland that the Legal Aid Bureau did ask to meet with the people that had the concern, and they refused to meet?

Mr. WALLACE. I had not heard that. I will tell you what I had heard. We had the growers from western Maryland come before one of our committee meetings, told us they had filed a complaint pursuant to the regulations with the Legal Aid Bureau of Maryland this high, and the Legal Aid Bureau refused to talk to them.

Mr. CARDIN. If in fact that were true, wouldn't that shoot your theory that it is always in the interest of defense people to sit down and negotiate?

Mr. WALLACE. It would certainly shoot some holes in it. The evidence I got went the other way, though.

Mr. CARDIN. As I listen, Mr. Wallace, to your testimony about additional rights that you would like to see for the Legal Services Corporation to go against potential fraud and abuse and misuse of funds, and then listened to your testimony on Mr. Cooper and his law firm, I thought perhaps that was one of the grantees that you wanted this additional power in order to make sure that money was properly spent.

If I might, Mr. Chairman, I would like to introduce a copy of the invoice from Mr. Cooper's law firm through April 30, 1989, if I might introduce that.

Mr. FRANK. Without objection. The Chair hears no objection.  
[The information follows:]



■ **LEGAL SERVICES CORPORATION**

PERSONAL AND CONFIDENTIAL

MEMORANDUM

TO: Members of the Board

FROM: Terrance J. Wear *TJW*  
President

RE: Copies of Statements of Fees for  
Services Rendered by the lawfirm  
of McGuire, Woods, Battle & Boothe

DATE: July 21, 1989

---

Attached please find a copy of a statement of account submitted by McGuire, Woods, Battle & Boothe covering the months of April and May 1989.

Please note that the billing rates on this statement have been discounted. Consistent with established Corporation practice, I ask that you do not disclose the hourly rates charged; since the Corporation's ability to obtain discounts in the future depends on its ability to protect this information.

This statement is provided to you for your information; no action is required.

LAW OFFICES IN ALEXANDRIA,  
CHARLOTTESVILLE, FAIRFAX,  
NOFOLK, RICHMOND,  
TYSONS CORNER, WILLIAMSBURG  
AND WASHINGTON, D.C.

**McGUIREWOODS  
BATTLE & BOOTHE**

THE ARMY AND NAVY CLUB BUILDING  
1627 EYE STREET, N.W.  
WASHINGTON, D.C. 20006  
TELEPHONE: (302) 637-1700  
TELECOPIER: (302) 637-1750  
TELEX: 634679 MWBS WSH

CHARLES J. COOPER

June 26, 1989

RECEIVED

JUN 29 1989

Terrance J. Wear  
President  
Legal Services Corporation  
400 Virginia Avenue, SW  
Washington, DC 20024-1839

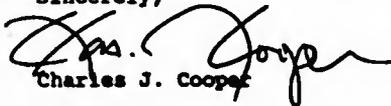
Dear Terry:

Enclosed is our statement for services rendered during the months of April and May. At the Board meeting in Chicago earlier this month, one of the Board members asked a question concerning our bill for services connected with the memorandum on the constitutional status of the Corporation. Our billing for those services were covered by our last statement and were reflected in entries on that statement from March 6 through March 31. Our total billing for those services, according to my calculations, was \$29,004, broken down as follows:

Charles J. Cooper	68.2 hrs. @ \$200.00/hr. =	\$13,640.00
Michael Carvin	87.5 hrs. @ \$135.00/hr. =	\$11,812.50
Thomas E. Spahn	.6 hrs. @ \$160.00/hr. =	\$ 96.00
Larry J. Gusman	30.0 hrs. @ \$ 65.00/hr. =	\$ 1,950.00
Marsha L. Fullard	9.5 hrs. @ \$ 65.00/hr. =	\$ 617.50
Eric D. Rivenbark	2.2 hrs. @ \$ 40.00/hr. =	\$ 88.00
Westlaw	3.2 hrs. @ \$250.00/hr. =	\$ 800.00
TOTAL		<u>\$29,004.00</u>

Additionally, I have noticed that we erroneously charged the Corporation \$135 per hour for Mr. Carvin's time on our earlier bills, rather than the agreed upon rate of \$130 per hour. Accordingly, a credit of \$1,808.00 reflecting this error appears on the enclosed statement.

Sincerely,

  
Charles J. Cooper

CJC:lad  
Enclosure

LAW OFFICES IN ALEXANDRIA,  
CHARLOTTESVILLE, FAIRFAX,  
NORFOLK, RICHMOND,  
TYSONS CORNER, WILLIAMSBURG  
AND WASHINGTON D.C.

McGUIRE WOODS  
BATTLE & BOOTHE

THE ARMY AND NAVY CLUB BUILDING  
327 EYE STREET, N.W.  
WASHINGTON, D.C. 20006  
TELEPHONE: (202) 834-4700  
TELECOPIER: (202) 834-0799

Terrence J. Wear  
President  
Legal Services Corporation  
400 Virginia Avenue, SW  
Washington, DC 20024-1839

May 31, 1989  
Page 1

FD-302 (Rev. 11-29-83)

DATE OF REPORT: 05/31/89

RE OUR FILE # 1860139.003  
LEGAL SVCS - Congressional Re-  
striction Project

THROUGH 05/31/89

4/4/89	Telephone conference with Jim Wootton re declaratory judgment issues; conference with Mr. Carvin re same; C.J. Cooper	2.00 hrs.
4/4/89	Telephone conference with Jim Wootton re declaratory judgment; conference with Mr. Cooper re same; M. Carvin	2.00 hrs.
4/5/89	Legal research re declaratory judgment actions; C.J. Cooper	3.20 hrs.
4/6/89	Legal research re declaratory judgment issues; C.J. Cooper	2.10 hrs.
4/6/89	Legal research re declaratory judgment issues; M. Carvin	5.10 hrs.
4/7/89	Telephone conference with Terry Wear and Jim Wootton re declaratory judgment actions and standing to bring same; C.J. Cooper	2.20 hrs.
4/7/89	Telephone conference with Terry Wear and Jim Wootton re declaratory judgment actions and standing to bring same; M. Carvin	1.50 hrs.

Legal Services Corporation

May 31, 1989  
PAGE 2

4/12/89	Legal research on standing issue; telephone conference with Jim Wootton and Mike Wallace re same; C.J. Cooper	4.20 hrs.
4/14/89	Research standing issue; telephone conference with Jim Wootton re Rep. Edwards' letter concerning Voting Rights Act; C.J. Cooper	2.90 hrs.
4/18/89	Telephone conference with Jim Wootton re status; telephone conference with Lee Liberman re meeting with Boyden Gray; research standing issue; telephone conference with Jim Wootton re same; C.J. Cooper	1.20 hrs.
4/19/89	Research standing issue; L.J. Gusman	5.00 hrs.
4/19/89	Research standing issue; C.J. Cooper	4.00 hrs.
4/20/89	Research standing issue; L.J. Gusman	2.00 hrs.
4/20/89	Research and draft memorandum re standing issue; telephone conference with Boyden Gray's office re meeting; C.J. Cooper	6.50 hrs.
4/21/89	Telephone conference with Terry Wear and Jim Wootton; review Daily Journal article; draft memorandum on standing issue; C.J. Cooper	5.90 hrs.
4/24/89	Research and draft memorandum on standing issue; telephone conference with Jim Wootton re same; telephone conference with Boyden Gray's office re meeting; C.J. Cooper	7.80 hrs.
4/24/89	Research directors liability; D.C. statutory provisions re liability; L.J. Gusman	5.50 hrs.

Legal Services Corporation

May 31, 1989

PAGE 3

4/25/89 Telephone conference with Terry Wear re meeting with Boyden Gray; reschedule same; further work on standing memorandum; telephone conference with Mr. Vieth re research project;  
C.J. Cooper 4.30 hrs.

4/25/89 Conference with Mr. Cooper re research project; review materials re similar agencies; review draft memo re constitutionality of Corporation;  
R.R. Vieth 3.10 hrs.

4/25/89 Research causes of action against directors of LSC; research statutes re officers liability;  
L.J. Gusman 5.50 hrs.

4/26/89 Draft memorandum re standing issue; telephone conference with Terry Wear re restrictions on anti-lobbying provisions and legal research re same;  
C.J. Cooper 9.10 hrs.

4/26/89 Research re liability of nonprofit directors; telephone call to Caroline Nauley; review cases and shepardize;  
L.J. Gusman 2.50 hrs.

4/26/89 Review organizing legislation for federal agencies or corporations for comparison to Legal Services Corporation;  
R.R. Vieth 5.50 hrs.

4/26/89 Computer research by Larry Gusman; Westlaw (Washington) .10 hrs.

4/27/89 Further work on standing memorandum;  
C.J. Cooper 2.10 hrs.

4/27/89 Review and revise memorandum;  
C.J. Cooper 2.00 hrs.

4/27/89 Continue reviewing statutory provisions relating to government corporations; telephone conference with Mr. Cooper;  
R.R. Vieth 2.50 hrs.

Legal Services Corporation

May 31, 1989

PAGE 4

4/28/89	Review anti-lobbying statutes and related materials provided by Terry Wear; conferences with Mr. Gusman, Mr. Scully re anti-lobbying issue; C.J. Cooper	1.50 hrs.
4/28/89	Research anti-lobbying issues; review legislative history of relevant statutes; L.J. Gusman	4.00 hrs.
4/28/89	Further work on standing memorandum; review materials re lobbying issue; review published Office of Legal Counsel opinions relating to anti-lobbying statutes; C.J. Cooper	5.80 hrs.
4/28/89	Conference with Mr. Cooper re 501(c)(3) organization lobbying activity; legal research re same; M. Scully	7.30 hrs.
4/30/89	Legal research re 501(c)(3) organization political activities; draft memo re same; M. Scully	6.00 hrs.
4/30/89	Research issues re federal anti-lobbying provisions; C.J. Cooper	9.20 hrs.
5/1/89	Conference with Mr. Cooper re directors' liability issues; research anti-lobbying issues; L.J. Gusman	3.80 hrs.
5/1/89	Prepare for and attend meeting re constitutional status of Legal Services Corporation with Boyden Gray, Lee Liberman and Legal Services officials; C.J. Cooper	4.30 hrs.
5/1/89	Research issues re federal anti-lobbying provisions; draft memorandum re same; conference with Terry Wear, Jim Wootton, Mike Wallace re same; C.J. Cooper	6.00 hrs.
5/1/89	Legal research re IRC section 527 and relevant treasury regulations; M. Scully	3.60 hrs.

Legal Services Corporation

May 31, 1989  
PAGE 5

5/1/89	Computer research by Larry Gusman; L.J. Gusman	.10 hrs.
5/2/89	Telephone conference with Jim Wootton re status; C.J. Cooper	.80 hrs.
5/3/89	Draft memorandum re directors' liability; L.J. Gusman	.80 hrs.
5/3/89	Telephone conference with Jim Wootton re status; C.J. Cooper	.40 hrs.
5/4/89	Finalize memorandum re standing; conference with Jim Wootton re same; C.J. Cooper	2.20 hrs.
5/5/89	Conference with Jim Wootton, Mr. Vieth re status; C.J. Cooper	1.70 hrs.
5/7/89	Finalize memorandum re standing; cover letter to Terry Wear re same; C.J. Cooper	1.70 hrs.
5/8/89	Telephone conference with Jim Wootton re status; C.J. Cooper	.90 hrs.
5/8/89	Review memorandum re standing; discussion with Mr. Cooper re same; M. Carvin	.90 hrs.
5/9/89	Prepare and draft memorandum re directors' liability; L.J. Gusman	3.50 hrs.
5/10/89	Conference with Mr. Gusman; receive and review preliminary draft of memorandum; research re liability of directors; R.R. Vieth	.80 hrs.
5/10/89	Telephone conference with Jim Wootton re status; M. Carvin	.90 hrs.

Legal Services Corporation

May 31, 1989  
PAGE 6

5/10/89	Telephone conferences with Jim Wootton and Mike Wallace re judicial resolution of constitutional issue; conference with Mr. Carvin re same; C.J. Cooper	1.90 hrs.
5/11/89	Computer research by Larry Gusman; Westlaw (Washington)	.10 hrs.
5/11/89	Further work on memorandum re anti-lobbying restrictions; C.J. Cooper	2.50 hrs.
5/12/89	Further work on memorandum re anti-lobbying restrictions; C.J. Cooper	2.00 hrs.
5/15/89	Review and revise anti-lobbying memorandum; C.J. Cooper	3.50 hrs.
5/15/89	Conference with Mr. Cooper and Jim Wootton re Board and potential lawsuit; M. Carvin	.70 hrs.
5/16/89	Computer research by R.R. Vieth; Westlaw (Tysons)	.20 hrs.
5/16/89	Continue research re theories of recovery against corporate directors; outline memorandum re same; R.R. Vieth	2.50 hrs.
5/17/89	Draft memorandum to Mr. Cooper re impact of potential directors' liability on standing of Board members to seek declaratory judgment; R.R. Vieth	4.50 hrs.
5/18/89	Finalize anti-lobbying memorandum; C.J. Cooper	1.40 hrs.

Legal Services Corporation

May 31, 1989  
PAGE 7

5/18/89	Telephone conferences with Jim Wootton and Terry Wear re status; M. Carvin	.80 hrs.
5/19/89	Review and revise anti-lobbying memorandum; M. Carvin	1.50 hrs.
5/22/89	Telephone conference with Terry Wear, Jim Wootton re status; C.J. Cooper	.70 hrs.
5/26/89	Telephone call from Jim Wootton re declaratory judgment suit and related matters; M. Carvin	.50 hrs.
5/26/89	Telephone conferences with Mike Wallace, Terry Wear and Jim Wootton re status; C.J. Cooper	1.90 hrs.
5/30/89	Telephone conferences with Terry Wear re status of various matters, San Francisco suit re alien regs; C.J. Cooper	.40 hrs.

## BILLING SUMMARY

	HOURS	RATE/HR	DOLLARS
C.J. Cooper	108.3	200.00	21,660.00
M.A. Carvin	13.9	130.00	1,807.00
R.R. Vieth	18.9	130.00	2,457.00
M. Scully	16.9	145.00	2,450.50
L.J. Gusman	32.7	65.00	2,125.00
Westlaw - WASH	.3	250.00	75.00
Westlaw - TYSONS	.2	250.00	50.00

SERVICES RENDERED...\$30625.00

## COSTS ADVANCED:

3/6/89	Travel expense	\$ 6.00
3/9/89	Dinner meeting	8.37
3/10/89	Travel expense	10.00
4/21/89	Travel & copying expense	20.00
4/24/89	Telecopier charges	3.00

Legal Services Corporation

May 31, 1989

PAGE 8

4/27/89	Telecopier charges	10.00
5/1/89	Travel expense	4.00
5/1/89	Document retrieval	30.00
5/3/89	Expenses	82.77
5/3/89	Document retrieval	46.50
5/17/89	Telecopier charges	24.00
5/17/89	Document retrieval	26.09
5/25/89	Document retrieval	23.62
5/31/89	Copying expense	122.10
5/31/89	Long distance telephone calls	4.34
5/31/89	Delivery service	215.70

TOTAL COSTS ADVANCED.....\$ 636.49  
 CREDIT FOR OVERCHARGE OF TIME FOR M. CARVIN.\$[1808.00]  
 TOTAL CURRENT BALANCE FOR THIS FILE.....\$29453.49  
 PLEASE REMIT TOTAL BALANCE DUE.....\$29453.49

CJC/LAD  
 MWBB#1860139.003

7/20/89

*approved for payment*  
 TSW

Mr. CARDIN. If I could also ask that Mr. Wear take a look at that. He indicated he didn't have a copy of it. It might refresh some of your recollection in regards to that bill. It is only through April 30, 1989. I assume that he was retained after that date so there would be some additional bills coming in or may have come in since that time.

Now, Mr. Wear, I don't want to put words in your mouth, but I believe you said he was retained in order to look at the independence, judge the independence of the Corporation, or something similar to that?

Mr. WEAR. That was the general reason for doing it, Mr. Cardin. There were some other subsidiary issues that were in it that I don't remember just now, but I believe I may have some notes on it, and I have asked my staff to try to recover those notes, if I may defer on your question until I have a chance to look at those notes.

Mr. CARDIN. If there is some question that I ask that you feel uncomfortable in responding to, make that clear and you can certainly supplement your response by letter.

What Board involvement was there in the selection of this particular law firm or in the subject matter that you retained the law firm for?

Mr. WEAR. There were—my recollection is four Board members that felt this was a question that should be pursued. They brought it to my attention.

Mr. CARDIN. By a Board meeting?

Mr. WEAR. No. Not at a Board meeting.

Mr. CARDIN. Did you initiate the phone call, or did they call you saying, "Gee, I think we should get independent review of the independence of the Board?"

Mr. WEAR. They called me?

Mr. CARDIN. All four called you with this thought?

Mr. WEAR. No, the former Chairman of the Corporation made the initial call, as I recall, and there were three other Board members who were involved with this in our—

Mr. CARDIN. Did they suggest Mr. Cooper as the attorney?

Mr. WEAR. Yes.

Mr. CARDIN. Did you use your new competitive bidding process to select this lawyer?

Mr. WEAR. No. Well, I should say I thought about who we should hire and looked around, did some research on it and settled on Mr. Cooper, as I stated earlier, because of his prior experience.

Mr. CARDIN. Was it ever discussed at a Board meeting—prior to hiring the law firm, was it ever on the agenda of the Board?

Mr. WEAR. No.

Mr. CARDIN. Now that you got the report, what will you do with it?

Mr. WEAR. I don't know that we will do anything with it, Mr. Cardin. The issue was whether or not there was a problem in this area. Mr. Cooper, in his opinion, believes that there is a constitutional problem. In looking at his opinion and looking at other thoughts of other Board members about it, I agree with Mr. Cooper in his analysis of this question. I think it is a serious question, and it is one that we have raised in our testimony before this subcom-

mittee and others this year in the hope that the Congress will be able to resolve it or at least give it very careful consideration.

Mr. CARDIN. One final question. I know that my time has expired. One final question, if I might, Mr. Chairman.

If I could call your attention to two time references in Mr. Cooper's time charts that he presented. One is a conversation he had with you on December 5, 1988, that is Mr. Cooper had with you for half an hour. The other is on March 12, 1989, a conversation between Mr. Carvin and Lee Lieberman for almost an hour. Both of those are specifically marked conversations involving the transition with the Bush administration.

I am wondering if you could comment as to the essence of those legal services that were rendered. It is particularly interesting to me because of the explanation that you gave that the firm was retained for independence, and yet it looked like it was dealing with transitional issues with the administration.

Mr. WEAR. No, I don't think that is accurate. The purpose of those telephone calls was to try to determine whether the new administration had any views on this constitutional question.

Mr. CARDIN. To see—

Mr. FRANK. If the gentleman would yield.

You were paying Mr. Cooper to ask the administration if they had any views on the constitutional question?

Mr. WEAR. To talk with the new people in the transition team, the initial call was at that time—

Mr. CARDIN. So you were using Legal Services Corporation money to pay a private lawyer to check with the Bush transition team to see whether they had any views in regards to the independence of the Legal Services Corporation?

Mr. WEAR. The independence and the constitutionality. The issue, it seemed to me, was this, Mr. Cardin: It is unlikely that a constitutional question is going to receive much attention unless at least one branch of the Government is interested in it.

The purpose of these telephone calls, they were preliminary in nature to try to determine who would consider that question and to see whether or not they had any interest in looking at it.

Mr. CARDIN. I am somewhat offended that you didn't have Mr. Cooper call me as a Member of Congress.

Mr. FRANK. I am not. It would have cost us even more money.

Mr. CARDIN. Your answers would have been longer.

Thank you, Mr. Chairman.

Mr. FRANK. The gentleman from Florida.

Mr. JAMES. Do you have any reason to believe that it is illegal or improper to hire counsel?

Mr. WEAR. No, Mr. James, the Corporation routinely hires outside counsel to handle a number of questions and issues, and there is no debate that I am aware as to whether or not the Corporation had the power to hire outside counsel in this case, nor in any others.

Mr. JAMES. The House itself does it, doesn't it? In fact, this committee hires how many Democratic attorneys, four, and the Republicans one?

Mr. FRANK. The gentleman's analogy is totally false. It would be to the General Counsel, not our staff. We are not talking about

full-time staff. Nobody raises any questions about the full-time staff.

Mr. JAMES. That wasn't the analogy that I was intending to draw at all. The analogy I was intending to draw—I don't care about outside counsel. Counsel are counsel. They cost money.

Mr. FRANK. But that is the analogy that was false. The gentleman may continue, and then I will respond.

Mr. JAMES. I am fully aware and in that I am not stupid that these are not outside counsel. My point is that we are talking money. I think you have four counsel to our one or three to our one. If you want to talk about squandering money and the unfairness and the impropriety of that, I would like to address that for an extended period of time, but my first question was, was it illegal to hire outside counsel, and apparently it is not.

But if you want to talk the issue, there are two issues.

Mr. FRANK. If the gentleman would yield.

First of all, I resent the gentleman's suggestion that there is impropriety. We have three counsel. I believe they function somewhat in a partisan way only very occasionally. In a unanimous partisan way. The analogy that the gentleman sought to draw was an incorrect one. The analogy was to outside counsel.

We asked why it wasn't done by the regular inside counsel. I don't think it would be relevant to me one way or the other. So that the suggestion that there were squandering of money by three hard working people here seems to be wrong.

In regard to illegality, there is a question of prudence here for the Legal Services Corporation to pay a fairly high priced lawyer in this case, not even to do any independent research, but to make phone calls to members of the administration's transition team seems to be a waste of money and highly imprudent.

There isn't any reason why Mr. Wear couldn't have made those phone calls himself. The notion that you had to hire an outside lawyer just to find out what their views were is a case of imprudence.

This subcommittee is concerned with the prudent spending of the agencies over which we have oversight.

Mr. JAMES. If the gentleman would yield for a second? I don't mean to suggest that an attack should be made. I don't believe that we squander money at all. I think it is appropriate.

I would argue under the rules that perhaps we should in some committees have a better balance in counsel, perhaps, but I don't mean to suggest in any way other than to say you could attack on sheer numbers anything or any issues, and I didn't start making the point or the issue about a phone call.

Congress does hire outside counsel. Mr. Phalen, I believe, he did not come inexpensively.

Mr. FRANK. I am for hiring him again.

Mr. JAMES. Yes.

Mr. FRANK. The gentleman from Texas.

Mr. JAMES. I was about to finish before Barney interrupted me. He distracted me, and he knows he can do that to me.

Mr. SMITH of Texas. I am just curious, as well, how much was Mr. Cooper paid per hour?

Mr. GLICKMAN. Two hundred dollars an hour.

Mr. SMITH of Texas. Not unusual. Also, Mr. Cardin's question reminded me of my interest in how the original grantees were chosen. Mr. Wallace, if you could address that? The original grantees, I don't know how many years they have been around or have been grantees. How were they chosen?

Mr. WALLACE. I have looked at the history of it, and all I know is what I read in the history books because I wasn't around at the time. But my understanding is that the original officers of the Corporation were charged with the responsibility of finding grantees in every area of the country. They went out, and they found grantees in every area of the country.

I think the process was entirely subjective. Indeed, the only concrete story I have heard about it is Congressman McCollum's story about how they specifically went past the bar program in his county because they thought it was too conservative and set up a group of their own.

I certainly believe Mr. McCollum's story, and I would be surprised if that hadn't been repeated in other cases around the country.

It is an entirely subjective process, and most of those people are still there.

Mr. SMITH of Texas. Thank you. You mentioned in your testimony today, Mr. Wallace, and you referred to it a few minutes ago as something that you subscribed to in the March hearing, and that is that you urge Congress to apply the ordinary Federal statutes governing waste, fraud and abuse to the expenditure of LSC funds.

I was happy to hear our chairman comment favorably on the need for criminal sanctions, as well. I say that I agree. I wanted to ask you to respond to some charges that were made in some written testimony that we were given by Mr. Robert Raven and asked you to respond to some of the points that he made.

Mr. WALLACE. I will be happy to. I have his testimony here some place. You go ahead and ask your question.

Mr. SMITH of Texas. The bottom of page 3 of his testimony, he talks about the fact, "We have been distressed for several years by the manner in which the Corporation has conducted its monitoring activities. First, the Corporation has operated without any published procedures or standards for monitoring. Second, its practices have not provided reasonable due process, let alone led to a constructive evaluation procedure."

What do you think about that charge?

Mr. WALLACE. I think it is overstated. I wouldn't doubt that our monitors have occasionally made mistakes. We started the monitoring program from scratch, although monitoring has always been in the statute. There was very, very little oversight of the programs in the old days. We hired a lot of people, spent a lot of money and started a new process from scratch.

I wouldn't be surprised at all if some of the people we hired made some mistakes. That happens in government. But I think it is a necessary process. I think most of those mistakes have been ironed out.

The president of the Corporation who deals with this every day, and I don't, just handed me a letter from the Georgia Legal Services program that says they were very impressed with the way in

which most of the monitors were very well prepared and were very focused in their work.

So, I think we are getting better. As we get more experience at it, I think we are doing a much better job of it.

Mr. SMITH of Texas. On page 9 of his testimony, he makes this statement, "The Corporation has not presented any imperical or other support for its contention that competitive bidding would improve the quality of services clients receive."

Do you have any evidence or data that will show that competitive bidding would be an improvement in the process?

Mr. WALLACE. I would refer you to the plethora of support in a report that has been released by the American Enterprise Institute in the last few weeks. They did research, and competitive bidding was one of the recommendations. I don't know how you can have empirical data about something that hasn't happened yet. Anything in that case is speculation.

But the peer review process has worked well in other areas of the Federal Government and right now, we don't have any process at all. We have just grandfathered in the way people were picked the way you and I discussed a while ago.

Mr. SMITH of Texas. On page 2 of his testimony, he talks about the research firm, the Spangenberg group, released the results of the first "National Civil Legal Needs Survey of the Poor."

Are you familiar with that survey?

Mr. WALLACE. No, I am not.

Mr. SMITH of Texas. Mr. Wear, on page 5 of Mr. Greco's testimony, he makes this allegation which I would like you to respond to: Both the LSC President and Board Chair, Michael Wallace, have come before you and your counterparts on the House and Senate Appropriations Committees with a diatribe of unsubstantiated charges about the alleged wasteful, fraudulent, and abusive behavior of the Nation's current Legal Services providers.

Is that, in fact, true? Or have you been able to substantiate the examples of wasteful, fraudulent and abusive behavior?

Mr. WEAR. Mr. Smith, I don't think that that is true at all. In the last hearing before this subcommittee, I spoke of a number of instances of waste, fraud and abuse and attempts to prosecute them, many of which have been unsuccessful. After that hearing, I submitted a list of those 16 instances.

In my testimony this morning, I referred to four additional instances that have come to my attention since our March hearing. We have a situation in California where program employees embezzled funds, client trust funds. We have a situation in Nebraska where a former executive director of that program billed expenses to the program for which he had already been reimbursed.

Mr. SMITH of Texas. Go into some detail if you would in regard to that situation.

Mr. WEAR. In that situation, the executive director submitted bills to the program for activity that he had already been reimbursed for. In that particular instance, the executive director was paid a per diem payment for expenses that he incurred on trips out of the office. But he billed those expenses. That is double billing. In addition, this program director maintained an outside practice of

law wherein he charged individuals who were eligible for legal services for the services he was providing them.

Mr. SMITH of Texas. Would those be violations of criminal law, if true?

Mr. WEAR. They would be violations of our regulations. I am not sure that outside practice——

Mr. SMITH of Texas. Why was this executive director hired as another Legal Services program director?

Mr. WEAR. That is a good question. I am not sure. The Corporation is looking into that.

[Mr. Wear's response, with attachments, follows.]

## CONGRESSMAN LAMAR SMITH

Q: Why was the Executive Director of the Western Nebraska Legal Services program hired as director of another legal services program?

On June 1, 1989, Western Nebraska Legal Services (WNLS) advised the Corporation that its former Executive Director, Joe Louie Romero, allegedly: 1) filed false travel claims; 2) filed claims for expenses previously reimbursed through per diem payments; and 3) engaged in the compensated outside practice of law. WNLS also informed LSC that its former Executive Director currently held the position as Executive Director of another Corporation funded program; Central California Legal Services (CCLS).

Based upon an examination of the information available, the Corporation determined that CCLS advertised an Executive Director position in the April and May 1988 issues of the Clearinghouse Review (Attachment 1). Subsequently, on May 12, 1988, the CCLS Board of Directors convened and, among other things, received a report from the program's Search Committee. According to the minutes of that meeting, CCLS had received eight resumes and the program's Search Committee was in the process of scheduling interviews (Attachment 2).

On July 6, 1988, the board confirmed the appointment of Joe Louie Romero as its new Executive Director. In that letter,

CCLS also stated that Mr. Romero would receive a salary of \$55,000 annually, and that it would pay for all reasonable moving expenses,<sup>1</sup> including a trip for Mr. Romero and his wife for "house hunting" purposes (Attachment 3). Subsequently, on January 30, 1989, CCLS approved a 4 percent cost-of-living increase for Mr. Romero (Attachment 4).

In an effort to obtain additional information, LSC asked CCLS to provide a detailed explanation for the hiring of Mr. Romero as Executive Director of CCLS and copies of all relevant documents generated in the hiring process used to select Mr. Romero. The Corporation anticipates receipt of this information by August 16, 1989. When this information is received, this response will be amended.

---

<sup>1</sup> The moving costs paid by CCLS were in excess of \$7,300.00.

ATTACHMENT 1

**Salary:** \$1,440-\$2,167.58 per month depending upon experience and qualifications, \$67.60 per month Spanish bilingual supplement upon successful completion of oral-writen exam

**Applications:** Please submit a resume, writing sample, and references with phone numbers

**Position:** Senior Attorney, South Central office

**Responsibilities:** Interview and counsel clients on poverty law problems, work with less-experienced attorneys on casework, supervise less-experienced attorneys and paralegals, conduct state and federal litigation at both trial and appellate court level, work with community groups on poverty law problems, participate in Foundation-wide task forces, other related duties as assigned

**Qualifications:** Active membership in the California state bar (although California bar is required, applicants may be offered a position with an opportunity to take the bar exam), minimum 4 years experience in law practice, including trial work, knowledge of poverty law, supervision experience preferred

**Salary/Benefits:** \$3,365-\$4,398 per month D.O.E.; full medical, dental, and vision care; retirement benefits after 3 years employment

**Position:** Staff Attorney, South Central office

**Responsibilities:** Interview and counsel clients on poverty law problems; work with community groups on community legal problems; conduct litigation at trial and appellate levels; participate in Foundation-wide task forces, other duties as assigned

**Qualifications:** Active membership in California state bar, minimum 1 year experience as a practicing attorney, poverty law experience preferred, bilingual English/Spanish a plus

**Salary/Benefits:** \$2,326-\$3,745 per month D.O.E.; full medical, dental, and vision care; retirement benefits after 3 years employment

**Position:** Staff Attorney

**Location:** Government Benefits Office, 1636 W. 8th St., #313, Los Angeles, CA 90017

**Responsibilities:** Interview and counsel clients on government benefits problems; work with community groups on community legal problems, conduct litigation at trial and appellate levels; participate in Foundation-wide task forces; other duties as assigned

**Qualifications:** Active membership in California state bar, minimum 1 year experience as a practicing attorney, poverty law experience preferred, bilingual English/Spanish a plus

**Probationary Period:** A 1 year probationary period will be required

**Salary:** \$2,419-\$3,895 per month (depending upon experience and qualifications)

**Applications:** Please submit a resume

**Opening/Closing Date:** There will be continuous recruitment on all positions until filled

If interested in any of these positions, please contact

Adelle Carson, Personnel Manager  
Legal Aid Foundation of Los Angeles  
1550 W 8th St  
Los Angeles, CA 90017

An equal opportunity employer. Minorities, women, and the handicapped are encouraged to apply

**California—Executive Director**

**Position:** Executive Director, Tulare/Kings Counties Legal Services

**Responsibilities:** Administration of legal services program, program development and leadership, maintaining relationships with client community, private bar, and funding sources, implementing board policies, budgeting, fiscal administration, fundraising, personnel administration, and direction of program representation of clients

**Qualifications:** Ability to plan, monitor, and evaluate budgets, ability to manage people, ability to envision, plan, and implement activities appropriate to further organizational goals, ability to work effectively with volunteer boards and committees, ability to direct and participate in aggressive quality litigation efforts

**Opening/Closing Date:** Open until filled.

**Salary/Benefits:** Salary requests should be submitted with the applicant's resume; liberal benefits

**Applications:** Send resume (including references and one or more writing samples) to

Leonard Herr, Esq  
Kahn, Soares & Company  
P.O. Box 2165  
Hanford, CA 93230

**California—Executive Director**

**Position:** Fresno-Merced Counties Legal Services (FMCLS)

**Background:** FMCLS provides a full range of civil legal services to the low-income of Fresno, Merced, Mariposa, and Tulare counties—4 extremely diverse counties in the central San Joaquin Valley. The program has staffed offices in Fresno and Merced, California. There are 15 lawyers, total staff numbers some 35 persons. The program's annual budget is approximately \$1,300,000

**Responsibilities:** In concert with the board of directors: (1) to lead the program in identifying and attacking those systematic practices disadvantage the poor, which are susceptible to reform via legal activity; (2) to put into practice the best thinking about legal services work; (3) to encourage and support an aggressive and high-quality advocacy; (4) to assume overall responsibility for program operation

**Qualifications:** Extensive experience with litigation, including actual trial experience, genuine interest in teaching and supervising to improve legal skills of staff, commitment to the needs and rights of the poor, administrative and fiscal experience, including personnel matters, California bar licensure or willingness to take next California bar exam, prefer bilingual in Spanish, Hmong, Lao, Cambodian, or Vietnamese

**Opening/Closing Date:** Closed when filled, interviews begin May 1, 1988

**Salary/Benefits:** Salary negotiable; liberal benefits

**Applications:** Applicant confidentiality respected. Send resumes, writing samples, enumeration of litigation, and references to

Search Committee  
Fresno-Merced Counties Legal Services  
2014 Tulare St., Suite 600  
Fresno, CA 93721

**California—Managing Attorney**

**Position:** Managing Attorney for branch office in Woodland, California. Office contains 3 attorneys, 1 office manager, and 2 secretaries and serves the poverty population in Yolo County.

**Program Profile:** Program has 3 offices, serving 17 northern California counties; main office located in Sacramento, California.

**Community:** Covers a service area encompassing Yolo County including the cities of Davis and Woodland. The primary industries of Yolo County are agriculture and education. Woodland is about 20 miles west of Sacramento.

**Responsibilities:** Direct and manage regional office; communicate with client community, local agencies, and private bar; legal representa-

**ATTACHMENT 1 (continued)****Arizona—Directing Attorney**

**Position:** Directing Attorney at Community Legal Services Farmworker Program in Tucson, Arizona

**Responsibilities:** Responsible for day-to-day operations, quality of legal representation, and supervision of staff at Farmworker Program, performs various administrative duties, including coordination of office relations with central Phoenix office

**Qualifications:** Arizona bar member, 2 or more years of legal experience preferably with legal services, significant litigation experience and demonstrated concern and sensitivity for the needs of low-income people; ability to speak and write Spanish desirable

**Opening/Closing Date:** Available until filled

**Salary/Benefits:** \$30,000 + D.O.E., includes excellent benefits package

**Applications:** Send resume to:

Fred Gerhard  
Community Legal Services  
PO Box 21538  
Phoenix, AZ 85036, (602) 258-3434

**California—Director**

**Position:** Director of Development Private Attorney Resource Coordinator to direct program's fundraising effort and to coordinate PAJ activities

**Program Profile:** Legal Services of Northern California provides services in 18 northern counties of California. It operates 3 offices in Sacramento, Auburn, Redding, Chico, and Woodland. The service area includes the farmlands of the Sacramento Valley to the Trinity Alps, and the Northern Sierra Nevada Mountains

**Responsibilities:** Under the general supervision of the Executive Director, develop alternative sources of funds, including but not limited to law firm contributions, corporate and private contributions, and sale of program-developed materials; also coordinate programwide PAJ efforts, recommend and implement program improvements

**Qualifications:** Degree from a college or university or equivalent experience and at least 3 years of experience in fundraising and/or public relations and/or Private Attorney Involvement activities

**Closing Date:** When filled

**Salary:** \$25,000 + depending on experience

**Applications:** Send resume to:

Vicki Germain, Executive Director  
Legal Services of Northern California  
515 12th St  
Sacramento, CA 95814

**California—Executive Director**

**Position:** Fresno-Merced Counties Legal Services (FMCLS)

**Background:** FMCLS provides a full range of civil legal services to the low-income people of Fresno, Merced, Mariposa, and Tuolumne counties—4 extremely diverse counties in the central San Joaquin Valley. The program has staffed offices in Fresno and Merced, California. There are 13 lawyers, total staff members some 35 persons. The program's annual budget is approximately \$1.3 million

**Responsibilities:** In concert with the board of directors: (1) to lead the program in identifying and attacking those systematic practices disadvantaging the poor, which are susceptible to reform via legal activity; (2) to put into practice the best thinking about legal services work; (3) to encourage and support an aggressive and high-quality advocacy; (4) to assume overall responsibility for program operation

**Qualifications:** Extensive experience with litigation, including actual trial experience, genuine interest in teaching and supervising to improve legal skills of staff; commitment to the needs and rights of the poor; administrative and fiscal experience, including personnel matters; California bar licensure or willingness to take next California bar exam, prefer bilingual in Spanish, Hmong, Lao, Cambodian, or Vietnamese

**Opening/Closing Date:** Closed when filled; interviews begin May 1, 1988

**Salary/Benefits:** \$30,000 or higher, depending on experience; liberal benefits

**Applications:** Applicant confidentiality respected. Send resumes, writing samples, enumeration of litigation, and references to:

Search Committee  
Fresno-Merced Counties Legal Services  
2014 Tulare St., Suite 600  
Fresno, CA 93721

**California—Executive Director**

**Position:** The National Health Law Program is recruiting applicants for the position of Executive Director.

**Background:** The National Health Law Program is one of the national support centers of the Legal Services Program. The Program's primary responsibility is to provide specialized assistance on Medicaid, Medicare, Hill-Burton, and indigent care matters to attorneys and other advocates representing low-income clients in all parts of the country. The assistance involves litigation, congressional and other legislative matters, representation at administrative agencies, training, and publications. Beyond this primary focus, the Program from time to time undertakes general research with foundation grants and advises governmental agencies pursuant to special contracts.

Each year, the Program responds to 2,500 to 3,000 requests for assistance from local attorneys and other health advocates. It normally carries a docket of 20-25 active cases in which it is either co-counsel, amicus curiae, or special advisor. The Program regularly responds to requests for its views for members of Congress, and represents clients in commenting upon HHS regulations. It presents training on health law at 20 to 30 training events annually, usually for legal services attorneys. It publishes the Health Advocate four times a year and is responsible for several other publications, including Advocate's Guides to Medicaid, Medi-Cal, Hill-Burton, Medicaid Speed Down, and Case Management. Throughout its nearly 20-year history, the Program has played a significant role in the major developments in health law relating to publicly subsidized programs for the indigent.

The Program's annual budget in approximately \$820,000. The federal Legal Services Corporation (LSC) provides about 80 percent of funding; California's IOLTA Program provides 15 percent, and the remainder comes from foundation grants and other sources. The Program is governed by an 11-member board of directors. In addition to its Executive Director, 3 Staff Attorneys work in the Program's main office in Los Angeles. The Program also has an office in Washington, D.C., where it employs 2 attorneys.

**Responsibilities:** The Executive Director is responsible for overall administration of the Program, including leadership, supervision, and involvement in its substantive work; maintaining good relations with LSC and other funding sources; budgeting and supervision relating to financial and personnel matters; and representing NHELP before the public. In light of the increasing portion of the Program's budget that must be covered by private funds, fundraising will be a major responsibility of the Executive Director. Other significant administrative responsibilities will be preparing and submitting reports and refunding applications to LSC and IOLTA, as well as supervising others who have responsibilities for staff recruiting, budgeting, financial controls, purchasing, leasing space, insurance, and audits.

**Qualifications and Selection:** The selection of the Executive Director will be made by the

ATTACHMENT 2

LAW OFFICES OF

FRESNO-MERCED COUNTIES LEGAL SERVICES

2

#7

MINUTES OF THE REGULAR MEETING OF THE BOARD OF DIRECTORS  
FRESNO-MERCED COUNTIES LEGAL SERVICES, INC.

May 12, 1988

T. W. PATTERSON  
BUILDING  
2014 TULARE,  
SUITE 800  
FRESNO, CA  
93721  
TELEPHONE:  
209 441-1611

The May meeting of the Board of Directors of Fresno-Merced Counties Legal Services, Inc., was called to order on Thursday, May 12, 1988, at 6:20 p.m. by President Nancy Cisneros. The meeting took place at the offices of Fresno-Merced Counties Legal Services.

Directors Present: Nancy Cisneros, Mika Campbell, Don Fiachbach, Lloyd Gonzales, Robert Haden, Peggy Loya, Vincent McGraw, Patricia Milrod, Dewey Todd, Josa Villarreal, and Jim Wagoner.

Directors Absent: Candelaria Arroyo-Salas, Hope Arroyo, Tom Burr, Hugo Morales, Jan Pearson, Robert Prentiss, and Jamaica Tucker.

Others Present: Marc Feldman, Executive Director; Myrna Butkowitz, Director of Litigation; Jose Garay, Director of Administration; Terry McQuigg, Staff Attorney; Virginia Salmaron, Legal Secretary; and Ms. Gonzales and Ms. Todd, members of the public.

Quorum: A quorum being present, Nancy Cisneros called the meeting to order.

Adopt the Agenda: The agenda was approved with one change. Discussion relative to the April 21, 1988, letter of Terrence McQuigg was moved to the top of the agenda.

Approval of the Minutes of the March Meeting: On motion (Haden/Loya), the minutes of the March meeting were approved as presented. There was one abstention.

April 21, 1988, Letter of Terrence McQuigg: There was discussion relating to the April 21st letter of Terrence McQuigg requesting that a union presentation be made a regular part of the Board agenda. After discussion, the motion was made (Milrod/Wagoner) to make the union presentation a regular part of the Board agenda. The motion passed on a vote of 7 to 4. Terry McQuigg made a presentation to the Board. The bargaining unit is concerned about the process to select the Executive

Director. They would like for the Search Committee to conduct an open process, make available to all staff the resumes of the candidates, and to involve staff in the Search Committee. The Board thanked Terry McQuigg for his presentation. Nancy Cisneros determined that as part of the Search Committee report, involvement of staff would be discussed.

Financial Report: Jose Garay presented the financial report for the month ending April 30, 1988.

Search Committee Report: Jim Wagoner presented the Search Committee report. He stated that the committee had received eight resumes and that the Search Committee was in the process of scheduling interviews. Jim stated that he would welcome involvement from staff in the Executive Director Search Committee. After discussion, the motion was made (Wagoner/Loya) to expand the Search Committee by three members from staff--two from the Fresno office and one from Merced. The motion passed.

The Search Committee directed Marc to write a letter to staff informing staff of the Board's decision. Any staff member interested in participating in the Search Committee should notify Jim Wagoner by May 18.

Personnel Committee: There was no report from this committee since it did not meet since the last Board meeting.

Priorities Committee Report: Mike Campbell presented the report for the Priorities Committee. He reported that the California School of Professional Psychology had agreed to conduct a survey of community organizations. One goal of the survey will be to determine what community organizations perceive as needs for legal services. The California School of Professional Psychology is to submit its report to the Priorities Committee by May 30th. Mike reported that the Committee would have a further report to present by the next Board meeting.

Litigation Report: Myrna Butkovitz reported on the statistical hand-outs that were part of the Board packet. Included were the monthly activity report by work group for the months of March and April, the program case statistics for March and April, and the Appearances Sheet for March and April of 1988. There were questions and discussion on the number and types of court appearances by the staff.

Adoption of New Eligibility Guidelines: On motion (Milrod/Campbell), new eligibility guidelines were adopted. There was discussion by the Board as to whether these eligibility guidelines should be circulated to community-based organizations. On motion (Milrod/Villarreal), the Board directed that these guidelines be circulated to community-based organizations in the future.



FRESNO-MERCED COUNTIES LEGAL SERVICES  
ATTACHMENT 4

Y. W. PATTERSON  
BUILDING  
2016 TULARE  
SUITE 600  
FRESNO, CA  
93721  
TELEPHONE  
209 441-1611

SALARY AUTHORIZATION FORM

EMPLOYEE: JOE L. ROMERO

ANNIVERSARY DATE: SEPTEMBER 1, 1989

CURRENT STATUS:

PROPOSED STATUS:

Job Title: Executive Director

Job Title: Executive Director

Step: N/A

Step: N/A

Salary: \$4,583.34

Salary: \$4,766.67

Bilingual: None

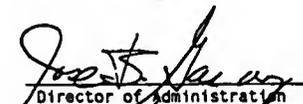
Bilingual: None

Classification: Full-Time, Permanent

Classification: Full-Time, Permanent

Effective Date: January 1, 1989

Reason for Salary Adjustment: 4% Cost of Living Increase

  
Director of Administration  
1/9/89  
Date Approved

  
President, Board of Directors  
Jan 30, 1989  
Date Approved

Mr. SMITH of Texas. I would be interested in what you find or what the justification or rationale for that would be.

On page 9 of your own testimony, you talk about the need for standardized system of timekeeping for Legal Services programs. That sounds reasonable to me. Why has that been resisted?

I might also add, given the questions regarding Mr. Cooper, it seems to me that that would be a good practice for any attorney.

Mr. WEAR. I believe that it is a good practice, Mr. Smith. Time-keeping will allow us to do several things, as I say in my prepared testimony.

Mr. SMITH of Texas. OK. Why can't that be implemented by the Board, for example?

Mr. WEAR. I believe that timekeeping can be implemented, and I have directed the Corporation staff to review that. This review started after our last hearing here in March. I believe that I will have something to put on the street that will revise the way that the Corporation does business.

I don't know that I need Board authorization to do that. It is a question that is still under review with the Corporation. I believe I can do it without that. It was my intent to discuss the benefits of that here today so that the committee would be aware of it if indeed there are any questions later when this system is put into place.

Mr. SMITH of Texas. Mr. Chairman, I don't have any other questions. Thank you.

Mr. FRANK. Mr. Glickman.

Mr. GLICKMAN. Thank you, Mr. Chairman. I must say that I find it an inexplicable waste of money, this legal opinion that you did. It is mindboggling. Here you are a Legal Services Corporation to try to serve legal needs of individual folks who are below the poverty line with particular problems, daily life problems.

We have restricted this Corporation from doing some of the more egregious acts which it did involve itself in years past. Here you are hiring a firm, you don't even use your own competitive process to hire a firm, no formal board action based upon what you have told us, to examine the constitutionality of an agency that has been in existence since 1974, signed into law by a Republican President of the United States.

You talk about waste, fraud and abuse. Now this isn't going to make our break the Federal budget, but this is a classic example of waste, fraud and abuse.

I am surprised at you, Mr. Wear. I know that you worked for Senator Helms and are interested in spending the Government's money wisely. I think you ought to be ashamed of yourself, and the Board should be ashamed of itself.

I note, also, for the record, that your General Counsel takes some umbrage at the opinion—in the past I understand that the General Counsel has been here at most of your hearings. I notice that General Counsel is not here today. What is the reason he is not here today?

Mr. WEAR. He is on vacation, Mr. Glickman. I think he is up in Massachusetts.

Mr. GLICKMAN. Well, it is probably a pretty good place to take a vacation.

Did you or anybody else ask him to come here to this hearing, though?

I don't know, Mr. Chairman, when did you call this particular hearing? When did we know that this hearing would be held?

Mr. FRANK. I would guess about a month ago. We asked Mr. Wear, as is our custom, and he asked that Mr. Wallace be the primary witness and he accompany them.

Mr. GLICKMAN. I would suggest, Mr. Chairman, that in light of the unusual nature of this that the General Counsel, being the chief legal officer of the Corporation, be invited to testify as to this memorandum.

Mr. FRANK. We will have another hearing, and we will ask him to do that.

Mr. GLICKMAN. I don't think that you have answered the question clearly about the legal opinion.

You indicate to us that four Board members just called you up and said, let's get a legal opinion as to whether this Corporation, which has been in existence for 15 years, is constitutional or not. I don't understand why you felt compelled to do that on your own internally.

It doesn't make any sense to me.

Mr. WEAR. The reason that we pursued the question of constitutionality, Mr. Glickman, is this. It appeared to me that there were serious questions about this. In addition, I had Board members who were interested in the issue.

Mr. GLICKMAN. So you are the one that spearheaded it, not the four Board members?

Mr. WEAR. No, I don't think that is accurate. I became involved in this when the former Chairman of the Corporation called me and raised the question with me. Some additional time—

Mr. FRANK. What is the name of that former Chairman, for the record, the former Chairman, the name of the former Chairman?

Mr. WEAR. Mr. Durant.

Mr. FRANK. Previously we have sometimes misidentified former chairmen.

Mr. WEAR. Some additional time went on. Mr. Durant talked with some other Board members about the question. They became interested in it. I then thought more about the question and began to think about who in the way of outside counsel could handle this question. I thought about several people here in Washington with whom I am acquainted.

I also thought about Mr. Cooper. I looked at Mr. Cooper's background in this area and ultimately decided to retain his law firm to examine this question.

Mr. GLICKMAN. I guess my point to you is that it may be a fascinating question that one could bring legal scholars together, but to what end?

Mr. WEAR. The concern that I had was that if the Corporation's structure is unconstitutional, and if that is a material problem, that the entire program might be shut down by someone raising that question, in a lawsuit, if there is a material problem there. I did not want that to happen, and I wanted to put that issue to bed, if you will. That was the reason for it.

Mr. GLICKMAN. But apparently the issue has not been put to bed because the counsel that you have hired has come up with a contrary opinion than what you apparently had hoped would happen, giving you the benefit of the doubt, which is that now—the Corporation is acting under a cloud. What do you do now?

Mr. WEAR. Well, the first thing that I did was to make the Corporation's Board members aware of the issue.

The second thing that I did was to make the relevant Members of the Congress aware of this issue by mailing copies of the opinion to them. I am hopeful that this issue can be addressed during the course of this reauthorization so that the problem can be cured.

If the issue is not addressed and if the problem goes away on its own, resolves itself in some other way, I guess I will be happy with that. But I would not want to see the program put in jeopardy by that question. That was the reason for doing it.

I thought it was a serious enough question to go out and do that. You are right about my background and my general unwillingness to spend money.

Mr. GLICKMAN. Do you believe now that the Legal Services Corporation statute is unconstitutional?

Mr. WEAR. I believe we have the statutory problem that Mr. Cooper points out. I am persuaded by his arguments on that, and I am hopeful that that question can be resolved.

Mr. FRANK. I didn't understand your answer. I didn't understand your answer to his question.

Mr. GLICKMAN. Are you presiding over an unconstitutional agency? Yes or no?

Mr. WALLACE. I think so. I said that to the committee the last time I was in here in March.

Mr. GLICKMAN. Why don't you resign then?

Mr. WALLACE. Because then someone else will be presiding over an unconstitutional agency. That doesn't solve the problem, Mr. Glickman.

Mr. GLICKMAN. Well, the other point I would make, Mr. Wear, is that you made Members of Congress aware of the Cooper legal opinion, but you didn't make them aware of the General Counsel's opinion or his point of view that thought that the Cooper opinion was wrong. So I think you were selective in that. I think we now know that because we have the material in front of us. Is that a fair statement?

Mr. WEAR. Well, there is a time difference in that the Cooper opinion was distributed to you before the General Counsel's opinion was prepared. General Counsel's opinion was prepared in response to questions raised by a couple of our Board members at the time the Cooper opinion was presented to them.

Mr. GLICKMAN. I have been talking too long. I think that this was a sweetheart contractual deal that you made with a former colleague in the sense of a person who is very close to the former Attorney General of the United States, noncompetitively bid to come up with a conclusion that a lot of people wanted to have come up with, that is to see this agency markedly and radically changed based upon preconceived ideas of what it ought to look like.

I am not sure that this is of the waste, fraud and abuse level of what we saw in the HUD situation or what we are seeing, but I

think you just frittered away \$80,000 that were unnecessarily frittered away, and I just think it is an example of what we ought not to see in government.

As I said before, there are a lot of problems with Legal Services over the years, some of which I have agreed with you in terms of my votes on this, but I don't think that you acted in a very constructive role as a public servant, either one of you, in approving the expenditure of these dollars.

Mr. WEAR. Let me respond, if I may. First of all, I had never met Mr. Cooper and was not aware of him until he was brought to my attention. I had no dealings with him at all that I can recall in any way.

Second, when we initially retained Mr. Cooper, we retained him to look at a separate issue. The issue was on the independence of the Corporation, what impact did the D.C. Corporation Act have on it or the Legal Services Act have on it? What other impacts there were?

Mr. Cooper concluded that the Corporation was not totally independent. So he wasn't driven in his conclusions by what someone may have asked him to look at.

In looking at the first issue, he raised the question of constitutionality. We then began to focus on that. So I don't think there is any basis to conclude that his response was driven by what someone may or may not have wanted to obtain. I don't think that is accurate.

Mr. GLICKMAN. Let me ask, if you had to do it all over again, would you have done a little wider search for an attorney to give you this opinion, or would you do the same thing all over again?

Mr. WEAR. I don't know. I guess it is easy to Monday morning quarterback. I did look at half a dozen lawyers here in Washington in deciding to make this choice. And I still believe that Mr. Cooper is the best qualified individual in light of his previous experience in dealing with these questions in his position at the Justice Department.

Mr. GLICKMAN. The sad thing about it is that \$80,000 could have been spent to helping people with pressing needs for survival. It has been spent on a high powered Washington law firm to decide the constitutionality of this.

Mr. WEAR. The program would be shut down, and there wouldn't be any service at all for these people—

Mr. GLICKMAN. But what you have done hasn't done anything to prevent that or help it.

Mr. WEAR. I believe it will, because it gets the issue out before this subcommittee, as well as others on the Hill, and you can deal with it.

Mr. GLICKMAN. Mr. Wallace, did you know Mr. Cooper?

Mr. WALLACE. Oh, yes, he took my place in Justice Renquist's chambers, 10 or 12 years ago.

Mr. GLICKMAN. Were you involved in recommending to Mr. Wear in any way?

Mr. WALLACE. No, I was not part of the group of four. I found out about it later. I would say now that Mr. Cooper is the most qualified man in this country to take care of the job. It was his job for 4 years to give opinions to the President, and we cannot get the

Office of Legal Counsel to give opinions to us because we are not a Federal agency.

At the chairman's request, last time, I wrote a letter to the Office of Legal Counsel on the question of aliens. They didn't even answer the letter because we are not a Federal agency.

I would be delighted not to have to hire private lawyers to get first rate constitutional opinions. But I would tell any client of mine, if you can get Chuck Cooper for \$200 an hour, you are doing well.

Mr. GLICKMAN. Back home I am not sure they would agree with you on that.

Mr. FRANK. The fact that you got this opinion, having no other purpose in mind other than to discredit your agency—can we or cannot we allow people to do this? Mr. Wear said it was to protect the agency. You protected the agency against your own threat. I don't remember any great feeling here in Congress that you were unconstitutional.

Were you aware that any defendant sued by a Legal Services Corporation has pled in defense in part that it was an unconstitutional agency bringing the suit? Have there been any such cases that you are aware of?

Mr. WEAR. Not that I am aware of, Mr. Chairman, but I believe that a defendant could do that.

Mr. FRANK. And none has in the 15 years that they have been sued.

Mr. WEAR. None have done it to my knowledge during my tenure.

Mr. FRANK. None has done it successfully in the last 15 years, in my opinion. But what is the threat that you were worried about, and how have you made it better? You have put a stick in your opponent's hands.

Mr. WEAR. Not if the General Counsel is correct.

Mr. FRANK. You spend \$80,000 to hope that the General Counsel, whom you ignored in this respect, is correct?

Mr. WEAR. I didn't ignore him. He was involved throughout the whole process.

Mr. FRANK. Mr. Cooper, I am told, is a very good lawyer. He also has a view of the separation of powers clause which has been—pretty decisively been repudiated by the Supreme Court. He was an advocate of the independent counsel statute, unconstitutional. That was repudiated 8 to 1 in an opinion written by Chief Justice Renquist.

So if I were picking someone to interpret the separation of powers, I don't think I would have chosen Mr. Cooper, not because he isn't in general a very good lawyer, but that he has been viewed in this case that was quite thoroughly repudiated.

Mr. Smith.

Mr. SMITH of Texas. Mr. Chairman, I am trying to get to what the disagreement is over here today. I don't know that any of us would disagree that \$200 an hour is unusual for a high powered reputable Washington law firm. The amount of \$80,000 is something less than three-one-hundredth of 1 percent of the total budget of the Legal Services Corporation.

It sounds to me like the disagreement today is a philosophical one over both the future of the Legal Services Corporation and whether or not we agree with the Board's actions or not.

Mr. FRANK. Would the gentleman yield?

Let me state the disagreement that I think I have and my colleagues, Mr. Glickman, Mr. Cardin and I think Mr. Morrison, one, we believe that General Counsel should have been used more, but we don't believe that this was necessary or useful for them to address this question.

There was no operational question pending. It is a philosophical question, and to spend \$80,000 of limited funds which the Federal Government has on a question of no compelling operational interest, that is what I have a problem with.

Mr. SMITH of Texas. To reclaim my time, now it seems to me that the constitutionality of the Legal Services Corporation is a pretty simple question that should be resolved if there is any doubt on the part of the individuals—

Mr. FRANK. There hasn't been any doubt in 15 years of litigation.

Mr. SMITH of Texas. Obviously some people had some doubt.

Mr. FRANK. Mr. Wear and Mr. Cooper.

Mr. SMITH of Texas. I don't have any other questions, Mr. Chairman.

Mr. FRANK. Mr. James.

Mr. JAMES. You met with some Board members. Did you meet with all of them and get approval of the hiring of the attorney?

Mr. WEAR. No. Under the regulations under which the Corporation operates, Mr. James, the President has the authority to hire outside counsel for these kinds of questions. The suggestion was made initially by the former Chairman, and then by three other members of the Board that we look at this question. I then reviewed it and subsequently hired outside counsel.

Mr. JAMES. If it is not up to the Board, why did you bother to talk to three or four members of the Board? Why not all of them?

Mr. WEAR. As a practical matter, I guess, I like to be as sure as I can that there is a genuine interest in questions before we refer them to outside counsel or indeed before the General Counsel's office looks at them.

Mr. JAMES. Did you ever determine whether or not a majority of the Board was interested in that issue after the fact?

Mr. WEAR. It was my impression, based upon the previous votes of members, that a majority of the Board would have supported that action.

Mr. JAMES. Well, I see the majority of us have inquired a great deal about your right to hire attorneys and what you paid them, so would you expect unanimity from us in demanding that the subcontractors who are really performing the services for the poor should be scrutinized as to the type and quality of services delivered? Would you not agree that we should inquire into that, as well as your wisdom of hiring attorneys?

Mr. WEAR. Yes, I would.

Mr. JAMES. That is one of your main concerns, is it not?

Mr. WEAR. It is one of them, yes.

Mr. JAMES. I would like to make it clear—make it clear that I was not attacking in any way the attorneys that provide such great

assistance to this Board or, in fact, the system of using it as an analogy for the purpose of economics.

Mr. FRANK. Thank you. I think my friend from Kansas wants to stipulate that we on our side consider this a matter of waste and abuse, not fraud. I don't think we would call this fraud except in an intellectual sense. But I think we would agree on this side that it was wasteful and abusive.

So, I think we have fixed that. Two out of three ain't bad.

Mr. JAMES. I would like to see you-all's excitement about inquiring into their performance. I think that is what I am interested in as far as the subcontractor is, also. I want to congratulate you.

Mr. GLICKMAN. If you were working for the Corporation and you knew that one of their high priorities was hiring an outside counsel to determine the constitutionality of the agency as a whole, it might inhibit your performance.

Mr. JAMES. I catch your point. You might also notice on the bill that 287 of the hours was for \$135 an hour from a Mr. Carvin. Mr. Cooper charged for only 74 hours. So the vast majority of the hours was at \$135 an hour for whatever benefit that is to you.

Mr. SMITH of Texas. I would like to recommend that the majority members with our universal concern over waste that we might all join the Grace Commission.

Mr. FRANK. I will say to the gentleman, I can remember having voted on the Floor for recommendations to the Grace Commission over the objections of Ronald Reagan. I would be glad to continue my support on parts of the Grace Commission.

Mr. SMITH of Texas. Thank you, Mr. Chairman.

Mr. FRANK. We will now hear from our panel, Mr. Raven, Mr. Powers, Mr. Greco, and Mr. Loines.

Let me make some suggestions. We are here to hear about the Legal Services Corporation. If you want to explain what your organization is, please do that in writing. Please don't take up the time to give us the details of your organization or to justify your organization.

Let's get right into the substance, and it would be best not to be duplicative of things otherwise said. We will begin with Mr. Raven.

#### STATEMENT OF ROBERT D. RAVEN, PRESIDENT, AMERICAN BAR ASSOCIATION

Mr. RAVEN. Thank you, Mr. Chairman and members of the subcommittee. My name is Bob Raven, a practicing lawyer from California. In my written statement, I mention a number of items referring to legal services for the poor that are very discouraging and concern the lack of services to the poor, but I am not—I won't cover that. It is in the written testimony.

But I would point out that I don't think that the situation calls for discouragement—but for a doubling of efforts, both by the public and private sector, to meet the legal needs of the poor. The passage of appropriate reauthorization legislation by Congress, I think, can play a very significant role in that advancement.

The ABA believes that the overriding principles that should guide the drafting of the Corporation's governing charters are these two: First, that Legal Services lawyers should be free within

the confines of the ethical codes to represent their clients as fully and zealously as would any private attorney do with respect to a client.

Second, that decisions about appropriate delivery mechanisms, program priorities and the legal techniques for meeting the legal needs of the poor are best made at the local program level where local client needs can best be assessed.

Within that framework of those two guidelines, let me comment just on two principal issues. The first one is the issue of competitive grant awards.

The notion of having local programs compete for grant funds on an annual or frequent basis on a bidding basis perhaps has a certain appeal, but there are serious questions about the efficiency of any such program, questions which lead us to believe that further, considerable experiments and studies should be undertaken and are needed before any program of implementation occurs.

First, there is substantial evidence that competitive bidding in the indigent defense area has been fraught with a number of difficulties, particularly in the area of quality and cost of the delivery of that legal services.

For example, the court in the *State of Arizona v. Smith* found a competitive bid system used to provide counsel to indigent criminal defendants in an Arizona county provided ineffective, ineffective assistance of counsel. Under that system attorneys bid a flat fee for a percentage of the indigent case load for the year regardless of the number of cases.

The low bidder received contracts without an examination of their experience, capabilities or background. The court also noted the system did not provide for support services such as investigators, paralegals nor did it take into account the complexity of the cases that might come before them.

The State Bar of California in 1981 in a report on contract defense services warned that in many respects contract public defending is an ill-conceived delivery system. It is not a panacea for providing defense services in lean economic times.

There is a widely-shared view that the process of obtaining and retaining a contract for a fixed period of time is not helpful to the proper delivery of legal services.

California had contract lawyers for some time in some counties, but no criminal defense experience, who pleaded their indigent clients guilty in the morning and did their civil work in the afternoon. In most contract systems, the most qualified practitioners have eventually dropped out of the system and been replaced by recent law graduates and marginally competent attorneys.

In the State of Washington, they expressed concern about the competence and quality of lawyers willing to participate in that contract system. It is pointed out that while highly qualified lawyers may participate for 1 or 2 years, they then depart because they are unable to compete economically in a bid system if they continue to provide the quality service which good lawyers are going to insist on doing.

Competitive bidding is a term generally associated with cost savings, not quality. Even these savings, however, have proven illusory in the area of indigent defense services.

Successful bidders often find they have contracted for an insufficient amount of money and seek to greatly increase the amounts the next time the bids come up.

In one experience involving a county in Oregon, officials were confronted with a 26-percent increase in the amount needed to contract with the private firm for the second year. The recent Oregon found, "the argument that competition in the market place will lead to reduction in the cost of indigent defense services is not proven to be the case and may be flawed and shortsighted."

Changes in contractors have caused serious transition problems in indigent defense services. For example, in legal services to the elderly provided under title 3 of the Older American Act. Questions have arisen over the responsibility for pending cases, particularly when contractors have shut their doors when their funding ended.

You have terrible transition problem. In addition, clients have been confused about how and where to obtain services. The Corporation does not receive support for its contention that competitive bidding would improve the quality of its service.

It has not provided specifics on how it would use competitive bidding to deliver services. That is whether it would contract for a specific type of cases or for a whole range of service.

In our view, the only efficient and sensible course to pursue would be to provide for a demonstration approach before any implementation effort is undertaken. We also believe it is essential that any competitive bidding program be based primarily upon quality of service considerations and that it assures the clients the local bar associations will continue to play an eminent role in priority setting.

Indeed, I think if that is not done, we are going to find ourselves in the—in another HUD situation. If you bring that all to Washington, if you put it in the hands of a board that is hostile to the program, I think it plays right into the hands of the same problems we are dealing with in HUD.

I think both parties in this country have come to realize that you don't have to do it all in Washington. A lot of hands-on control is best done out there where the action takes place. And I think that would be a mistake if you set up the kind of bidding that was going to be doled out by people that were appointed to the Board here in Washington rather than having local input into the problem.

I think that would be a serious mistake.

Let me turn to the private fund issue. The legal services system as it functions at the local level represents an exemplary blending of public and private resources. A significant reason why this public/private partnership has worked so well is that the Federal program was able to enhance and build upon existing private systems, legal systems for the poor.

Local contributions of dollars and service by charities, foundations, law firms and individuals continue as a vital component of that program today. Those of us in the private sector who make contributions to legal service programs, and many of us do, are offended by the restrictions imposed by Federal statutes on the purpose for which our private contribution may be used.

We see no justification for the Federal Government telling citizens they cannot contribute funds to local nonprofit entities to be

used for whatever legal purposes the grantor and the entity agree upon. We understand the need for the Federal Government to ensure the grant money it puts out there be properly used, properly accounted for and for the purpose intended for the act.

If there is any doubt on that score, then tightened audit procedures ought to be the answer, not the bludgeoning remedy of converting private funds to public funds. We believe it is an inappropriate use of Government authority and one which is a highly questionable legality for the Federal Government to dictate the nonprofit entities that they may not receive funds from private sources to provide legal representation to poor people on particular matters.

A recent case law suggests Government attempts to use grant-making authority to impose restrictions on the use of recipients' private funds are constitutionally impermissible.

In our view, the donation of private funds to a nonprofit corporation should not result in funds being treated like public funds.

I want to, in closing, compliment the chairman and the committee for these hearings.

[The prepared statement of Mr. Raven follows:]

PREPARED STATEMENT OF ROBERT D. RAVEN,  
PRESIDENT, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

I am Robert D. Raven, a practicing attorney from San Francisco and the current President of the American Bar Association. I am pleased to again have the honor of appearing before this subcommittee this year on the subject of the Legal Services Corporation, reflecting both the Association's and my own deep commitment to this issue.

Samuel Johnson wisely observed two centuries ago that "A decent provision for the poor is the true test of civilization." But the provision of legal counsel for those unable to afford it has a significance and importance that goes far beyond our providing for those less fortunate than ourselves. It reaches to one of the bedrock principles of our democracy -- that all those in this country, regardless of financial means, should be able to have wrongs righted and grievances resolved -- that is, should be able to obtain justice.

Reginald Heber Smith presented a paper at the 1920 Annual Meeting of the American Bar Association in which he stated eloquently the case for a federal legal services program:

If men, because of poverty, cannot secure counsel, the machinery of justice becomes unworkable, and that in turn means that rights are lost and wrongs go unaddressed. When persons are thus debarred from their day in court they are so effectively stripped of their only protection as if they had been outlawed.

No democracy can tolerate such a condition in its most essential institution, nor can it safely incur the dangerous sense of injustice, bitterness, and unrest which it inevitably engenders.

- 2 -

Regrettably, almost seventy years later, the poor in this country are able to have satisfied only a small fraction of their legal needs. At an ABA sponsored conference on Access to Justice in the 1990's last month, a nationally-recognized research firm, the Spangenberg Group, released the results of the first national civil legal needs survey of the poor. The survey revealed that the average annual number of civil legal problems for which legal assistance was provided was 0.28 per household, and the average annual number for which no legal assistance was provided was 1.08 per household. What does this mean on a national basis? It means that the poor had approximately 19 million civil legal problems in the past year for which there was no legal help. It also means that only about 20% of the civil legal needs of the poor were met -- a statistic consistent with that found in various state assessments of need, such as those in Massachusetts and Maryland.

It is discouraging, indeed, that almost a quarter century after the federal government joined the private sector in trying to address the civil legal needs of the poor, we have made such little progress. It is doubly discouraging when one realizes the incredible cost-effectiveness of this federal program. Were it not for the fact that legal services attorneys work for virtually the lowest salaries in the legal profession; that legal services programs have been in the forefront of utilizing paralegals, standardized forms, and other cost-saving devices; and that more than 120,000 attorneys in private practice provide free representation to poor clients through organized pro bono programs, we would find ourselves in far worse shape.

The situation calls not for discouragement and resignation, however, but for a redoubling of efforts by both the public and private sectors to meet the legal needs of the poor. The passage of appropriate reauthorization legislation by Congress can play a significant role in that effort.

The ABA believes that two overriding principles should guide the drafting of the corporation's governing charter:

- First, that legal services lawyers should be free, within the confines of ethical codes, to represent their clients as fully and zealously as would any other private attorney; and
- Second, that decisions about appropriate delivery mechanisms, program priorities, and legal techniques for meeting the legal needs of the poor are best made at the local program level, where local client needs and circumstances can best be assessed.

Within the framework of these guiding principles, let me comment on some of the specific issues that should be addressed in any reauthorization legislation.

#### Monitoring of programs

We have been distressed for several years by the manner in which the Corporation has conducted its monitoring activities. First, the Corporation has operated without any published procedures or standards for monitoring. Second, its practices -- consisting often of very short notice to programs of visits, refusals to accommodate local program scheduling

needs in making visits, interviewing opposing parties at far greater length than program personnel or clients, using evaluators with little or no experience with legal services for the poor, and demanding copies of extraordinary volumes of material -- have not provided reasonable due process, let alone led to a constructive evaluation procedure. Third, the focus of the monitoring visits has not been on the quality of the legal assistance being provided or even on whether the programs have complied with the statute but rather on whether technical violations of Corporation regulations have occurred. In short, the monitoring process has been without focus, and carried out by inexperienced people operating without guidelines and standards.

We would suggest that Section 1007(d) of the LSC Act be amended to emphasize that economical, effective, high-quality legal assistance is the objective of the LSC program and should be a focal point of the monitoring process. We would also recommend that Section 1006(b)(1)(A) be amended to require that independent evaluations be conducted of the quality of legal representation being provided. I would add that the ABA Standing Committee on Legal Aid and Indigent Defendants is in the process of drafting standards and guidelines for monitoring visits and hopes to publish a preliminary draft in the next few months. Finally, I would point out that here, as in so many of the areas we will discuss today, the successful implementation and application of whatever standards Congress adopts for the Corporation and its grantees are dependent to a very large degree on the competence and good will of those appointed to the corporation's governing Board.

Negotiation requirement

There are a number of provisions in the current Act, in riders to LSC appropriations bills, and in various proposals to amend the LSC statute which are not in accord with our belief that legal services attorneys should be free to represent their clients as fully and zealously as do other private attorneys. The restrictions on legislative and administrative representation and on class actions fall in this category, as do the provisions to require negotiation before a suit is filed. While negotiation is in most situations the natural precursor to litigation, there are circumstances in which negotiation would be a futile gesture and others in which it might well do a disservice to one's client. There may be substantial reasons why the interest of a migrant worker client, for example, would be ill-served by such a requirement. An operator of a migrant worker camp might well desire extended negotiation of a complaint, realizing the migrant worker would move on to another area shortly. The operator also might have a history of retaliatory action against complaining workers; and in a situation in which not only one's job but one's living quarters and most services are within the control of the operator, the consequences can be severe.

Thus we would recommend that great caution be exercised in imposing such a negotiating requirement -- particularly one that is not imposed on other attorneys. There are a number of proven models of effective dispute resolution mechanisms which can assist in the

resolution of legal disputes short of litigation and which may well be appropriate in some circumstances. We would be happy to provide information on them to your subcommittee. We do not believe, however, that a mandatory, across-the-board negotiation requirement would serve well the interests of the clients of this program.

Private bar involvement

We favor effective utilization of the private bar in the delivery of legal services to the poor. It is our general experience that the most effective utilization of the private bar has been in pro bono programs which supplement staff attorney programs. In any event, we believe that local bar associations and local legal services programs are in the best position to determine the most effective means of utilizing the private bar in their own areas. The LSC Act and the current appropriations riders appropriately place the responsibility for involving the private bar with the local program and the local bar association, and we believe these provisions meet the needs in this area.

Competitive grant awards

The notion of having local programs compete for grant funds on an annual or frequent basis has a facile appeal. But there are serious questions about the efficacy of any such program -- questions which lead us to believe that considerable further experimentation and study are needed before any program of

implementation occurs. For example, there is a need in this area to preserve the continuity of representation in cases which do not neatly fall into one fiscal year. There is also a need to preserve the expertise in the specialized areas of poverty law which can be found in existing grantee programs and which would be dissipated, and would be very difficult to reassemble, if the grantee were defunded. Above all, there is substantial evidence that competitive bidding in the indigent defense area has been fraught with a number of difficulties, particularly in the areas of quality of service and cost, which suggest that this approach has been a failure.

For example, the Supreme Court of Arizona, in State of Arizona v. Smith, 140 Ariz. 355 (1984), found that the competitive bid system used to provide counsel to indigent criminal defendants in an Arizona county provided ineffective assistance of counsel. Under that system attorneys bid a flat fee for a percentage of the indigent caseload for a year, regardless of the number of cases. The low bidders received contracts without any examination of their background, experience or capabilities. The Court also noted that the system did not provide for support services, e.g., investigators and paralegals, nor did it take into account the complexity of the cases. The State Bar of California in a 1981 report on contract defense services warned

that in many respects contract public defending is an ill-conceived delivery system and is not the panacea for providing defense services in lean economic times. There is a widely shared view that the process of obtaining and retaining a contract for a fixed term is inimical to the proper delivery of defense services.

In California, we had contract lawyers, with no criminal defense experience, pleading their indigent defense clients guilty each morning and resuming their civil practice in the afternoon. In most contract systems, the most qualified and experienced practitioners have eventually dropped out of the system and have generally been replaced by recent law graduates and marginally competent criminal attorneys. Recent reports on indigent defense services in Oregon and Washington express concern about the competence and quality of lawyers willing to participate in the contract systems. It is pointed out that while highly qualified lawyers may participate for one or two years, they then depart because they are unable to compete economically if they continue to provide quality services.

Competitive bidding is a term generally associated with cost savings, not quality. Even these savings, however, have proven illusory in the area of indigent defense services. Successful bidders often find that they have contracted for an insufficient amount of money and seek greatly increased amounts the next bid cycle. In one experience involving Deschutes County, Oregon, officials were confronted with a 26% increase in the amount needed to contract with a private firm for a second year. The recent Oregon report found that "the argument that competition in the market place will lead to reductions in the cost of indigent defense services has not proven to be the case...and may be flawed and short-sighted."

Changes in contractors have also caused serious transition problems in indigent defense services and in legal services to the elderly provided under Title III of The Older Americans Act. Questions and conflicts have arisen over the responsibility for pending cases, particularly when contractors have shut their doors when their funding ended. In addition, clients have been confused about how and where to obtain services.

The American Bar Association believes that contract systems for indigent defense could be made acceptable if they met a comprehensive set of standards such as those developed by the ABA. However, we are unaware of any contract system which meets these standards.

The Corporation has not presented any empirical or other support for its contention that competitive bidding would improve the quality of services clients receive. It also has not provided any specifics on how it would use competitive bidding to deliver services, i.e., whether it would contract for specific types of cases or for a whole range of services.

In our view, the only efficient and sensible course to pursue would be to provide for a study and demonstration approach before any implementation effort is undertaken. We also believe it essential that any competitive bidding program be based primarily upon quality of service considerations and assure that clients and local bar associations will continue to play the preeminent role in local program governance and priority-setting.

Private funds

As I noted above, the legal services system, as it functions at the local level, represents an exemplary blending of public and private resources. A significant reason why this public-private partnership has worked so well is that the federal program was able to enhance and build upon existing private systems of legal services for the poor. Local contributions of dollars and services by charities, foundations, law firms and individuals predated by decades the federal legal services program and continues as a vital component of the program today.

Those of us in the private sector who make contributions to the legal services program, however, are deeply offended by the restrictions which are imposed by federal statute on the purposes for which our private contributions may be used. We see no justification for the federal government telling private citizens that they cannot contribute funds to a local non-profit entity to be used for whatever legal purpose the grantor and the entity agree upon.

We understand the need for the federal government to ensure that the grants it makes to local entities are spent only for authorized purposes. If there are doubts on this score, tightened audit procedures may be needed. But we believe it is a totally inappropriate extrapolation of governmental authority, and one which

is of highly questionable legality, for the federal government to dictate to independent non-profit entities that they may not receive funds from private sources to provide legal representation to poor clients on particular matters.

Recent case law strongly suggests that government attempts to use grantmaking authority to impose restrictions on the use of recipients' private funds are constitutionally impermissible. See, e.g., FCC v. League of Women Voters, 468 U.S. 346 (1987) (unconstitutional to prohibit editorials by public radio and television stations financed by nongovernment funds); and Planned Parenthood of Central and Northern Arizona v. Arizona, 107 S. Ct. 391 (1986); See, also, Planned Parenthood Federation of America v. Bowen, 680 F. Supp. 1465 (D. Colo. 1988) and Massachusetts v. Bowen, 679 F. Supp. 137 (D. Mass. 1988). We believe that efforts by the federal government to impose such restrictions on private citizens and groups smack of a totalitarian, not democratic society.

#### Governing bodies

As stated earlier in various places in my testimony, we believe it is vitally important that there be a high degree of local control over the operation of each legal services program. As also stated above, we believe that clients and the local bar should have the preeminent role in local program governance and decisions regarding priorities. We believe the present statutory language in the appropriation riders (the "McCollum amendment") largely achieves

- 12 -

these objectives. We do not believe a more rigid set of rules, either statutory or regulatory, regarding board selection would be productive or desirable. We would, however, favor certain amendments to the current provisions on this subject.

First, with respect to national support center boards, we do not believe the approach provided by the statute for local boards was designed for or is workable for national boards. The present system for appointment of such boards -- that is, by the appropriate bar association(s) in the area of the support center's home office -- is appropriate and should be retained.

Second, we believe the statutory provisions for local board appointment should apply to all local programs, regardless of the nature or structure of the local program.

Third, we do not believe that employees of a local program should be barred absolutely from service on other legal service program boards, such as that of a state or national support center. The Corporation has recently interpreted the statute as barring such service. We see no good reason to preclude those with special expertise from serving in such a capacity, and we see a considerable downside to doing so.

Funding Level

The resources available for meeting the legal needs of the poor are woefully inadequate, as I noted above. We believe a significant increase in the level of federal funding is appropriate and desirable. We have testified before the Senate and House Appropriations Committees that we believe a funding level, at a minimum, of \$383.5 million for FY 1990 would represent a meaningful step by Congress in the direction of returning the LSC appropriation to its FY 1981 level, as adjusted for inflation. The \$383.5 million figure represents only an adjustment for inflation to the FY 1984 appropriation. Indeed, an adjustment for inflation since 1981 would mandate an appropriation in excess of \$500 million.

Mr. Chairman, I congratulate you and your subcommittee for embarking upon this important venture -- a venture ultimately to ensure that all members of our society, regardless of wealth or social status, can share fully in the system of justice we enjoy in this country.

Mr. FRANK. You don't need to do that.

Mr. RAVEN. I want to because I think it is very important.

Mr. FRANK. I appreciate it, I love it, but I can't waste any time.

Mr. Loines.

**STATEMENT OF DWIGHT LOINES, PRESIDENT, UAW-65,  
NATIONAL ORGANIZATION OF LEGAL SERVICE WORKERS**

Mr. LOINES. Thank you. My name is Dwight Loines. I am president of the National Organization of Legal Services. We are part of the United Auto Workers.

I would like to start right away by talking about competitive bidding. Competitive bidding is being discussed and debated in every program in this country. I want people here to understand that.

Every worker in the programs across this country today is talking about competitive bidding. Frankly, they are scared to death. They believe that competitive bidding is going to mean that their programs are going to be out of business and out of business soon.

Many of these workers have lived through the last 8 years of the program and they have lived from day-to-day not knowing whether their programs were going to be refunded or not. I think for Congress to seriously consider this issue at this point in time is, frankly, not what programs need. They need a shot in the arm.

If competitive bidding or any notion of that kind is appropriate, frankly, that is not something that we believe should be considered at this point in time.

I would like to say, despite the obsession of Mr. Wear and other people at the Corporation about alleged fraud, misuse and abuse of funds, there is no serious argument that programs across the country are engaged in such activities, from my point of view.

The few exceptions Mr. Wear points to does not make his case. Despite that, despite the fact that the programs are universally praised, nationally in this country, despite that fact, competitive bidding is being pushed and pushed vigorously by the corporation.

And we have to ask the question why. Competitive bidding is not being proposed to correct anything. Nobody has demonstrated that there is anything wrong with this program. In fact, it is just the contrary.

So it raises very strong suspicions in our minds as to what this is all about. From our point of view, very frankly, we think competitive bidding is simply a guise to destroy and end a very effective and efficient program. We would urge you not to include competitive bidding in any reauthorization bill and to, of course, urge that it not be included in any appropriation measure dealing with legal services.

I should remind this committee that the local workers, people who work in legal services, the attorneys, the paralegals, et cetera, who provide services to clients are private employees. They are private employees of local, not-for-profit corporations. Therefore, they don't have any guaranteed rights of salaries, benefits, health benefits, pension benefits, things of that nature that are enjoyed, for instance, by Federal employees.

And we are not suggesting that they should be Federal employees. I just point that out.

As a result of that, however, over the last 8 years salaries have become depressed. I am not going to take your time today. But if you read my material, we provide anecdotal information which we think makes the case very strongly.

We are at the point in time where legal services workers, and particularly paralegals and clerical workers who have worked for the program, in some cases 20 years, are beginning to retire. We are beginning to see the phenomena of former legal services workers retiring into poverty.

There are cases where they are coming back to their former programs for representation. We think that that, frankly, is a horrible situation.

The pension benefits in legal services are for the most part non-existent. The few situations where they do exist, the level of contribution and the nature of the plan is such that they really do not provide retirement benefits.

The union, incidentally, has developed and submitted to IRS for approval a national pension plan which we hope to be able to collectively bargain into programs in the next several years.

But, of course, that depends on programs having resources to make contributions to that pension plan. But it just points out the nature of what has happened to the program over the last several years from the perspective of the workers.

People earlier, one, I believe it was Congresswoman Byron talked about—I guess she was saying that the farmers or growers in Maryland are victimized. I would like to hand up to the committee, if the committee would accept the articles from a paper in upstate New York that might suggest why farmers have not historically been interested in negotiating with legal services clients.

In this situation—

Mr. FRANK. You want to hand it to her? Without objection, we will make them a part of the record.

[The information was not available at the time of printing.]

Mr. LOINES. In this situation, legal services workers were physically attacked by farmers in that part of the country. That might suggest perhaps why settlements have not been negotiated.

I would like to at this point—there has been some discussion about abuse of monitoring in the past. I don't want to take a lot of time with that. However, I do want to bring an issue to this committee that has developed recently under President Wear's administration.

That is the question of confidentiality of the files of the local program employees. Now, historically when monitors came into programs they had access to tons of information. A lot of it we maintain was irrelevant, but nevertheless it has been made available.

When it has come to the personnel files, however, they have generally recognized, particularly when there are collective bargaining agreements, that they were confidential. We represent a significant number of problems in 30 States across this country where there are collective bargaining agreements with provisions that say the personnel files are considered confidential.

The monitors have respected that. They have never said in the past, "We need the sensitive and personal information that is in

these files in order to complete our monitoring in an effective fashioning."

They have recognized that. Recently for, and we can't explain this, they have suddenly taken the position that we absolutely have to have access to these files. In several cases, they have threatened to suspend funding.

In Rhode Island they threatened to suspend funding when the program relied on local privacy law. In Evergreen in Washington State they threatened to de-fund the program if the program continued to rely on a collective bargaining agreement that was negotiated in good faith that made these files private.

Right now, unfortunately, we are involved in a law suit in Portland, OR. We attempted to, as we have done in the past when personnel file issues have come up, to work out an accommodation where LSC gets all the information it is absolutely entitled to, but at the same time provides that the personnel files and intimate information about employees would be protected.

In this situation, LSC said, "No, with perhaps one exception for medical records, we have an absolute right to see everything. We are going to see it despite the assurances from the program that the kinds of information that they have identified as to their need could be provided from other sources."

So I want to bring that to this committee's attention. We consider this a fairly serious matter. It is not going to go away.

Every day, right now, in fact, when I get back to my office, I expect to have at least three or four messages from members across the country informing us that their programs are being monitored and they expect this issue to come up.

I thank you for your indulgence.

Mr. FRANK. Thank you, Mr. Loines.

[The prepared statement of Mr. Loines follows:]

PREPARED STATEMENT OF DWIGHT LOINES,  
PRESIDENT, NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS,  
DISTRICT 65, UAW

**STATEMENT**

Mr Chairman, and members of the Subcommittee, my name is Dwight Loines. I want to thank you for the opportunity to present testimony before this Subcommittee. I am President of the National Organization of Legal Services Workers, District 65, UAW (NOLSW/UAW). NOLSW/UAW is a labor union that represents approximately 3000 staff attorneys, paralegals and clerical workers employed by Legal Services programs around the country. More than any other organization, we represent the people who daily advocate for justice for poor people within the legal system of the United States. We are proud to be affiliated with the United Auto Workers.

Mr. Chairman, the last eight years of constant harassment from a hostile Legal Services Corporation (LSC) and inadequate funding have taken their toll on local programs and workers. We are firmly convinced that this Subcommittee must take steps to insure that there is a marked improvement in the national administration and funding of this program. Those steps should include a clarification of the qualifications for nominees to the LSC Board, the appointment of a labor representative to the LSC Board, adequate funding recommendations for the next several years, and the recognition of privacy rights of recipient employees.

**LSC BOARD**

Mr. Chairman, we believe that the LSC Act should be amended to require that attorney nominees to the LSC Board must have demonstrated records of commitment to providing legal services to

the poor, which should include prior service as a staff attorney, pro-bono attorney, or board member of a local program, member of a law school clinical faculty, member of a bar association committee with jurisdiction in the area of indigent representation, or similar public interest law experience. This program cannot survive the term of another Board composed of individuals dedicated to its destruction.

NOLSW/UAW strongly believes that one Board member should also be from organized labor. Labor has been a ardent supporter of Legal Services over the years. A Labor representative would bring an important perspective and understanding of the needs of a significant segment of the client community to the Board - the unemployed and working poor. Moreover, Legal Services programs in thirty states are unionized, and a representative of labor on the LSC Board would facilitate the development of national policy that is more sensitive to the needs of the front line workers and that promotes labor-management peace.

#### LSC FUNDING

Mr. Chairman, it is imperative that federal funding for Legal Services be significantly increased over the next several years. It is a disaster for the poor of this country that federal funding for the Legal Services program remains substantially below its 1981 level, even without factoring in eight years of inflation.

The impact of inadequate funding on the provision of legal services to the poor has been dramatic. At the beginning of 1981,

Legal Services programs, while receiving 86 percent of their funding from LSC, employed 4123 staff attorneys.<sup>1</sup> Therefore, based on the number of persons in poverty found in the 1980 census, federal funding for legal services provided 1.2 attorneys per 10,000 poor persons in 1981.

While this figure is far short of the "minimum access" goal<sup>2</sup>, it is twice as good as what exists today. By the beginning of 1988, the number of staff attorneys working in Legal Services programs had fallen to 2593, and although federal funding to field programs had nearly returned to its 1981 level, it now represented only 70 percent of the total funding to local programs.<sup>3</sup> Thus, using the same poverty estimate from 1980, federal funding for legal services in 1988 only supported six-tenths of one attorney per 10,000 poor persons. With the poverty population expected to show a large increase in the 1990 census, the situation today can only be worse.

The following statements further illustrate the impact of inadequate funding on the program over the years:

---

<sup>1</sup> See Characteristics of Field Programs Supported by the Legal Services Corporation, Start of 1981 - A Fact Book, Legal Services Corporation, February 1981.

<sup>2</sup> The "Minimum Access" concept, originally developed in the mid-seventies, represents the amount of funding necessary to support two lawyers per 10,000 poor persons. The achievement of full "Minimum Access" funding was understood to be the federal obligation for the provision of legal services to the poor.

<sup>3</sup> See 1987-1988 Fact Book, Legal Services Corporation, 1989.

"My checks bounce and I have to borrow money to pay my rent. I can't do anything extra."

"I am 27 years of age...have to live with my sister because I cannot afford to pay rent, eat and pay utilities at the same time."

"Difficulties in meeting family expenses have caused considerable marital strife, including filing of divorce by my wife."

"I am behind in my bills and being threatened with garnishment. I am seriously considering bankruptcy."

You might well assume that these are the woeful cries of impoverished Legal Services clients, but you would be wrong. These are statements representative of more than half of the legal services staff attorneys who responded to an NOLSW\UAW survey. Further responses included one from an attorney in the Midwest:

My husband and I both went to law school at the same time, both got low paying work-study jobs at Legal Services, and both have worked in Legal Services since graduating five years ago. We pay approximately \$500 per month rent - 1/4th of our take home. We pay high urban rent, and could make house payments of the same amount, but neither FHA or any bank will lend us money despite excellent payment records because of our massive student loans.

A graduate of an Ivy League law school working in a Northeast program wrote:

Since I worked in Legal Services throughout law school and always planned on a Legal Services career, I thought I was mentally prepared for the fiscal realities, but I wasn't. When I first graduated, I knew that I could not live...alone...so I entered a shared living arrangement that made me miserable.

When I moved...into my own apartment, my rent more than doubled. I found that after paying rent and [student] loans, I often literally had absolutely no money. Probably the biggest impact my low salary had was to force me to refinance what was originally a very favorable loan from my law school.

Margaret Argent, a graduate of New York University Law School, was featured in an August 9, 1987 Washington Post article dealing with the impact of the high cost of a legal education on the ability to practice public interest law.

Margaret Argent lost ten pounds during her first year practicing law. She wasn't on a diet. But with \$27,500 in law school loans to pay and a starting salary of \$12,600 at her legal job, Argent was counting pennies in order to make loan payments - and still falling behind. "I was late in payments and the bank was calling me," said Argent, a staff attorney with Georgia Legal Services in Waycross, Ga., since her graduation from law school in 1985. Although her office contributed \$100 toward her monthly loan payments of about \$340, she said "I pay my bills and then I'd have \$40 to go to the grocery store for two weeks."

Such statements bear witness to the fact that Legal Services attorneys are drastically underpaid. Between 1980 and 1987, the average attorney salaries in Legal Services programs, when adjusted for level of experience, increased by less than 25 percent.<sup>4</sup> During the same period, by comparison, inflation rose by thirty-seven percent.

---

<sup>4</sup> Based on comparison of average salary and years of experience figures published by the Legal Services Corporation in their 1981 and 1987-88 Fact Books.

Local programs are also finding it difficult to meet the increasing cost of health insurance for their employees. Those costs are often passed along to the employees which, of course, further depresses their standard of living. The cost of family coverage is often entirely borne by the employees. Starting a family while in Legal Services often poses an impossible dilemma for employees who are forced to choose between medical coverage for their children or putting food on the table. This dilemma is most difficult for lower paid paralegal and clerical workers who, more often than not, are from the communities that they serve, and tend to be longer term employees.

Furthermore, very few local programs have any kind of pensions and none have health benefits for their retired employees. As a result, at a time that we celebrate the fifteenth year of the founding of the Legal Services Corporation, we are beginning to witness the phenomena of paralegal and clerical workers retiring into poverty with no pension or health benefits. Except for a few better paid management attorneys, the lack of retirement benefits also discourages experienced staff attorneys from remaining in the program.

It is almost miraculous that Legal Services workers have continued to provide quality representation to poor people despite the serious erosion of federal funding. To maintain the effectiveness of this exceptional program it is essential that this committee recommend annual appropriation increases, beginning with fiscal year 1990, to achieve adequate funding by a time certain.

Using a revised cost of \$25.00<sup>3</sup> per poor person, NOLSW/UAW calculates that the total funding necessary to achieve "Minimum Access" would include an allocation to basic field programs of \$736,635,450. Since the FY 1989 appropriation allocates \$264,349,000 to field programs, this would amount to an increase of \$472,286,450.

Given the political reality of the budget deficit and the enormity of the necessary funding level, NOLSW/UAW advocates for the adoption a five year strategy to achieve "Minimum Access." Accordingly, we recommend a total allocation of \$358,806,290 to basic field programs in FY 1990, an increase of \$94,457,290 over FY 1989. Assuming a parallel increase for most other special census and non-census based line items, we estimate that another \$71,293,710 should be allocated.<sup>4</sup>

Therefore, NOLSW/UAW strongly urges that this Subcommittee recommend that Legal Services be funded at \$430,100,000 for FY 1990 as the first step in a five-year plan for restoring adequate funding. For subsequent years under the plan, our recommended appropriation levels are as follows: for FY 1991 - \$540,225,000; for FY 1992 - \$650,350,000; for FY 1993 - \$760,500,000; and for FY

---

<sup>3</sup> For a detailed explanation of NOLSW/UAW's revised "Minimum Access" cost, see our statement before the Subcommittee on Commerce, Justice, State and the Judiciary of the United States House of Representatives Appropriations Committee, April 12, 1989.

<sup>4</sup> A breakdown of NOLSW/UAW's recommended FY 1990 budget mark proposal is appended to this statement.

1994 - \$870,750,000.<sup>7</sup>

#### COMPETITIVE BIDDING

Mr. Chairman, NOLSW\UAW firmly believes that the concept of competitive bidding has no place in Legal Services, and that it would in fact result in the destruction of the program. Legal Services is recognized as one of the most effective and economically efficient federally funded programs in existence and to tamper with it in such a fundamental and untested fashion would be criminal.

Competitive bidding would result in a program in which the sole funding criteria would be disposing of as many cases as possible at the lowest cost per case. Working conditions, salaries and benefits, already depressed, would become even more so. Sorely needed senior staff with years of experience and expertise in poverty law would be driven out of the field and replaced by hacks out to make a fast buck.

A competitive bidding system would sacrifice important principles that underlie the existing delivery system, including the fundamental principle of local administration and priority setting. The current system requires that local programs involve bar associations, client groups and program staff in establishing priorities. There are also composition requirements for the boards

---

<sup>7</sup> These figures are based on an increase of \$94,457,290 for Basic Field programs each year, with a proportional increase for other service delivery and support components and an estimated 4% cost of living increase for other line items.

of directors of local programs that are designed to make sure that bar associations and clients are in a position to insure compliance with the highest ethical and professional standards while meeting the needs of the community.

Competitive bidding would replace local administration with control from LSC bureaucrats in D.C. with no experience in running local programs or knowledge of hundreds of service areas around the country. The sheer magnitude of making administrative decisions from D.C. for thousands of communities all over the country is mind boggling and simply beyond the capacity of LSC. In fact the regulation being considered by the LSC Board would give the President of the Corporation total discretion to make all major funding and priority decisions for every community in the country.

Mr. Chairman, I need not remind this Subcommittee that competitive bidding language was introduced into LSC's appropriation bill as a last minute compromise to avoid the threat of a Presidential veto. It certainly did not come about as a result of a well thought out and reasoned process. There is no dispute that this concept would radically alter the existing program.

Under the circumstances NOLSW\UAW strongly urges this committee not to include a competitive bidding requirement in an LSC reauthorization bill, and that you oppose any such requirement in appropriation legislation should this process not go its full course.

**PRIVACY RIGHTS OF LEGAL SERVICES WORKERS**

The history of LSC's abuse of its monitoring authority is well known and well established. Under the current LSC President, Terrance Wear, that abuse has taken on a new dimension. LSC is now demanding complete access to the personnel files of recipient employees over their objections. LSC says that it is entitled to this level of detail regardless of any privacy claims of recipient employees.

In the past, on an infrequent basis, LSC monitors would request access to personnel files, but would not insist on disclosure over the employees objections. Employees often relied on the existence of local labor contracts which recognized that personnel files were confidential. Historically LSC was able to obtain all the information needed from program records to meet its monitoring obligations without the degree of intrusiveness that it now asserts. Furthermore accommodations were always worked out to allow reasonable access while shielding truly personal information from disclosure.

LSC now takes the position that it is entitled to examine all personnel files no matter how sensitive or personal the contents might be, and regardless of privacy claims or contractual rights of the employees. That is essentially the position that LSC has asserted in pending litigation with NOLSW/UAW in Federal District Court in Portland, Or. (Civil No. 89-484-PA). This is an example of needless litigation brought about by LSC's arrogance and inexplicable change in policy with respect to personnel files.

Mr. Chairman, NOLSW/UAW strongly urges this committee to adopt legislative language recognizing that personnel files of local program employees are private and protected from disclosure to parties outside the local program.

Thank you for your consideration of our views.

## APPENDIX

## MOLSW FY 1990 BUDGET MARK RECOMMENDATION

	<u>FY 1989</u> <u>Appropriation</u>	<u>FY 1990</u> <u>Proposal</u>
<b>I. DELIVERY OF LEGAL ASSISTANCE</b>		
<b>A. Field Programs</b>		
1. Basic Field	264,349,000	358,806,290
2. Native American	7,022,000	10,764,189 <sup>a</sup>
3. Migrant	9,698,000	14,352,252 <sup>b</sup>
<b>B. Supplemental Service Provision</b>		
1. Supplemental Field	1,000,000	1,045,000 <sup>c</sup>
2. Law School Clinics	1,100,000	0
3. R.H. Smith Fellowships	0	7,176,126 <sup>d</sup>
<b>II. SUPPORT FOR DELIVERY OF LEGAL SERVICES</b>		
A. Regional Training Centers	624,000	652,080 <sup>e</sup>
<b>B. Other Support</b>		
1. National Support	7,228,000	10,764,189 <sup>a</sup>
2. State Support	7,843,000	14,352,252 <sup>b</sup>
3. Clearinghouse	865,000	903,925 <sup>c</sup>
4. CALR Grants	510,000	532,950 <sup>d</sup>
5. Client Support	0	526,959
<b>III. CORPORATION MANAGEMENT &amp; GRANT ADMINISTRATION</b>		
A. Management & Administration	8,316,000	8,690,220 <sup>e</sup>
B. Program Development & Technical Assistance	0	1,533,568 <sup>e</sup>
<b>TOTAL</b>	<b>308,555,000</b>	<b>430,100,000</b>

-----

<sup>a</sup> Represents 3% of Basic Field funding level.<sup>b</sup> Represents 4% of Basic Field funding level.<sup>c</sup> FY 1989 funding level with 4.5% cost of living increase.<sup>d</sup> Represents 2% of Basic Field funding level.<sup>e</sup> Represents 15% of Corporation Management & Grant Admin.

Mr. FRANK. Mr. Powers.

**STATEMENT OF LONNIE A. POWERS, EXECUTIVE DIRECTOR,  
MASSACHUSETTS LEGAL ASSISTANCE CORPORATION**

Mr. POWERS. Thank you, Mr. Chairman. I want to speak to you for a few minutes about an issue which, I think, is central to the discussion today and to talk about that issue from the standpoint of my 6 years of experience running the Massachusetts Legal Assistance Corporation, which is in many ways a State level analogue to the national Legal Services Corporation.

The central issue is, I think, the responsiveness and the responsibility of local legal services programs to the Legal Services Corporation, the responsiveness of the Legal Services Corporation to the Congress and the responsibility of those local programs in making decisions.

The context of my remarks starts with the legal needs study which we did in Massachusetts and published in 1987. It was the first, as far as I know, comprehensive Statewide legal need study. There certainly are others. Certainly the effort Congressman Cardin headed up in Maryland was another excellent legal needs study.

What the Massachusetts study showed was that only 15 percent of the civil legal needs of the poor people in Massachusetts were then being met. It also showed the specific legal needs and the gaps in legal services that existed. Now, we did that study in conjunction with the State and local bar associations and did it mostly with funds from private foundations which contributed to it.

We did it because we wanted to know better how to distribute the funds from Massachusetts which we had available. Also we knew that if the study showed we were not meeting the legal needs of the poor, we had to raise more funds and that the study would give us the foundation for doing so.

We undertook this study—and I discuss the methodology in my written testimony—we undertook the study for the purposes I described. We found that only 15 percent of the civil legal needs of the poor were being met and that only 35 percent of the people that we surveyed through a random sample telephone survey even knew how to find free legal services.

These were people who were eligible for services. We found that those people that we talked to needed more representation in housing cases, even though Legal Services programs were already doing 31 percent of their work on housing cases, but the housing crisis in Massachusetts is such that we needed even more work.

We found more needed to be done in terms of representation in public benefits cases. Much more needed to be done for family law matters, battered spouses, battered children, and that there were specific populations throughout the State, populations of poor people who had special legal problems that were not being adequately addressed.

Such groups as handicapped people, children, recent immigrants to this country, the elderly and certain minority groups had special legal problems that needed assistance. But we didn't just point out the problems that existed.

We went further to suggest specific responses that should occur both from the State and from the local programs. And we have been able in Massachusetts as a result of the study to see the filing fee surcharge, which is our major source of funding, doubled by the legislature—

Mr. FRANK. Please let's talk about national legal services.

Mr. POWERS. All right. The point, Mr. Chairman, is that Massachusetts is now doing more per capita to provide State funding for programs—

Mr. FRANK. That is not the point. I don't want to know what Massachusetts is doing. I want to know what the Federal Government is doing, shouldn't be doing and how we should do it.

Mr. POWERS. We are in partnership with the Federal Government. Therefore, the work that we do brings us into daily contact with the results of the funding policies of the Congress and the operational policies of the Legal Services Corporation Board and staff.

We understand the results of those funding and operational policies because we monitor all the programs that we give money to on a biannual basis, at least every 24 months. That means that I and the other members of the staff and occasionally, as we need it, other experienced legal service directors from outside the State of Massachusetts go on site, interview people at the programs and determine the quality and quantity of work which they are doing.

Because we approach that monitoring task from the standpoint of cooperation with the programs, we have been able not only to determine the kind of work that has been done, but also to suggest needed changes and to see those changes put into effect.

Part of those changes have been that local programs have responded positively to the findings of the legal needs study, the local staff and the board have incorporated those findings into the priority setting process and have shifted the focus of the work that they do.

The point of that for this committee and for the reauthorization bill, I think, Mr. Chairman, is that local programs are independent nonprofit corporations run by boards which are composed of a majority of attorneys appointed by State and local bar associations.

Our experience has been that the staffs of those programs have been responsive to positive suggestions for changes for the better needed in their operation. They have not always liked the suggestions we have made, but they listened to them, they responded to them.

As a consequence, poor people in Massachusetts are getting not only more service, but better service than they would had our suggestions had not been put forward and had the programs not made those changes.

What that proves, what it demonstrates is that there is another way to do monitoring than that currently practiced by LSC, there is a better way to do it, and that competition, especially without standards, is not the only way, and I would submit probably not the best way to ensure the responsiveness of local legal services programs. That is a major finding, I believe, and a major connection with the work of this committee.

In closing, I would like to make two points. One is probably self-evident. That is that if there is going to be a partnership between State and local funding, the voluntary efforts of private attorneys and the Federal Government, the Federal Government must, to the extent that it can, pull its weight on the funding side. I urge you in the reauthorization bill to include authority to at least fund the Corporation at the 1981 level adjusted for inflation under current dollars.

That I would think would be a minimum.

The second point I would like to make in closing, is that the full range of representation, the same kind of representation that is provided by private attorneys to private clients, is no less than what poor people deserve if we believe in equal access to justice in this country.

That seems to me to be the foundation of the Legal Services Corporation Act. It is certainly the foundation of the act that created the organization I work for: That we have to provide the same kind of representation to poor people that is provided to people who are not poor.

With that, Mr. Chairman, I will close.

Mr. FRANK. Thank you.

[The prepared statement of Mr. Powers follows:]

TESTIMONY OF  
LONNIE A. POWERS, EXECUTIVE DIRECTOR,  
MASSACHUSETTS LEGAL ASSISTANCE CORPORATION,  
BEFORE THE HOUSE SUB-COMMITTEE ON  
ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS,  
COMMITTEE ON THE JUDICIARY,  
UNITED STATES HOUSE OF REPRESENTATIVES  
19 JULY 1989

Chairman Frank, and members of the Committee, I appreciate this opportunity to appear before you to testify regarding the Legal Services Corporation reauthorization bill. My testimony will cover the legal needs of the poor as shown in Massachusetts Legal Services: Plan for Action, the first comprehensive statewide study of the legal needs of the poor, published in November 1987. I will also discuss the experience of the Massachusetts Legal Assistance Corporation, a state level analog to the Legal Services Corporation, in funding, monitoring and supporting legal services programs.

The Massachusetts Legal Assistance Corporation (MLAC) was established by a state statute effective in March 1983. MLAC was authorized and directed to provide funding for civil legal services programs throughout the state and was modeled after the Legal Services Corporation. Initially a surcharge on civil case filing fees was MLAC's sole source of support. Now MLAC receives additional funds from a voluntary interest on Lawyers Trust Accounts (IOLTA) program, a direct state appropriation and through a contract between MLAC and the Massachusetts Department of Public Welfare.

From the beginning, we have regarded our efforts as complementary to those of the federal government through the Legal Services Corporation. The LSC-funded programs seeking to meet the broad range of the legal needs of the poor are the foundation of our efforts to increase legal assistance to the poor through funding provided by the state. We also fund non-LSC programs focused on meeting specific legal needs of the poor. Even with this additional funding the great majority of the legal needs of the poor are not being met.

#### 1. LEGAL NEEDS OF THE POOR

In early 1986 MLAC had existed for 3 years and the amount it distributed for civil legal services to the poor had increased from \$125,000 in 1983 to \$2,051,970 for 1986. While it seemed clear to us at MLAC and to the programs that poor people suffered from overwhelming legal problems, no statewide attempt had been made to

determine the legal needs of the poor. The dearth of accurate information on legal needs hampered the MLAC Board's ability to ensure that their limited resources were properly directed and the ability to generate additional support. Through the joint sponsorship of MLAC and the Massachusetts and Boston Bar Associations, with major funding from private foundations, a comprehensive statewide legal needs study was conducted over 18 months.

The three principal goals of the study were:

- \* To quantify the legal needs of the poor throughout Massachusetts.
- \* To inventory civil legal assistance resources available in the Commonwealth and to identify any gaps in services.
- \* To develop a plan for action to address the identified unmet legal needs of the poor and any deficiencies in existing services.

Achieving these goals through the Plan for Action has resulted in more effective and efficient legal services to the poor in Massachusetts directed at the most critical areas, a stronger partnership between the private bar and legal assistance programs and greatly increased resources to support civil legal services to the poor.

The legal needs of the poor people in this country (those whose incomes are equal to or below 125% of the federal poverty level) are not now being met in any meaningful way. We found in Massachusetts that only approximately 15% of the civil legal needs of the poor were being met. In 1988 approximately 50,000 poor people were represented by all the legal assistance programs in Massachusetts. Some unknown number of others received pro bono assistance by lawyers not associated with any organized programs. We found that no representation or assistance was available for the other 320,000 legal problems faced by the poor in Massachusetts.

Our conclusions were based on three sources of information. The first, and most important, was a telephone survey of a random sample of 1,082 low income households in Massachusetts. The second component was site visits to all 14 counties including 350 face-to-face interviews with persons knowledgeable about the legal needs of the poor, the Massachusetts court system, social services programs available to the poor and funding for legal and social services programs. Those interviewed included lawyers, bar officials, directors of United Ways and other funding agencies, social services providers, judges, court clerks and legal services providers. The third element of our study was an extensive written questionnaire sent to 50 legal services and pro bono programs throughout the state. We received substantially complete information from 25 of those programs including all of the programs receiving funding either from LSC or MLAC. The responding programs represented all the major legal assistance providers in the State. A further description of the study's methodology is included in the Appendix.

Given the small percentage of legal problems of the poor that are addressed it is even more chilling to realize that only 35% of the people surveyed were aware that free legal assistance existed. These statistics can tell only part of the story. They do not describe the plight of a 50 year old man in Springfield, Massachusetts, who responded to the telephone survey. He had worked all of his life until he was injured on the job. He and his wife lived on food stamps, general relief and Medicaid. They paid, in 1987, \$315 a month for an apartment where the stove hardly worked, the roof leaked, the sink and toilet backed up and the heater was so ineffective that the windows had ice on the inside in the winter. But it used to be worse, the husband stated, "I was homeless for a while, me and my wife lived in the street and then in the woods until we found a place." That couple and hundreds of thousands of other citizens of Massachusetts and millions of citizens of this country desperately need legal assistance in civil cases.

Not only did the Plan for Action find that we were serving only about one-sixth of the legal needs of the poor, it also identified significant gaps in the types of services provided. The most critical was the need to provide even more assistance in housing cases, even though 31% of all legal assistance cases involved housing. Low income people in Massachusetts face an acute housing crisis caused by a lack of public and private housing at affordable prices.

The recent boom in real estate prices, the conversion of substantial amounts of existing rental stock to condominiums and the rise in the price of existing rental units has created a drastic increase in the demand for legal assistance in housing-related matters. Discrimination against low-income people, single parents and their children, racial minorities and the disabled increases the difficulty these people have in finding and maintaining affordable housing. This housing crisis exists in all regions of the state whether urban, suburban or rural. The consequences of the lack of decent affordable housing are particularly devastating for single parents, especially female single parents.

A twenty-seven year old single mother lives with her three young children in Bristol County. They are on AFDC, Food Stamps, and Medicaid. She brought her husband, from whom she is separated, to family court. "He threatened to abuse my daughter, and to hurt me." She was granted a restraining order. She did not have the assistance of a lawyer in this case, because she thought it would be too expensive. She has been threatened with eviction by her landlord for non-payment of rent. The landlord has also refused to repair and exterminate the building. "I had to call the Department of Health to get him to do the repairs. They still aren't fixed." The neighborhood is noisy and dangerous. "There are junkies outside all night long, and they wake up my five month old son." The police are ineffective in

keeping the junkies out of the neighborhood. When her husband moved out he left a large debt to the landlord, which is why she has been threatened with eviction. She reports difficulty in finding new housing. "They tell me that until I pay, I can't get public housing, but if I do pay, they can't guarantee me housing. It's bad for my son to live here." She does not know of any free legal services in her own area.

Poor people are unable to obtain adequate legal services to assist them in receiving public benefits for which they are legally eligible. Despite the low unemployment rate in Massachusetts, individuals and families are falling below the poverty line in increasing numbers. Not enough entry level jobs are available, and those that are available often do not pay enough to raise the worker above the poverty line. Housing conditions have deteriorated while rents have increased. The number of single parent households has increased, and many of our citizens are disabled. All of these factors contribute to the need to ensure that low-income individuals have access to federal and state benefits for which they qualify.

The suffering caused by problems in obtaining benefits is almost unbelievable.

A forty-one year old woman lives in Essex County. She describes herself as a recovering alcoholic with perception, motor, and memory problems. She is on Food Stamps, General Relief, and Medicaid. She has had several problems obtaining government benefits. "I have been denied SSI twice because they say I am not seriously handicapped enough." She has also had several problems with the limitations of her Medicaid coverage. "Medicaid said they would pay for upper and lower dentures and I had all my teeth extracted. Then they only paid for the uppers. I can't afford the bottom dentures." Another time Medicaid would not pay for transportation to the hospital, only for treatment upon arrival. "I had to walk to the emergency room." Additionally she lacks transportation to get to public services, including the welfare office. "There is no bus or taxi in this town, so I have to rely on friends. They are never reimbursed for their mileage, even though I submit it." She says she does not know of any free legal services in her area.

Another critical gap in legal services in 1986 was in domestic relations and family law. The need for increased legal assistance for low-income clients with domestic relations and family law problems was second only to the need for assistance in housing matters. Although Greater Boston Legal Services (whose service area includes 30.5% of the poor in Massachusetts) made family law a priority and other programs had recently increased their capacity to handle family law cases, domestic relations problems represented one of the principal areas of unmet legal needs for low-income people in the Commonwealth. Legal services programs reported that they lacked adequate resources to keep pace with the current demand for

representation in family law cases.

Family law issues compound the already desperate lives of many clients.

A twenty-seven year old battered woman lives in Western Massachusetts with her three year old daughter. She has part time custody of her five year old son. Her husband, from whom she is separated, "beat me up, and he may have sexually abused my daughter." She has brought two cases against him in court, one for assault and battery and the other for threatening phone calls. Restraining orders were granted in both cases and her husband is currently serving one year's probation. She wants a divorce, full custody of her son, and child support from her husband once they are divorced. However, she cannot afford legal assistance. She knows of legal services, but has been told that they no longer handle family matters.

We also found that several identifiable groups of clients had special legal problems. These included the disabled, the mentally ill, immigrants, the elderly, children, minorities and incarcerated persons.

Two examples illustrate some of these special problems:

A twenty-eight year old mother lives in Suffolk County with her husband and three children. One of her children is in need of special education. "My son is eight years old and he still can't read. I don't even know what kind of learning disability he has." Her application for food stamps was rejected last year. "We were told that we were over income. My husband makes five dollars an hour." She knows of no free legal services in her area.

\*\*\*\*\*

A sixty-four year old woman lives in Worcester County. She is widowed. She is on the Low-income Energy Assistance Program (LEAP), Social Security, and receives a retirement pension. She faced age discrimination at her job. "I had worked my way up to a good amount of money. When I was one month away from twenty years, they offered me a choice, a lower grade job, or a layoff. I was forced out. They gave my job, with a five dollar a week raise, to a young girl, and they didn't give me my twenty year pension. They also laid off four other people my age. The heating does not work in her apartment, the rent has been raised, and the absentee landlord does not make repairs. She knows of no free legal services in her area.

Massachusetts provides more funding per capita than probably any other state for legal services to the poor. In the twelve months beginning with July, 1989 the state

will provide, through MLAC, over \$7 million in state and IOLTA funding for civil legal services. But this still will not meet the needs identified by the Plan for Action.

Some other states are also responding to this challenge and also are conducting or have conducted legal needs studies similar to the Massachusetts study with similar results. The Maryland Legal Needs Study, although not identical to Massachusetts, concluded that only approximately 20% of the civil legal needs in that state were being met. Congressman Cardin, a member of this sub-committee, chaired the Advisory Committee for the Maryland Legal Needs Study. Studies quite similar to the Massachusetts study are now underway in New York and Illinois. Preliminary results from both of those surveys indicate that only approximately 15-20% of the civil legal needs of the poor are being met there.

## 2 RESULTS OF THE LEGAL NEEDS STUDY

Massachusetts did not stop with merely documenting the legal needs of the poor. We proposed 21 specific recommendations for addressing the problems revealed by the study. Several of these involved additional funding and support for civil legal assistance, others called for increasing the salaries of legal services workers which were not only far below salaries paid in the private sector but also significantly below those paid to other persons in public employment. We recommended better coordination in the delivery of existing legal services, changes in the court system to make it more accessible to low income people, and more effort to such areas as family law, housing and homelessness, the unmet legal needs of children, the needs of minorities, older people, those with physical and mental handicaps and recent immigrants, among others. Much progress has been made in carrying out these recommendations but much more remains to be done.

One of the essential sources of increased funding and support for civil legal assistance is the federal government. As this sub-committee is well aware, federal funding for civil legal services was cut by 25% in fiscal year 1982 and, despite some modest increases, today remains at \$308.5 million, \$13 million below the 1981 funding level. When adjusted for inflation, current funding is approximately 40% below the 1981 level. I urge this sub-committee in drafting the reauthorization bill to include authority to at least restore the Legal Services Corporation to the 1981 funding level adjusted for inflation.

Massachusetts has responded to the findings of the legal needs study by doubling the surcharge on civil case filing fees from \$5 to \$10 and by a decision of the Massachusetts Supreme Judicial Court to convert, in the near future, our voluntary IOLTA program to a comprehensive IOLTA program. Also the legislature has

continued to provide appropriations for legal representation in social security disability and supplemental security income and medicare cases and for persons seeking political asylum and refugee status in Massachusetts. Additionally, the organized bar has increased its efforts to provide pro bono representation.

Legal services providers in Massachusetts have responded to the findings of the Plan for Action. They have re-examined and modified their priorities in light of the report. No program has or should adopt the findings wholesale but they have incorporated them into their own priority setting and planning processes. Significant changes in the work done by programs have resulted.

The following examples illustrate the responses of programs to the results of the Plan for Action.

Greater Boston Legal Services determined as part of its 1989 priority setting to establish a unit to expand services to homeless clients. The homelessness unit will develop strategies to address the multi-faceted nature of homelessness and will aggressively advocate on behalf of clients on the local, state and national levels to affect the recurring problems causing homelessness. GBLS established its homeless unit using a part of the filing fee surcharge increase.

Legal Services for Cape Cod and Islands concluded its priority setting process in December, 1988, with a decision by its Board of Directors to open a permanent office in Plymouth County, and add one and one-half attorneys to its staff. The half-time temporary attorney will be used to help reduce the current client waiting list for family law representation and to allow the full-time family law attorney to explore handling Department of Social Services cases. Although the Board delayed its decision on the specialty area of the permanent full-time attorney, the program expects this person will work on special education and mental health cases.

Western Massachusetts Legal Services completed its priority setting process with a decision to add two new full-time attorney positions to its staff. The first attorney will be assigned to the program's family law unit and will work closely with the WMLS pro bono unit to develop pro se clinics, monitor and advocate as necessary regarding the activities of the Child Support Enforcement Unit of the Department of Revenue and pursue appeals of cases that were initially handled pro bono or pro se where decisions were egregious or apparently discriminatory due to the litigants' race or economic status. The second full-time attorney will focus on a wide range of educational matters, an area of law where WMLS has been relatively inactive.

Cambridge and Somerville Legal Services will supplement the compensation paid to a senior aide working as a paralegal in the program's housing unit and will convert the current consultant to a half-time family law attorney to better address an increasing demand for family law representation.

These examples also clearly demonstrate the strength of local priority setting and the terribly difficult choices faced by local boards of directors.

### 3. THE ESSENTIAL PARTNERSHIP

An essential component of legal services to the poor is the partnership that is formed between the programs funded by government and private sources and the voluntary involvement by the private bar. MLAC's funding decisions have sought, in large measure, to supplement the funding provided by LSC. One important motivation behind the creation of MLAC was to make up for cuts in LSC funding which reduced support to local programs by 25% or more. We have made some progress toward that goal.

Exacerbating the problems caused by the decrease in federal funding have been the policies and attitudes of the majority of the Board of the Legal Services Corporation and its various staff members over the last several years. These have diminished the ability of legal services programs to provide a full range of legal services to the poor and have required programs to waste a significant amount of their already inadequate resources responding to unnecessary administrative demands. This Committee has heard many times of the witch hunts conducted by the Legal Services Corporation in the name of monitoring and has witnessed this year the refusal of the staff of the Legal Services Corporation to issue annualized grants as has been done historically. Short-term funding has caused unnecessary cash flow problems for many programs. The excessive length of the current grant applications and the requirements of two recorded roll call votes of each program's board of directors are also disruptive. The prohibition against local program staff serving on the boards of national and state support programs is petty, completely unjustified and deprives the support centers of needed information and insights.

MLAC conducts onsite monitoring visits to each program we fund at least every 24 months. These visits, which last from one day to three or four days depending on the size and complexity of the program, involve our staff and, where appropriate, experienced legal services workers from other states. During the six years of our existence we have not found any evidence of financial wrongdoing or deliberate violations of the law. We have, where justified, recommended that programs improve their administrative and service delivery practices. Almost without exception, the programs have welcomed our visits and our advice. Our monitoring reports and

recommendations have resulted in significant systemic changes in programs throughout the state and in an increase in the quality and quantity of legal services available to the poor. Our monitoring format is based upon, and our experiences are similar to, the monitoring done by the Legal Services Corporation prior to 1981. We have demonstrated that monitoring can be thorough, vigorous and critical while at the same time beneficial, helpful and appreciated if conducted in a cooperative manner with the goal of improving not destroying programs.

MLAC maintains a cooperative relationship with all programs we fund, LSC-funded and otherwise, allowing for a free exchange of information which results in more effective and efficient assessments of program performance. Programs annually submit a written application for funds. We also receive copies of the LSC-funded programs Case Service Reports, annual audits, copies of the minutes of the meetings of each program's board of directors and specific reports on activities funded by state appropriations. Regular contacts with program directors, fiscal officers and other staff and attendance at annual meetings and other special events supplement and help provide a proper context for interpreting the other information we obtain. The cooperation MLAC receives enables us to evaluate programs without resort to the intrusive, adversarial methods employed over the last few years by LSC-methods which have generated much heat about "hands in the cookie jar" but little light and few examples of wrongdoings.

Our monitoring process, like the MLAC Board's funding decisions, recognizes that each local legal services program is an independent non-profit corporation governed by its own board of directors, composed of at least 51% attorneys and a significant percentage (25% under MLAC regulations) of persons eligible to receive legal services from the program. We, as does the Legal Services Corporation Act, require that each recipient program engage in a priority setting process and that the service delivery plan and other activities of the program reflect those priorities and be directed at meeting the most critical legal needs of the poor. Unlike LSC we believe it both illegal and illegitimate to attempt to substitute our judgement for that of the boards of the local programs as LSC has done with, for example, Part 1632 of the Regulations on redistricting.

Those local boards have consistently recognized that low income persons, no less than those with more adequate incomes, deserve the full range of representation. Therefore, they have requested and MLAC has provided funding to support legislative and administrative representation-activities which are prohibited or severely restricted by the Legal Services Corporation. The MLAC statute reflects the determination of the legislature, which the MLAC Board has carried out, that equal justice under law for the poor requires that they receive the full range of legal representation and advocacy available to any other citizen. Anything less is by definition second class justice.

#### 4. OTHER FUNDING

In addition to the funding provided by federal and state sources and the efforts of the private bar, private funding in Massachusetts is an essential component of the partnership supporting legal services to the poor. Private funds amounted to approximately 12 1/2% of all legal services funding in Massachusetts in 1986. Much of the private funding in our state comes from United Ways and private foundations. These private funds most often support general legal services to the poor. However, much funding is also restricted to specific kinds of representation and may be directed at persons who, while having similar legal problems to eligible clients, may not themselves be financially eligible under LSC guidelines. Several Massachusetts programs provide assistance to the elderly with funds provided under Title III of the Older Americans Act. No means test may be applied to clients receiving such services and matching funds are required. Prohibiting the use of private funds to match Title III funds seems particularly unnecessary and unwise. Such funding allows local programs to expand their services and does not detract from representation provided to eligible clients.

In addition to the dollars received, the personal and professional support provided by local private funding sources is essential in forging strong partnerships between legal services programs and their local communities. The LSC requirement for private attorney involvement reintroduced the organized bar and private lawyers to the unmet legal needs of the poor. Support by the United Way or a private foundation to a local legal services program operates in much the same way to introduce the staff and the members of the boards of those organizations to the legal problems of the poor and the efforts of the legal services programs and the bar to meet those needs.

The recent actions of the Legal Services Corporation Board in restricting access to private funds by LSC programs is not only punitive but also counter productive. LSC should encourage local programs to use every legitimate means to seek out funding from both private and public sources. In this way local programs can help insure that local community leaders, who are often those most concerned about the overall health of their states and their communities, are aware of and respond to the enormous needs of the poor for civil legal assistance. Rather than concentrating the efforts of legal services programs on eligible clients, the policy of the Legal Services Corporation Board will have the effect of isolating those clients further from local sources of support and could have (and possibly is intended to have) the effect of fragmenting if not balkanizing service delivery to the poor at the local level.

LSC has also recently intimated that it may try to classify IOLTA funds as "private" rather than "public" under 1010(c) of the LSC Act. All IOLTA programs are

established either by authority of the court of highest jurisdiction or the legislature of the state (and the District of Columbia) where they are located. IOLTA funds, therefore, are created by public authority and are properly "public funds" under the LSC Act. The appropriate uses of the public funds derived from IOLTA are properly defined by the court or legislature creating the program and implemented by those charged with administering the IOLTA funds.

## 5. CONCLUSION

The legal needs study conducted in Massachusetts, and similar legal needs studies in other states, have demonstrated that only 15-20% of the civil legal needs of the poor are now being met. Several steps are essential to moving towards meeting more of the critical legal needs of the poor. These include the reauthorization of the Legal Services Corporation at an adequate funding level, appropriation of funds to match that reauthorization and a change in the leadership of the Legal Services Corporation resulting in the adoption of policies which will be beneficial and not detrimental to the adequate provision of legal services to the poor. We also must have the strongest possible state and local support for civil legal services including a continuation of the strong partnership between legal services programs and the private bar.

A free nation can only survive if its citizens are guaranteed equal justice under law. Only then will the individual citizen understand that he or she has made an adequate bargain in giving up the right to use unimpeded self-help in redressing his or her own grievances. Only when the weakest among us, the most despised of our citizens, receive the same treatment before the law as does the most honored and the most wealthy can we say that we have redeemed the promises made in the Constitutions of the United States and of Massachusetts that all citizens are equal before the law.

Thank you again for the opportunity to appear before you. I would be glad to answer any questions that you might have or to later provide further information.

One of the research methods employed in the current study of the civil legal needs of the poor in Massachusetts was a telephone survey of a sample of low-income residents of the Commonwealth. This survey was undertaken as the primary means of quantifying these needs with information collected directly from potential clients. The survey provided the critical opportunity to learn firsthand from the client community what problems they have encountered and what kind of experiences they have had with lawyers and the courts in the last five years.

The goal of this survey was to assess both the number and type of civil legal problems for which low-income residents of Massachusetts have sought assistance and the number and type of problems which they either did not recognize as legal or did not, for some other reason, seek legal assistance in solving.

There are three basic survey methods available:

- Mail survey
- In-person interview
- Telephone survey

The mail survey is the easiest to administer and probably the least costly. However, experience has shown that there are a number of serious problems associated with a mail survey, such as the difficulty of obtaining an appropriate mailing list and the generally low return rate. Given a low response rate, it is not possible to generalize to a larger population and those individuals who do respond may be unrepresentative of the individuals and families for which information is sought.

The in-person interview, while perhaps the most reliable, is clearly the most costly. In the context of this study, which required that information be obtained from low-income residents throughout the state, the expense of this method would have been prohibitive and well beyond the resources available.

For all of these reasons, the telephone survey method was chosen as the best alternative. There are several limitations to this method, however. These include:

- Non-telephone households are eliminated from the sampling frame. Individuals thus excluded may include the homeless, disabled, and institutionalized populations in the state.
- Telephone interviews cannot exceed approximately twenty minutes in length.
- Telephone interviews eliminate interviewer observation as a method of data collection.

There are a number of advantages to a telephone survey, including:

- Telephone surveys provide greater access to younger, more mobile populations who are less frequently at home.
- Telephone surveys may provide less biased sampling of inner city residents, such as the poor, minorities, and the elderly, since the difficulties of securing physical access to their homes are eliminated.

## *The Legal Needs of the Poor in Massachusetts*

- Telephone interviewing provides the capability to shift to multilingual interviewers if the respondent is more comfortable in a language other than English.
- The telephone provides anonymity between interviewer and respondent necessary for surveys that may involve sensitive, personal issues.
- Telephone surveys allow for unclustered interviewing in a rapid and economical manner.
- Telephone interviewing makes possible follow-up much less time-consuming and much more cost effective.
- Telephone surveys afford the opportunity to achieve a larger sample size at a lower cost than the alternatives.

It was the decision of the study's directors that the benefits of a telephone survey far outweighed its limitations. However, special attention was paid to addressing the drawbacks of the phone survey in designing the overall research plan.

Some individuals and families within our sample population do not have phones and are thus excluded from the sample. An initial assumption of our survey was that low-income residents without phones would be likely to have no fewer, and possibly more, unmet legal needs than similar residents with phones. This assumption was validated by legal service providers who were interviewed during the course of our site work.

We also considered the necessity of assessing the needs of special population groups unlikely to be well represented in our telephone sample, such as the homeless, the disabled, and the institutionalized. This was accomplished primarily through data obtained from programs serving these populations and from our field visits.

### ***Telephone Survey Methodology***

#### **Developing the Sample**

The individual counties were the unit of analysis for which the sample was drawn. This method provided a sample representative of the various demographic groups and regions around the state. Further, the county level was selected as the sample stratification most likely to be meaningful and useful to the bar associations, service providers, legislators and others interested in the results.

To provide a valid base of information from across the state, a target of at least 60 completed interviews was established for each county. The target rates were increased proportionally for those counties with a larger percentage of the state's poor. Dukes and Nantucket Counties were not included in the survey since initial calculations indicated that the number of possible respondents would not be large enough to be statistically significant.

Telephone lists were prepared by a private firm using a stratified systematic sampling method. This firm has a database of over 74 million names and addresses, representing 86% of all U.S. households. Each record in the database carries a predicted income score derived from a sophisticated income predictor to enable the selection of samples that target households within a specified income range. To select the low-income exchanges to be included in this survey, the firm computed an average of the income

predictor scores at the household level for each county's telephone exchanges. A listing was then generated of all the telephone exchanges in the 12 counties under study, along with an estimation of the average income level of the households in each exchange. Finally, the sample population was selected by generating a random list of phone numbers in each county for those exchanges with predicted average incomes of approximately \$25,000 or less. These low-income exchanges were chosen in order to increase the likelihood of reaching the target number of respondents with fewer calls.

The number of completed interviews, 1,082 households, is a sufficiently large sample upon which to base statewide projections.

#### **Telephone Survey Design**

In designing the questionnaire for the telephone survey, we reviewed a number of other survey instruments that had been used in similar studies in other parts of the country. The basic design of the telephone questionnaire in the current study is similar to the one used in 1975 for the Civil Legal Needs study in Boston. It is divided into three sections:

- (1) *Attorney/Court Inquiry Statement.*
- (2) *4 Problem Identification Inquiry Statement.*
- (3) *Household Demographics.*

Extreme care was exercised to assure that the questions were written in such a way as to be understandable to respondents. Thus, the emphasis was on using common, everyday terminology and not technical legal terms. Care was also taken to design a survey that would take no more than 20-30 minutes to complete.

Professional interviewers conducted the survey over a three-month period. Before proceeding with the interview, in each case, interviewers first screened the respondent household for financial eligibility. Thus, only households which qualify for civil legal services under federal Legal Services Corporation guidelines (125% of the poverty level income established by the United States Office of Management and Budget) were included in the final survey sample.

The first section of the survey, *Attorney/Court Inquiry Statement*, attempted to collect information on the number of occasions over the past five years that a household had contact with lawyers and/or the courts or had a problem that they thought needed a lawyer's help. Because this information relates to perceived legal problems and actual contact with the legal system, this section is referred to as the "recognized legal needs" section of the survey. All of this information was obtained by asking four questions:

- (1) *Have you or anyone in your household brought anyone to court in the last 5 years, or since January 1982?*
- (2) *Has anyone brought you or any member of your household to court in the last 5 years, or since January 1982?*
- (3) *Have you or anyone in your household in the last 5 years received notice to go to court (for anything other than a parking violation), but decided not to go?*

*(4) In the last 5 years, or since January 1982, have you or anyone in your household had any kind of problem which you thought needed a lawyer's help (apart from the information supplied in answer to questions 1, 2 and 3)?*

If the respondent answered yes to any of these questions, additional information was then gathered, for example, on the nature and type of problem, the outcome, and whether or not a public or private lawyer was involved. If there was no lawyer, respondents were asked why not and whether or not they felt that they would have been better off with a lawyer.

The second section of the questionnaire, the *Problem Identification Inquiry Statement*, consisted of a list of potential problems that a low-income family might have experienced that could possibly benefit from the advice of a legally trained person. This list was developed with the assistance of legal services lawyers in Massachusetts and the problems included were those identified as those most commonly experienced by their clients. Because this section addressed specific problems that respondents did not themselves identify as being legal in nature, it is referred to throughout this report as the "unrecognized legal needs" section of the survey.

Section two was subdivided into eleven main categories of problems: consumer, utility, housing, employment, school, medical care, nursing home care, mental health care, government agencies and benefits, family problems and miscellaneous problems. Several specific questions, outlining various fact situations, were contained within each category of problem. Follow-up questions were asked whenever a respondent reported experiencing a problem. Naturally, many of the problems that might be encountered by the poor could not be included, due to time and other resource limitations.

Clearly, the quantification of legal needs is tied closely to the manner in which the number and type of problems are set out in the questionnaire. Fewer questions and narrower definitions of legal problems yield the most conservative estimates. Likewise, respondents who are asked to recall problems experienced over a shorter period of time are more likely to report a higher incidence. For example, a legal needs survey completed in New Jersey in September 1986 listed over 300 separate problems, used a one-year time frame, and thus obtained an annual rate of 4.12 household problems. Similarly, in Colorado, a study conducted in 1985 asked respondents to indicate the total number of times each problem had occurred over the past year. The annual rate of household problems in Colorado was reported at 3.7. The relatively high rates of incidence in these two studies are unusual. Most of the other legal needs studies conducted in the last 10 years report an incidence per household of between one and two problems per year.

The primary concern in preparing this telephone survey was to determine how many households had encountered specific problem types over a five-year period. Respondents were not asked how many times such problems had occurred during that period. The anticipated result of these decisions in the survey design process was a more conservative overall annual rate of household problems in Massachusetts than those found in New Jersey and Colorado.

The final section of the questionnaire, *Household Demographics*, asked a series of questions relating to the household, including length of time at present residence; makeup of the household including age, sex and relationship of each member; sources of income for 1983 and 1986; race; marital status; education; and a final set of questions regarding the respondent's knowledge of free legal services in their area and how they would find a lawyer if they needed one.

Demographic characteristics of any sample population are an important factor in understanding the data. For example, other civil legal needs surveys have shown that the number of members of a sample household may have a direct effect on the total number of problems reported by that household. Age, race, and sex of the individual respondent, or of the household head, may also have an effect. Thus, before proceeding to an analysis of the incidence of legal problems according to a number of variables, this section outlines the general demographic characteristics of the sample households.

The following table shows the number of household members for those households in our total sample.

Number of Household Members	Number of Respondents	Percentage
1	372	34.4%
2	299	27.6%
3	164	15.1%
4	135	12.5%
5	66	6.1%
6	29	2.7%
7	12	1.1%
8	2	0.2%
>9	3	0.3%
TOTAL	1,082	100.0%

## Demographic Characteristics

**Table 2-1**  
**Size of Sample Households**

An analysis of Table 2-1 discloses that the median size of the households in our sample was approximately two members and that only 10% of the sample households had five or more members.

Table 2-2 shows the racial/ethnic mix of our sample population. The survey questions on race attempted to collect demographic data for the following categories: White, Black, Hispanic, Native American, Asian and Other.

Mr. FRANK. Mr. Greco.

**STATEMENT OF MICHAEL S. GRECO, PRESIDENT OF NEW ENGLAND BAR FOUNDATION, AND COFOUNDER, BAR LEADERS FOR PRESERVATION OF LEGAL SERVICES FOR THE POOR**

Mr. GRECO. Mr. Chairman, and members of the committee, in my written remarks I address a number of issues, but I will limit myself to three issues in my oral remarks. Those three issues are the following: On behalf of the 140 bar associations and hundreds of bar leaders who I speak for today, we are of the view that the poor in our country are entitled to legal services comparable to those affordable by the rich.

The second point I am going to address is that neither this committee nor Congress should handcuff the legal services lawyer in the manner that is being suggested by others.

My third point today will be that I hope that this committee will not permit the destruction of the current basic structure of the Federal Legal Services program as we know it.

The first point. I was heartened to hear Mr. Wallace say this morning that he is past the point and we are past the point of trying to do away with the Legal Services program.

My view is that that is what the Reagan administration was about for 8 years. So it seems that the debate now is not whether there should be a Legal Services program, but what kind of a Legal Services program.

I think what I glean from everything I have heard from the majority of the Legal Services Corporation members is that the type of lawyering, the quality of legal services given to poor people can somehow be of a lesser quality, of a second-rate nature.

That is where I bring my analysis right now. The poor in this country are entitled to legal services which adhere to the highest standards of competence, diligence and professionalism. It can't be any other way.

We have in the Legal Services program, we all know it, a very controversial program. It has been controversial from day one. Why is it a controversial program?

Because it works. It has been protecting the rights of poor people ever since the Corporation was started. In my written remarks on page 4, I indicate some of the reasons why this program is controversial.

Others would call it an offensive program. Well, whenever a court blocks the eviction of a poor person after intervention of a legal services lawyer, that act by a judge is offensive to the landlord. Whenever a judge responds to the arguments of a legal aid lawyer and orders an individual or a class of thousands of individuals back on the social security disability rolls, that is controversial and offensive to some. Whenever a court responds to the pleadings of a migrant legal aid specialist and orders a grower to provide basic sanitary housing and working conditions for a group of migrant farm workers, that is highly offensive, not only to the grower involved, but also to all the regional and national groups.

When a low-income resident of a mobile home park is threatened with eviction and a judge prevents it, the judge, of course, is pre-

venting homelessness, but the fact is there will be very unhappy developers, townspeople and others. So the very nature of the Legal Services program is the very nature of litigation and lawyering.

I have been a trial lawyer for 17 years with a law firm in Boston that charges prevailing rates for Boston and comparable cities. And I know that if we make this Legal Services program any less than what I as a private lawyer am permitted to do for those who can afford it, we will be rendering this program impotent. It will be a sham.

We have to be guided by what the current authorization statute provides. Currently, the Legal Services Corporation Act mandates LSC, "To ensure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas."

It is a dual test, economical and effective, not cheapest, not the least quality that we can get away with, not the, as Mr. Wallace said this morning, not the greatest bang for the buck, because the greatest bang for the buck makes no provision for quality.

My only experience, members of the committee, with a competitive bidding-type situation in my State, Massachusetts, happened in the late seventies when I was a member of the Board of Bar Overseers appointed by the Supreme Court of Massachusetts.

That is a body that governs attorney adherence to the canons of ethics. During my 3 years on that board, I saw one instance of what I am afraid might happen with competitive bidding.

There was a very enterprising lawyer who started a series of clinics around the State. I will leave his name out of the record. He attracted thousands of people who wanted low-cost divorces. Within 6 months he had taken all the money paid by these people, and he had declared bankruptcy and was nowhere to be found.

I urge you in considering competitive bidding, if you must, because I don't believe it has been demonstrated yet that it is worthy of consideration, make sure that quality is not sacrificed for economy.

I mentioned that I am a private lawyer. My law firm provides all kinds of nurturing and support services for our young lawyers. When they join us, we train them, we provide them with continuing legal education. We make available to them technological advances, we share information with them.

There are senior attorneys in the firm they can consult with. It should be the same, I submit, for the legal services lawyer. That has not been happening for the past 8 years.

The Legal Services Corporation Board has defined monitoring not for the purpose of trying to improve the local programs, but to try to find fault, to nitpick, to harass, to find ways in which the local programs could do their jobs less effectively.

On my first point, to sum up, this committee must ensure that the existing act's commitment to effective, meaningful representation for the poor of our Nation continues.

My second point. I refer to it as please don't handcuff the legal services lawyer. The current act requires as follows, "attorneys providing legal assistance must have full freedom to protect the best interest of their clients in keeping with the code of professional re-

sponsibility, the canons of ethics and the high standards of the legal profession."

The words, "full freedom." I, as a private lawyer, would find it repugnant to be told that, if I were going to represent the chairman of this committee, that I would not be allowed to consider administrative proceedings or class actions or legislative activity even though those activities might be the most efficient and most economic way of my rendering services to the chairman.

It should be no different for a legal services lawyer. So I urge on this committee that the ethical practice of law in this country, the canons of ethics, apply to every lawyer, not just private lawyers, they apply to legal services lawyers. That means that every lawyer must exercise independent judgment, must be permitted to choose the best vehicle for protecting the client's rights.

And if it happens to be negotiation and arbitration, that tool should be available to a lawyer. If it happens to be litigation of a class action, so that thousands of problems are solved with one case, then it should be class action. And the same with administrative proceedings and legislative activity.

I will sum up on my second point and then quickly get to my third point—

Mr. FRANK. I think we got your second point.

Why don't you go to your third point.

Mr. GRECO. Finally, perhaps my most important point, and that is that this committee not permit the destruction of the current basic structure of the Federal Legal Services program. You have heard the word "reform" today many times. You have heard it in recent months; you will hear it over and over again.

The people who are urging reform, I submit, wrap themselves around in a flag emblazoned with the word "reform" on it. The word "reform," I submit, is a guise, it is a subterfuge, it is a cover.

I believe it is a code word. What the detractors really mean to use is the word "deform." They want to severely restrict not only what the local, legal services lawyer can do for a client. They want to restrict the very rights that the poor people can have protected by the legal services lawyer.

I believe that if the other side were honest, they would use a more descriptive term, not reform, but amputation. That is what I think they are about. And I don't think the program needs amputation.

The program doesn't need major surgery. The program doesn't need to be tampered with in the radical way being proposed.

As a matter of fact, the only surgery that I think we need is that we surgically remove at least six of the members of the current LSC Board and urge the President to appoint an entirely new board.

That perhaps is the most immediate thing your committee can address. Because until there is a new board, this whole program is in limbo.

I want to close, as I must, as a trial lawyer and address the question posed by Mr. Smith of Texas. Mr. Smith asked a question and read from page 5 of my remarks having to do with the fact that Mr. Wallace and others have presented a diatribe of unsubstantiat-

ed charges about alleged, wasteful, fraudulent conduct on the part of local programs.

May I respond to your question, Mr. Smith?

In my mind as a trial lawyer, accusations are different from final judgments rendered on those allegations of misconduct, point one.

Point two, in my view——

Mr. SMITH of Texas. The accusations may or may not be true?

Mr. GRECO. Accusations being made against a local program or a local lawyer are merely accusations until a judge and jury have proved that that accusation holds water.

Mr. SMITH of Texas. Were your comments accusations as well as proof?

Mr. GRECO. I have read very carefully, Mr. Smith, every instance that I have seen to date, and I submit that they are mostly accusations. And to the extent that there was merit in some of those accusations, I would be the first to say that fraud or misconduct at any level, whether it is in the Reagan administration, a Democratic administration, the LSC Board of Directors or a local program should be dealt with summarily and quickly. So there is no mistaking about that.

Committee members, you are embarking on a very important mission. The legal services attorneys and the bar associations of this country stand ready to help you.

Mr. FRANK. Thank you.

Mr. GRECO. Thank you very much.

[The prepared statement of Mr. Greco follows:]



**Bar Leaders for the Preservation of  
Legal Services for the Poor**

20 West Street · Boston, MA 02111

*Testimony of*

**MICHAEL S. GRECO**

*Past President, Massachusetts Bar Association,  
President, New England Bar Foundation  
and  
Co-Founder, Bar Leaders for the Preservation of  
Legal Services for the Poor*

*Before the*

**UNITED STATES HOUSE JUDICIARY SUBCOMMITTEE  
ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS**

**ON THE REAUTHORIZATION OF THE  
LEGAL SERVICES CORPORATION**

**July 19, 1989**

*Bar Leaders for the Preservation of Legal Services for the Poor is a national organization supported by bar associations and elected bar leaders from every state in the nation.*

**TESTIMONY OF MICHAEL S. GRECO**

**BEFORE THE**

**HOUSE JUDICIARY SUBCOMMITTEE**

**ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS**

**Wednesday July 19, 1989**

Mr. Chairman and Members of the Committee.

My name is Michael S. Greco, and I am a partner in the law firm of Hill and Barlow in Boston. I am also Past President of the Massachusetts Bar Association and the New England Bar Association, current President of the New England Bar Foundation and a co-founder of the national ad hoc group Bar Leaders for the Preservation of Legal Services for the Poor which involves over 140 bar associations and hundreds of bar leaders from every state in the nation.

I am honored to appear before you today to address the very important issue of reauthorization of the Legal Services Corporation. On behalf of bar association leaders all across this country, I bring you the message that the legal profession's leaders believe the very foundation of the Legal Services Corporation Act should be its rock-solid commitment to the provision of legal services to the poor which adhere to the highest standards of competence, diligence and professionalism.

Additionally, LSC should rest on a foundation which is adequately funded by Congress. Therefore, Bar Leaders for the Preservation of Legal Services for the Poor advocates 408.4 million dollars as a starting point for funding in 1990, with necessary sums added in 1991 and 1992 to finally bring the Legal Services Corporation appropriation to a

level which will achieve the Congressional goal of "minimum access to justice" for our nation's poor -- a goal last achieved in 1981. We also feel very strongly that, until we reach that miraculous moment when the federal funding base ensures not just "minimum access to justice" but total access to justice 100% of the time, the legal services delivery system MUST remain one in which local clients, in partnership with local legal professionals, shape how their limited programmatic resources will be utilized and determine the case priorities of each local program.

As you well know, the federal legal services program for the poor, by its very nature has always been controversial in some circles. And it will always be so. Any time there is a system in which society's "have nots" receive assistance in asserting their rights and redressing their grievances against powerful governmental and private institutions, there will be cries of "foul" from the powerful people or groups who are ordered by the courts to change their behavior or alter their illegal practices regarding the poor. But "foul" it is not. It is absolutely the only way you, as our elected officials, can ensure that the game remains fair.

Ensuring the provision of high quality, effective legal services for the poor is the only way Congress can guarantee that we as a nation deliver on our constitutional promise of establishing justice, insuring domestic tranquility and securing the blessing of liberty. Ensuring that even the poorest among us have full, fair and equal access to the courts of our land is the only way you can guarantee that those without money and resources and power have the means to settle their legitimate disputes in a peaceful, civil manner. It is only you who can guarantee that the cornerstone of our democratic heritage -- equal access to justice for all -- is preserved.

Quite frankly, the legal profession as a whole, and the organized bar groups for which I speak and with which I am affiliated, have not themselves always understood completely the pivotal role the federally-funded system of legal services for the poor

has played in ensuring that our justice system remains fair. There was a time when lawyers for landlords, for the government bureaucracy, for hospitals and utilities, for schools and employers, strongly resented the legal services system -- especially as it prevailed against them in asserting poor clients' rights. Unfortunately, there are still a few individuals among us who represent powerful groups who continue to resent the fact that the elected officials to whom they contribute substantial sums turn around and appropriate government dollars to fund the work of these groups' legal adversaries. However, in the more than 20 years in which our current legal services system has been alive, and especially in the 15 years in which in which the Legal Services Corporation itself has been in existence, our profession -- and the organized bar's leaders -- have matured greatly in their understanding of the precious and essential nature of the national legal services system. We have grown to respect the work of the legal aid lawyers in our midst and to recognize their standing in our organizations as professionals of the highest caliber who are striving, as all lawyers should, to represent their clients with care and diligence and the highest quality lawyering possible.

As members of the bar yourselves, you know that in recent years we have become more and more concerned with the professionalism of the nation's lawyers. Bar leaders from the American Bar Association to the smallest local bars have emphasized this topic. And, interestingly, we have found in the legal services system some of our best role models of individuals who adhere to the highest standards of lawyer professionalism. Thus, we have reached into this group of legal services staff lawyers for new bar leaders, for chairs of our committees, for faculty for our continuing legal education programs, for officer candidates for both state and local bars -- and, this year, even for the bar presidency in St. Louis, Missouri.

Additionally, in the past two years, as the organized bar has embarked on a multi-year celebration of the bicentennial of the United States Constitution -- and as we have extolled the virtues of the rule of law and our constitutional promise of equal justice

for all -- we have quickly realized that the work of our local legal services programs is the very embodiment of all that we are celebrating.

You, as our elected officials, should be proud of this system which has grown and matured into an integral and respected part of our legal profession and justice system and which, through your urging, has developed a significant and effective working partnership with the private bar. That is not to say that parts of the system cannot be improved or should not continue to be nurtured; it is not to say that the system should not continue to reach for new innovations or new technological improvements in order to strive for the most economical and effective services possible for the poor; it is not to say that the system should not be well monitored annually by its funders in order to evaluate its strengths and pinpoint and correct its weaknesses. But the basic system itself -- of locally-based, locally-controlled, experienced, staffed legal aid programs with locally-designed adjunct services from the private bar -- is sound. Again, at your urging, we in the bar leadership have worked long and hard and zealously to ensure that this basic system works well. It does not now need major tampering.

As you begin the process of Congressional reauthorization of the Legal Services Corporation into the 1990's, there is a danger that the adversaries of Legal Services will lobby hard to turn the program into one which is no longer "controversial" or "offensive." But to do so would also be to render it impotent. Whenever a court blocks the eviction of a poor person, after the intervention of a legal services advocate, that is offensive to the landlord. Whenever a judge responds to the arguments of a legal aid lawyer (who may be assisted by support center specialist) and orders an individual, or a "class" of thousands of individuals, back on the social security disability rolls, that is controversial for the massive social security bureaucracy. Whenever a court responds to the pleadings of a migrant legal aid specialist and orders a grower to provide basic sanitary housing and working conditions for a group of migrant farmworkers, that is highly offensive not only to the grower involved but also to all the

regional and national groups to which the grower belongs. When the low income residents of a mobile home park ask a legal services program to represent their rights before a legislative body when their very homes are threatened by zoning or land use policy, that is indeed controversial for landowners, town officials or developers who consider such dwellings to be undesirable or an impediment to their development plans. But this is what good lawyering is all about.

We have already seen a tremendous effort on the part of the current Legal Services Corporation leadership, which is well known for its unrelenting hostility to the existing legal services system, to convince both you and the American public that legal services lawyers are purposely unresponsive, in the words of LSC President Terrance Wear, to the "basic, local, day-to-day individual needs" of the poor in order to pursue their own "pet projects and causes." Both the LSC President and Board Chair Michael Wallace have come before you and your counterparts on the House and Senate Appropriations Committees with a diatribe of unsubstantiated charges about the alleged wasteful, fraudulent and abusive behavior of the nation's current legal services providers, to the alleged harm of those who need "basic, local, day-to-day legal services." The LSC administration has spent thousands of dollars printing and disseminating a newsletter which continues the theme that "reforms" are necessary to ensure that legal aid programs are limited to providing basic, day-to-day services to individuals. LSC has also issued press releases, engaged in extensive lobbying, and contracted with outside "think tanks" and "researchers" to push these same themes. LSC Board member and Board Chair from 1984-1988 Clark Durant even appeared on Rev. Pat Robertson's "700 Club" television program this past September to beseech the faithful to lobby the White House for these "reforms." But what does all this really mean?

My colleague Bill Whitehurst, a Past President of the 51,000-member State Bar of Texas and also a co-founder of Bar Leaders for the Preservation of Legal Services for the Poor, told a Senate Appropriations Subcommittee on May 2, 1989 that LSC's

recent and fanatic emphasis on basic, local day-to-day legal services is a "malevolent sham" and a "disingenuous code" -- a "seemingly innocent attempt to hide LSC's true intentions" for emasculating the legal services system as we now know it. He explained:

These words really mean services to one person or family at a time for the simplest of complaints only -- complaints that will never require research or training. And they reflect LSC's strange notion that legal services attorneys ought to treat their cases simply, even if an emerging fact pattern might dictate otherwise. These words mean only handling cases in which the rich or powerful, or government institutions, are never offended and their actions are never questioned.

Speaking for bar leaders across the nation, Mr. Whitehurst assailed LSC's 1990 budget proposal to Congress which gave lip service to supporting "high quality legal services to poor individuals" but which, in reality, called for a 4.3% funding cut in the Legal Services appropriation and specifically emphasized that "no funds are allocated for research or training centers or for other services not directly related to the direct delivery of legal assistance." Reacting to LSC's budget message, Mr. Whitehurst told the Senate Subcommittee:

First, I do not think LSC's version of "quality" is in any dictionary with which I am familiar. (Mr. Wallace and Mr. Wear's) version of "quality" means unobtrusive, inoffensive; "quality" in their eyes means services rendered to the lowest bidder despite reams of data that show that such a scheme is a travesty of justice in the criminal defense arena. Their version of "quality" means services rendered with no training or research or back-up support from someone with special expertise.

Second, their concept of "individual poor persons" is a total distortion of the real meaning of the LSC Act. . . . In the bizarre view of the current LSC administration, . . . complex cases, handled with the highest concern for ethical and competent representation, are wasteful and abusive of the legal services system. . . . It is clear, from the words and deeds of the current LSC leadership, that as long as the poor have access, in groups, to (representation from legal services programs), this LSC administration will do its best to dismantle the system which makes such cases possible.

Those were the serious concerns of bar leaders prompted by LSC's frenzy of activity surrounding the appropriations process and its push for legal services "reforms." This frenzy at LSC has continued, unabated, to this day. Therefore, through the Legal Services Corporation reauthorization process which you are beginning today, we fully expect the current LSC leadership and its allies to sound the same "alarm" regarding the need to "narrow" and "reform" LSC -- the same message Bill Whitehurst appropriately called a "malevolent sham."

And so we appear before you to urge a different course. In fact, the roadmap for the course Bar Leaders for the Preservation of Legal Services for the Poor now advocates can be found in the existing Legal Services Corporation Act.

The Act now mandates LSC to "insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas." We strongly suggest that the combined facets of "economical and effective" continue to be the basic building block of the national legal services system and the basic standard by which all grantees and potential grantees are measured and evaluated.

As I hope this distinguished Committee recognizes, the organized bar has spent a great

deal of time, money and leadership energy on seeking improvements in the practice of law and the administration of justice. We have promoted the use of computers in the law office, and computer training for lawyers, in order to assist legal professionals in becoming more effective and efficient. We have sponsored extensive programs of training and continuing legal education because we recognize that ongoing education is a necessity for competent, effective lawyering. When young lawyers enter solo practice, we have sponsored mentor programs to link these young attorneys with "senior partner substitutes" in order to reduce their isolation within the practice of law and in order to foster communication and a sharing of expertise. We consider these things to be basic to the practice of competent, effective, ethical law. We consider these activities to be inextricably interwoven with the day-to-day practice of law for any lawyer who strives to be effective for his or her clients, and, indeed, they are in the best interests of the public.

Therefore, if the basic standard of "economical and effective" is truly interwoven into a newly authorized Legal Services Corporation, we should see similar activities and attributes. In terms of the system's structure, this standard literally requires the support of comprehensive, coordinated services wherever possible, rather than the fragmented, disjointed, isolated services LSC seems to have envisioned in its recently unveiled "competitive bidding" scheme. A roadmap to "economical and effective" legal services for the poor must provide for a comprehensive system of ongoing training, continuing education and technological advancement. It must provide an efficient and economical way in which local grantees have access to information-sharing and to significant legal expertise -- that is, "senior partner substitutes" -- in the many substantive areas embraced by poverty law without having to replicate that expertise over and over again in each local program.

Of equal importance, your newly authorized roadmap to an "economical and effective" legal services system should also emphasize professionalism and ethics. Any

reauthorization of the Legal Services Corporation must maintain as a key underpinning the current LSC Act's essential requirement that "attorneys providing legal assistance (under this Act) 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." This concept is a sound and important one. It simply needs to be updated to include reference to the Model Rules of Professional Conduct and the American Bar Association's very significant Standards for Providers of Civil Legal Services to the Poor.

Again, the notion of "the full freedom to protect the best interests of clients" is more than just an idle phrase. The ethical practice of poverty law requires that legal services lawyers have available to them all the tools, practice techniques, and problem-solving forums to which lawyers in private practice have ready access. These words make clear that legal services attorneys are not to be viewed as second class lawyers whose clients should be content with second class justice. They make clear that such lawyers should not be blocked from pursuing all proper and appropriate remedies and legal strategies -- be they negotiated, litigated, administrative or legislative -- for their clients.

In some cases, the representation of a whole class of poor people is both ethical and required if a legal services program is going to represent a number of similarly situated individuals economically and effectively. In other cases, it may quickly become apparent that pursuit of legislative or administrative relief is the most professionally appropriate method of representing the interests of a program's poor clients. Clearly, these representation strategies will never be popular with those whose very status and power enable them to affect a whole class of poor people with a single policy, working environment or deteriorating housing project. But, when these strategies are the most economical and effective method of representing indigent clients, they must be pursued. The practice of competent, ethical law requires it

We fully expect that this Committee, and your colleagues in Congress, will hear a great deal from those who oppose this caliber of lawyering for the poor, and we expect that such opposition to effective legal services for the indigent will often be carefully disguised and hidden behind the code word "reform." The leaders of this nation's legal profession, however, implore you to resist all pressure to block our nation's poverty lawyers from representing their clients with the due care, diligence and competence required of an effective, high quality advocate. We urge you to resist all pressure to "handcuff" lawyers for the poor in a way in which you and I absolutely would not tolerate for our own personal legal advocates.

Finally, we urge that, as you shape the newly authorized Legal Services Corporation, you provide guidance which will ensure that there is a fair and competent process for measuring the quality, the economy, the effectiveness and the diligence of all LSC funded programs (and all new "competitors" for these same LSC funds). During its entire tenure, the current LSC leadership has been absolutely incapable of evaluating the quality of its grantees' work. LSC program "monitoring" in recent years has been a hostile, abusive, uneconomical, ineffective and standardless process which has done nothing to improve the overall delivery system or increase its quality. Therefore, in addition to a necessary focus on monitoring or auditing grantees for their compliance with certain bureaucratic provisions or funding requirements, a new authorization bill should also call for the professional evaluation of the work of LSC grantees by persons experienced in poverty law practice and poverty law program management. Such a meaningful evaluation process could go a long way toward turning LSC into an agency which is capable of sharing and replicating the strengths of its highest quality programs; which can provide technical assistance to improve its weaker programs; and which has the credibility necessary to replace its occasional dysfunctional programs in a smooth and effective manner.

All of this, however, requires a Legal Services Corporation leadership which is truly

committed to high quality, effective, economical representation for the poor and which treats its funded programs and their private bar partners with integrity and respect rather than suspicion, hostility and constant accusations of wrongdoing. And that leadership must hire a skilled, experienced and effective staff which clearly has the expertise and the positive vision necessary not only to oversee grantees but to assist them and contribute to their improved performance. Regrettably, none of this now exists at the Legal Services Corporation's headquarters.

Our grave concern is that anything positive in a reauthorization bill which truly fosters an economical and effective system of delivering civil legal services to our nation's poorest citizens will be for naught in the hands of a hostile, ill-intentioned or incompetent LSC Board or staff which attempts to flaunt the will and intent of Congress at every turn. Thus, this country's bar leaders also ask you to turn your close attention to the question of who shall lead the Legal Services Corporation into the 1990's, for that is the critical question if the words and the dictates of a reauthorization bill are to matter. Perhaps nothing is more critical to shaping the direction of Legal Services in the next decade than the appointment of a new LSC Board, and we look to this oversight body to bring whatever influence you can bear on this ongoing process to ensure that we finally attain competent, well-intentioned, creative and effective LSC leaders with whom we can work to ensure the most effective and economical local programs possible.

As the reauthorization process continues, we expect to continue to comment and provide input. We sincerely thank you for this opportunity to become involved in preserving and protecting our nation's constitutional promise and policy commitment to equal justice for all.

Mr. FRANK. Mr. James.

Mr. JAMES. How ethically can you charge interest on a trust account that is really the client and then use the funds?

Mr. FRANK. That would be Mr. Powers' question.

Mr. POWERS. Well, Mr. James, that question has been addressed by State legislatures and Supreme Courts all over the country.

Mr. JAMES. It was in my State, too. But how did we do it ethically?

You mentioned you take interest on a trust account that is client's moneys that has not been claimed as fee or cost, and yet take the costs. We might ask the president of the bar association.

Mr. POWERS. Certainly as to any net funds that can be earned for the client, it is my understanding that an attorney has the highest ethical responsibility to turn those funds over to the client. The only instances where the IOLTA program works is where it is not economically possible to generate interest for a specific client. Those funds never would have gone to the client had IOLTA not existed.

They would have gone to the bank. In many instances, Mr. James, I believe that the lawyers were getting a lot of indirect benefits from the fact that clients—that banks were making money off of noninterest bearing accounts. So I don't believe that either constitutionally or ethically we have taken one penny away from a client in this country with the IOLTA program.

I would certainly not advocate that.

Mr. FRANK. That is IOLTA.

Mr. JAMES. Of course you have. In some trust account in every firm there is some sums of money that could be isolated in an account or be yielded except for the bar rule that you can't get interest off of a trust account, a general trust account unless you isolate it—

Mr. POWERS. The lawyer, in my understanding, has an ethical responsibility to isolate those funds. If individual lawyers are not carrying out their ethical responsibility, then that is something that the bar associations and the State should deal with, but the fact that lawyers don't do what they should in every instance does not, in my opinion undercut the validity of the interest on lawyers trust account program.

Mr. JAMES. Thank you.

Mr. RAVEN. I was president of the State bar in California when we put in the mandatory program in 1981. The fact is at that time and today electronic data processing cannot deal with the sub-accounting that can allocate those to the client. That some day will occur, I am convinced.

I am convinced as EDP gets better and better, there will be a day when you can probably account for that. When that day comes, then it will have to be given to the client because it will be the client's money.

Mr. JAMES. In some cases, it certainly could be now. It becomes such a difficult decision as to which accounts you isolate. Are you dealing with \$15, are you dealing with a half-a-million dollars for 5 days on a clearance of a check? There are so many questions that remain unanswered in that issue.

Mr. RAVEN. That is right. If they can account for it, then it goes to the client.

Mr. JAMES. Let's move on to another question.

You had made reference about we ought to do a study and do a prototype and have it combined. Did the bar not do one, not for the same purpose, but have a review of the system in conjunction with legal services, of Mr. Steven R. Cox and ask him to do a report?

Mr. RAVEN. Professor Cox does not even claim that is the kind of study that would establish this point. That was a very narrow study on a number of other issues.

I don't think anyone quarrels with that.

Mr. JAMES. There was a study done on certain issues. Did he not complain and ask his name to be taken off the report because the committee changed his draft, his conclusions and studies and put their name on it?

Mr. RAVEN. The committee laid out the course of study in the beginning.

Mr. JAMES. DO you have a copy of the original draft before the committee changed?

Mr. RAVEN. Whatever we have, I will get for you. I don't know what we have.

Mr. JAMES. You don't know whether you have his original report? He is accusing the bar of completely distorting his professional—well, this is what he said. From a letter dated March 31, 1989.

I understand from your letter of March 29, 1989, and from a number of phone conversations you and I have had over the past few months, the delivery committee is genuinely interested in receiving any comments which I may have in regard to both the substantive and stylistic changes it made in the report.

My view is the committee and I have irreconcilable differences with regard to the report's contents. Therefore, I do not see any point in detailing all the changes I would make in the committee's revision of my drafts.

Mr. RAVEN. The committee has responded to that. I will certainly get you the response.

Mr. JAMES. He wrote a letter earlier saying, look, this is not what I said. You hired me to give you an independent evaluation. He says the purpose of it was to have an independent evaluation.

I gave it to you. What you did is took my work product and completely changed it, put the committee's name on it and leave me as director.

So he wanted to be totally disassociated from the final draft.

Mr. RAVEN. That is what he said. He said a number of things, if you go thoroughly through the whole matter, and it is not an uncomplicated matter, I think you will find the committee is supported and not Mr. Cox.

I will send you all those papers. It is quite a stack and it takes a little effort to go through it. His conclusionary comments such as that are not born out.

Mr. JAMES. What surprises me is not who is right or who is wrong. It is the fact that the bar association would take a draft of the director, et cetera, and then submit it as if it was a compilation of his work and the committee's without a qualification.

Mr. RAVEN. It is not my understanding that as done. You know, there is a number of things going on, and I try to get on top of them, especially when there is some controversy. And I looked into it, and I am satisfied from what I looked at, and I think you would be satisfied.

I know you are a fine trial lawyer. I think if you looked at everything in this matter, you would be on our side and not his side.

Mr. JAMES. I just wanted to get a copy so I can make that determination for my future on this committee to see what type of problem we could anticipate.

[The information follows:]

Report on  
THE SAN ANTONIO STUDY  
OF LEGAL SERVICES DELIVERY SYSTEMS

American Bar Association

Special Committee  
on the Delivery of Legal Services

Jane H. Barrett, Chair  
Paul V. Carlin  
Gilbert F. Casellas  
J. Chrys Dougherty  
Fred D. Gray  
Lonnie Powers  
Fred S. Richards  
Gerry Singsen  
Ted F. Warner

May 1989

Steven R. Cox, Project Director

James Podgers, Staff Counsel

This report has not been approved by the House of Delegates  
or the Board of Governors and, until approved, does not  
constitute the policy of the American Bar Association.

Copyright 1989 American Bar Association  
ISBN 089707-473-4

## TABLE OF CONTENTS

CHAPTER		PAGE
	FOREWARD . . . . .	v
1	INTRODUCTION . . . . .	1
2	RESEARCH DESIGN AND METHODOLOGY . . . . .	5
	Research Design . . . . .	5
	Research Methodology . . . . .	9
3	STUDY FINDINGS . . . . .	23
	Case Management . . . . .	23
	Peer Review . . . . .	31
	Service Cost Estimates . . . . .	38
4	CONCLUSIONS AND RECOMMENDATIONS . . . . .	57

APPENDICES

A	Biographical Information on Steven R. Cox.....	65
B	Voucher-Related Materials.....	73
C	Case Service Report Form.....	85
D	Client Satisfaction Survey Questionnaires.....	89
E	Case Fact Sheet and Supplemental Case Service Report...111	
F	Divorce Questionnaire and Case Intake Card.....	119
G	Peer Review Grading System.....	129
H	Peer Review Evaluation Sheets.....	133

## FOREWARD

This report is based on a comparative study of three mechanisms for delivering legal services to poor persons: a legal services staff program and voucher and contract mechanisms. Both the contract and voucher mechanisms provide for private attorneys to receive reduced fees to represent indigent clients. The study was designed and conducted in Bexar County, Texas, which includes San Antonio, by Steven R. Cox, an associate professor of economics at Arizona State University in Tempe. Professor Cox was selected by and worked under the direction of the American Bar Association's Special Committee on the Delivery of Legal Services.

This report is the result of the Delivery Committee's redrafting of a preliminary report written by Professor Cox. The Committee believes this report accurately presents the data collected in the study, analyzes the data within the appropriate context of the study and draws only those conclusions which are supported by the data.

Professor Cox and the Delivery Committee differ in their interpretations of the data collected in the study and in conclusions based on that data. We acknowledge Professor Cox's disclaimer of responsibility for this report, other than the data on which it is based. The conclusions presented in this report are those of the Delivery Committee and do not

necessarily represent the views of Professor Cox.

The San Antonio Study was an important and necessary initial step toward understanding a number of issues concerning the delivery of legal services to the poor. The Delivery Committee believes this report will serve as a helpful reference to those conducting further studies on these issues. However, conclusive answers to the questions raised in the San Antonio Study cannot be reached without additional research information. It is the Committee's view that the San Antonio Study alone does not provide basis for any system-wide conclusions or policies.

The Delivery Committee has, by issuing this report, correctly carried out its responsibility to the ABA, the legal profession, the legal services community and recipients of legal services in this country.

Special Committee on the Delivery of Legal Services  
Jane H. Barrett, Chair  
Paul V. Carlin  
Gilbert F. Casellas  
J. Chrys Dougherty  
Fred D. Gray  
Lonnie A. Powers  
Fred S. Richards  
Gerry Singen  
Ted F. Warner

CHAPTER 1  
INTRODUCTION

When Congress created the Legal Services Corporation in 1974, it directed the Corporation to undertake a comprehensive study of alternative legal services delivery systems. That study, conducted in the late 1970s, is known as the Delivery Systems Study (DSS).<sup>1</sup> In all, eight delivery systems were included in the DSS: seven private attorney mechanisms and the staff attorney program mechanism, on which legal services offices generally base their structures.

However, two private attorney models which economic theory suggests may be effective in terms of cost and quality were either not fully tested or not examined at all in the DSS: a competitive-bid contract model and a voucher model.<sup>2</sup>

---

<sup>1</sup>Legal Services Corporation, *The Delivery Systems Study: A Policy Report to the Congress and the President of the United States* (June 1980).

<sup>2</sup>The theoretical attractiveness of a voucher system is twofold: It can give poor persons a greater choice of legal services providers and it may contribute over time to lower program costs (provided, of course, that voucher recipients shop among available attorneys and that competition among those attorneys increases as a result of such comparison shopping). The theoretical promise of a competitive-bid contract system also lies in the competitive market forces which it is designed to unleash. In this case, such forces are imposed directly on attorneys rather than indirectly through price-conscious consumers. To maximize the economic efficiency of a contract system, four conditions must be satisfied: Service contracts

A second LSC-funded delivery system study, called the Private Law Firm Project (PLFP), was launched in 1983. It was designed to test the workability of a competitive-bid contract model in delivering relatively routine legal services. A final project report has not yet been published.

Studies like the DSS and PLFP, which examine only one delivery mechanism per geographic site, are known as demonstration projects. These projects are useful for examining the workability of alternative legal services delivery systems, but they do not permit valid inter-mechanism performance comparisons since different systems are examined in different geographic and legal services contexts. To be able to make such valid comparisons, all mechanisms studied must be used to deliver the same legal services in the same geographic areas.

The major purposes of this study were to determine the workability<sup>3</sup> of the voucher system in practice alongside two other existing delivery mechanisms -- competitive-bid contracts

---

must be awarded on a competitive-bid basis; attorneys must be paid on a flat fee rather than an hourly rate basis; contracts must be awarded for a specified time period with no guarantee of continuation; and a reasonable source of supply of attorneys willing to enter into such contracts must be available.

<sup>3</sup>"Workability" as used in this study refers to whether the theoretical system works under actual market conditions. For example, will poor people, in practice, pick up vouchers for legal services and take them to lawyers who they carefully choose? Will those lawyers accept the vouchers, will they perform quality legal services and will they continue to

and a staff attorney program -- and to gather information on the quality effectiveness and cost efficiency of all three mechanisms. The staff attorney program mechanism was chosen as the study's standard of comparison since it accounts for the vast majority of legal services cases handled by attorneys in the United States. The voucher and contract models were selected to test their theoretical promise.<sup>4</sup>

The type of legal service selected for study was divorce cases and the geographic site selected was Bexar County, Texas, which includes San Antonio. Divorce cases were chosen because they would not be expected to create a bias in favor of either private or staff attorneys since both groups have some familiarity with handling such cases. The pilot nature of the study dictated that the number of study sites be limited to one.<sup>5</sup> The selection of San Antonio was based on two

---

provide quality services over time, or will the system break down at any point? Once workability is thus established, the questions of quality effectiveness and cost efficiency become relevant. "Quality effectiveness" relates to whether the legal services provided are of a consistent level of quality and are thus fairly comparable across the system. "Cost efficiency" asks whether at each stage of the system and overall the same level of service is delivered at the lowest dollar cost.

<sup>4</sup>Originally, the voucher component was to have been designed "to encourage voucher recipients to shop for low-market alternatives." That was not done, nor were voucher recipients given any other incentives to compensate for the burdens on them of using the voucher system, including such matters as gaining sufficient knowledge to make a choice among available voucher attorneys.

<sup>5</sup>As a result, the study's scope is limited by the fact

considerations: First, Bexar County Legal Aid (the local legal services program in San Antonio, identified in this report as BCLA) was willing to participate in and cooperate with an experimentally designed comparative study. Second, BCLA at the time of the study attached a high service priority to divorce cases. Almost half of all cases closed by BCLA at the time the study began were divorces.

The research design of the San Antonio Study was crafted to address certain performance comparison questions which earlier studies did not answer. While the study's findings contribute to our knowledge of the relative performance of alternative service delivery systems, those findings remain incomplete. Several important questions demand further research before any definitive system-wide conclusions can be formed regarding alternative delivery mechanisms. The major purpose of that future research should be to develop answers to those questions by studying wider samples of geographic and legal services providers over longer periods of time.

---

that the staff attorney mechanism findings are based on services rendered by only one legal services program, and its contract and voucher mechanism findings are based on services rendered only by a small sample of attorneys and law firms in that city.

CHAPTER 2  
RESEARCH DESIGN AND METHODOLOGY

This chapter presents a detailed description of the study's research design and methodology.

I. Research Design

Mechanism, Service and Site Selection

The three basic elements of any comparative legal services delivery systems study are the delivery mechanisms and case types tested and the geographic location(s) selected for examination. The mechanisms chosen for this study were a voucher system, a competitive-bid contract system and a staff attorney program. The voucher and contract systems both use private attorneys; that is, under each, attorneys in private practice assist income-eligible legal services clients for reduced fees typically paid through a legal services office. In the staff attorney mechanism, attorneys employed by a local program funded directly by the Legal Services Corporation (LSC) assist clients.

Since the vast majority of legal services clients in the United States are represented by staff attorneys, the staff attorney mechanism was chosen as the study's standard of comparison. The two private attorney mechanisms were selected primarily for their theoretical promise as possible quality

effective and cost-efficient delivery methods.

The primary concern with regard to the study's choice of case type was that both private and staff attorneys have some familiarity or experience in handling them so that the study's results would not be biased from the beginning toward either segment of the bar. Relatively simple divorce cases met this criterion. In addition, divorces of all types (simple and otherwise) accounted for 15.5 percent of all legal services cases closed in the United States in 1985, the year the study began.<sup>4</sup>

The study was designed to compare the performance of the delivery mechanisms in handling three types of divorce cases reflecting various levels of complexity: uncontested divorces; contested divorces involving some dispute other than child custody, without domestic violence; and contested divorces involving some dispute other than child custody, with domestic violence.

None of the delivery mechanisms were evaluated or compared on their performance in handling cases involving child custody disputes. However, cases involving child custody disputes were a factor in the study since they were either retained by the staff program in the first instance or, if custody issues arose after a case had been referred to a voucher or contract

---

<sup>4</sup>Legal Services Corporation, Characteristics of Field Programs -- 1986 (final draft, 1987).

attorney, the case was sent back to the staff attorney program for handling.

The pilot nature of the study dictated that it be limited to one location. The selection of San Antonio was based on two considerations:

First, the Bexar County Legal Aid Association (BCLA) was willing to participate in and cooperate with an experimentally designed comparative study. BCLA was the only legal services program contacted that expressed a willingness to participate in and cooperate with the study. This fact has both immediate and long-range implications. For this study, it raises questions whether BCLA is a representative legal services program. As with any legal services provider, there may have been unique characteristics of BCLA's management and general operation or of Bexar County generally as a study locale that affected study data collection. It must be recognized that such factors may affect data collected in any single location.

Second, BCLA attached high service priority to handling divorce cases. Almost half of all cases closed by BCLA in 1985, the year the study was started, were divorce cases, approximately three times the national average for legal services programs.<sup>7</sup>

---

<sup>7</sup>It is impossible to state, based on this study alone, whether and to what extent the atypically high priority given divorce cases by BCLA affected the results of the study.

Case Intake, Referral and Closure

The manner in which case intake, referral and closure are handled in a delivery systems study is critical to the validity of its findings. The following design actions were taken to avoid, to the maximum extent possible, elements of bias which might skew this study's results: First, all study personnel were employed, paid and trained by neutral organizations. Second, clients seeking legal assistance were referred to the study in a random, unbiased manner. Third, the processing of all case intakes, referrals and closures was conducted by study personnel. Fourth, study cases were handled in a way that made it unnecessary for clients to be informed that they were part of a study. Fifth, study cases were assigned randomly to the delivery mechanisms being studied.

The study personnel were a project director and a project administrator. The project director was responsible for all research aspects of the study, including oversight of case intake, referral and closure and analysis of results, as well as writing the preliminary draft of the study report. Working under the project director's supervision, the project administrator was responsible for the day-to-day operation of the study, including interviewing all clients referred by BCLA for service, classifying cases, making random assignments of eligible cases to the study's delivery mechanisms and maintaining all case-related records. The project director was employed and paid as a consultant by the American Bar

Association, and the project administrator was employed and paid by the San Antonio Bar Association with LSC funding.

Because the project administrator worked in the central office of BCLA, clients were unaware of the fact that the administrator was not employed by BCLA. Each week during the study's research phase, the administrator gave appointment sheets to BCLA intake personnel indicating the number and times of client interview appointments available for the following week. Clients calling BCLA for an intake interview on a divorce case one week were given an appointment with the project administrator on a first-come, first-served basis for the following week until all available appointments were filled. In an exception to the procedure, clients whose cases involved domestic violence, such as child abuse, spouse battering or threats of physical harm, were interviewed as soon as possible.

## II. Research Methodology

### Preparatory Study Tasks

1. Selection and training of project personnel. Steven R. Cox, an associate professor of economics at Arizona State University in Tempe, was appointed project director in 1983. Professor Cox designed the study prior to its implementation in 1985. (Biographical information on Professor Cox is provided in Appendix A.) In July 1985, the position of project administrator was advertised widely in the San Antonio area. Twenty-seven applications were received, and 15 candidates were

interviewed. Terry Workman of San Antonio was selected from among the five final candidates. From 1982 to 1985, Ms. Workman had served as the paralegal for the Divorce Section of BCLA. As a result, she had very helpful experience in handling a large volume of divorce cases in a legal services setting. She also spoke fluent Spanish in addition to English, which was an invaluable skill in the largely bilingual environment of San Antonio.

Ms. Workman began working as project administrator in late October 1985. She did not require any special job training because of her familiarity with BCLA case procedures, but she did spend about two weeks establishing her own office and record-keeping systems for handling study case intake, referral and closure. During this time, Ms. Workman also worked with the project director to finalize all client intake and referral correspondence forms. Form letters were prepared for notifying interviewed clients about the referral and status of their cases, informing staff and contract attorneys of cases referred to them and reminding voucher clients either to pick up their vouchers or to select an attorney to help them once they did pick up their vouchers.

2. Development of study voucher materials and data collection instruments. Four items were prepared for distribution to voucher clients: a Voucher Client Information Sheet, a Voucher Attorney Information Sheet, legal service vouchers (one for each case type) and a list of the names,

addresses and telephone numbers of those private attorneys in the San Antonio area who had agreed in advance to handle voucher cases for a fee equal to the value of each voucher. (Appendix B contains copies of the first three items.)<sup>8</sup>

Each voucher was prepared in quadruplicate. The client filled out and signed and dated each copy on the day the voucher was issued. The project administrator retained the study copy, the client kept the client copy and the attorney selected by the client kept the attorney copy. The attorney also kept the original until returning it to the project administrator when the case was closed.

The study's primary data collection instrument was the Case Service Report (CSR) (see Appendix C). The top portion of that form, seeking information from each client, was completed by the project administrator during her intake interview with the client. The bottom portion, requesting case closure information, was completed later by each client's attorney. A case fractionalization system was developed and incorporated as part of the CSR so that private attorneys could be paid in accordance with the developmental status of each case at

---

<sup>8</sup>The fourth item is not included in Appendix B. The data collected in the study does not provide a basis for evaluating the extent to which selection and use of voucher attorneys were affected by location of and ease of client access to those attorneys.

closure.<sup>9</sup> For staff and contract cases, the project administrator sent the CSR to attorneys with the case referral letter. For voucher cases, the administrator gave the CSR to each client and asked that it be given to the attorney selected by the client.

A Client Satisfaction Survey questionnaire was developed for use following the close of each case (see Appendix D). The project administrator mailed each client a copy when she received a completed CSR.<sup>10</sup> From the start, client return rates were low. During the early part of the study, various follow-up survey procedures were tried to increase client response, but both mail and telephone follow-ups were unsuccessful. Eventually, the project director decided that, as a practical matter, all follow-up efforts would be abandoned.

---

<sup>9</sup>The specifics of the case fractionalization system for each type of case handled under the study are described in Appendix C. Generally, the case fractionalization system assigned values at one-quarter increments, with a highest value of 1.00, to identify the point at which they were closed. Under that formula, different increments defined the following status of cases:

- 0.00 - Case closed prior to an initial client interview by an attorney.
- 0.25 - Case closed after an initial client interview but prior to filing of initial pleading.
- 0.50 - Case closed after initial pleading filed following attorney client interview.
- 0.75 - Case closed after initial pleadings filed and after some additional work or upon withdrawal of filings after additional client interviews.
- 1.00 - Case closed through judicial resolution.

<sup>10</sup>Although a Study Proposal dated March 18, 1985 prepared for the Committee by Professor Cox contemplated that the

Unfortunately, the study's experience offers no particular insights on how to solve the problem of low client response in any future delivery systems studies.

3. Solicitation, evaluation and selection of contract bids. A detailed solicitation package seeking bids for the contract services was prepared and mailed to every licensed attorney in the San Antonio area. The bid solicitation package identified the types of cases that would be handled in the study and stated that complex cases could be returned to the BCLA. Twelve bids were received and evaluated by a bid review committee consisting of three members of the Legal Services Corporation staff and the study's project director. The bids were also reviewed and evaluated by an ad hoc committee of the BCLA Pro Bono Law Project Advisory Board, whose recommendations were forwarded to the LSC.<sup>11</sup> LSC staff negotiated final contract award amounts with the six bidders who received the highest rankings by the LSC bid review committee. Three

---

service providers would be asked to administer a client satisfaction survey questionnaire at the end of each case, attorneys were not asked to administer the questionnaire for two reasons: to minimize their burden and to avoid any bias which attorney administration might introduce.

The final return rate was less than 20 percent. As a result, the client satisfaction data are not included in this report.

<sup>11</sup>Differences between these recommendations and those of the bid review committee were due mostly to the greater weight which the bid review committee attached to contract bid prices.

contractors were finally selected, one each to handle each type of study case. As a result, the work of one contract law firm could not be compared to that of the other two because each firm handled a different type of divorce case.

4. Determination of voucher values and formation of the voucher panel. A fee survey questionnaire was developed and mailed to a random sample of 200 attorneys in private practice in the San Antonio area asking them what fee they would charge for handling each of three well-defined hypothetical divorce cases corresponding to the study's case types. An acceptable response rate of 54 percent was obtained from the initial survey mailing and one follow-up. The lowest fee quotations received were compared to the winning contract bids. Some difference between the two figures for each case type was expected since contract attorneys were guaranteed a sufficient volume of business to enable them to use certain cost-saving approaches to handling contract cases. The actual differences, however, exceeded those expected, so compromise values were selected (see Table 2-1). The specific values selected represent mark-ups on the final negotiated contract bids of 20 percent for uncontested divorce cases, 25 percent for contested divorces without domestic violence and 35 percent for contested divorces with domestic violence.

Following the determination of voucher values, a letter soliciting attorney participation on the San Antonio Voucher Panel was mailed to all licensed attorneys in the San Antonio

area. A special letter was also prepared and mailed to all Pro Bono Law Project participants. Initially, 49 attorneys asked to have their names, addresses and telephone numbers placed on the panel list. Three other attorneys joined the panel after client intake began, and four attorneys accepted voucher cases but requested that their names not be placed on the panel list. Voucher clients' choices of attorneys were not limited to those on the panel list, but all attorneys representing voucher clients were required to accept the value of the voucher as payment in full for services rendered.<sup>12</sup>

5. Selection of a peer review panel and development of its evaluation criteria. Measuring the quality of any professional service is a difficult task at best, and every possible measure of such quality has its own limitations. Nevertheless, peer review is generally acknowledged to be the most appropriate and acceptable means of evaluating professional service quality. Accordingly, the study's research proposal recommended that a

---

<sup>12</sup>In all, 50 attorneys from 44 different firms agreed to have their names placed on the study's "official" panel of voucher attorneys. Of those, 39, from 35 different firms, handled one or more study cases. Eight other attorneys whose names were not on the "official" list each handled one voucher case.

Four firms handled the study's contract cases. Two attorneys from one of the firms handled uncontested divorces (105 study cases referred, 85 closed at some stage past 0). Two attorneys in the second firm handled contested divorces without domestic violence (112 cases referred, 89 closed past 0). One attorney in each of two different firms handled contested divorces with domestic violence (81 total cases referred, 66 closed past 0). These numbers are also contained in Table 3-1.

peer review panel of three family law experts in the San Antonio area be formed to evaluate the quality of services rendered in those study cases closed via judicial resolution. One panel member would be chosen by each of the LSC, the San Antonio Bar Association and BCLA.

To assist in the formation of the panel, the project director sought panelist recommendations from various local attorneys with whom he had become acquainted in the course of his work on the study's research design. The names of three attorneys were mentioned more frequently than any others. After meeting with each of those attorneys, the project director forwarded their names to the LSC, San Antonio Bar and BCLA. All three organizations eventually waived their rights to each name one panelist and agreed to accept all three attorneys recommended by the project director. Each panelist is certified in family law by the Texas Board of Legal Specialization.

The panel's first task was to identify the criteria it would use in evaluating service quality. The panel's discussion of quality review criteria generated two documents: a grading system, which is discussed in more detail in Chapter 3 and the study's quality review data collection instrument, called the Case Fact Sheet (see Appendix E), which identified the case-related information which the panel said it needed to evaluate service quality. Data for all but five items listed in the Case Fact Sheet could be obtained from either

study or court case files. After the study was underway, a Supplemental Case Service Report (SCSR) was developed to obtain the remaining information (see Appendix E). Attorneys were asked to complete this form after the study's case closure deadline passed on June 30, 1987.

It is necessary to point out that the quality review component of the study was added after the study was underway. Initially, it did not seem necessary to have the Quality Review Panel selected and its criteria defined and relative weights assigned to them before the study began and some cases were closed. The peer review procedure was designed and implemented after the study began. Whether this affected the overall peer review findings for any specific mechanisms or for all the providers cannot be determined from the data collected.

Moreover, it now appears that considerable administrative time and effort would have been saved in the collection of quality review data -- for example, the Case Service Report and its supplement could have been combined into one form -- if the peer review panel had been formed and its evaluation criteria identified prior to client intake, as was originally planned.

#### Case Intake, Referral and Closure

When the study's case intake began, BCLA's intake procedures for clients seeking legal assistance with a divorce case consisted of the following four steps: First, clients were initially screened for income eligibility, usually in a

brief telephone interview. Most clients were told to call BCLA on Mondays for these interviews, although office policy permitted urgent cases to be handled at any time. Second, during the initial telephone screening interview, clients who were determined to be income-eligible were given an intake interview appointment for another day that same week. During that interview, a case card was prepared for each client. Third, case cards were reviewed by the chief of BCLA's Divorce Section. Fourth, following that review, clients were notified whether their case was accepted. If accepted, clients were asked to call back for a divorce questionnaire interview with the Divorce Section's paralegal. Clients with non-urgent cases were asked to call for a questionnaire interview appointment about 8-10 weeks after being notified of case acceptance, and, when they called, they were given an appointment another 8-10 weeks after that. In other words, the wait for what most law offices call the initial client intake interview typically amounted to a minimum of four months.

During this study, BCLA intake personnel continued to conduct all initial telephone screening interviews. The first clients who called each week and were found to be income-eligible were given intake interview appointments with the project administrator until all appointment openings for the week were filled.

The project administrator's client intake interviews were based on BCLA's initial intake and subsequent divorce

questionnaire interviews. BCLA's divorce questionnaire was adapted for use by the study, and each client was asked to complete it upon arriving for the intake interview (see Appendix F). In addition, the project administrator completed a BCLA case intake card for each client either during or following the intake interview (see Appendix F).

The project administrator classified each client's case on the basis of the information gathered during the intake interview. At the end of each week, the administrator divided those cases accepted for service under the study by case type and assigned them to the study mechanisms on a rotational basis.

If a client was assigned to either the contract or staff mechanism, the project administrator sent a form acceptance letter to the client and a form referral letter to the appropriate attorney. The client's acceptance letter included information about who to contact for further service. A copy of the client's CSR was also sent to the attorney.

If a client was assigned to the voucher mechanism, the project administrator prepared and sent the client a form letter which said that a private attorney would handle the case. The letter also asked the client to come to the administrator's office at a designated time to pick up a legal services voucher. When a client came to the administrator's office to pick up the voucher, the administrator first gave the client an information sheet and a copy of the voucher panel list. The administrator asked if the client had any questions,

and, if so, the administrator tried to answer them. Second, the administrator had the client sign and date each copy of the voucher. Third, the administrator gave the client an envelope containing the three signed voucher copies with the following three items attached to the original voucher: a postcard which the selected attorney was to complete and return to the administrator notifying her of the client's selection of that attorney, an Attorney Information Sheet and the client's original CSR. The administrator kept for the study's files a copy of the CSR and the study copy of the client's signed voucher.

Table 2-1  
Potential and Actual Voucher Values

---

<u>Case Type</u>	<u>Potential Values</u>		
	<u>Lowest Survey Fee Quotation</u>	<u>Winning Negotiated Contract Amount</u>	<u>Actual Values Selected</u>
Uncontested Divorce	\$150	\$101	\$120
Contested Divorce without domestic violence	500	225	280
Contested Divorce with domestic violence	500	265	360

CHAPTER 3  
STUDY FINDINGS

The study was designed with two primary goals: to test the workability of two private attorney mechanisms -- contracts and vouchers -- for delivering legal services to the poor and to compare the cost efficiency and quality effectiveness of those mechanisms to each other and to a staff attorney program. The study's case management, peer review and cost estimate data provide some evidence regarding each of those issues.

I. Case Management

The study's case management statistics identify efficiency-related issues in connection with the delivery systems studied. Those issues are discussed in detail below:

Client intake

Case intake and referral occurred from November 1985 through October 1986. During that time, the project administrator scheduled 2,956 client intake interviews. Nearly 1,400 of those scheduled intake interview appointments were not kept, a no-show rate of 47 percent. This compares to BCLA's initial-intake-interview-appointment no-show rate for all cases, not just divorce, of 30 percent for 1985 and 25 percent for 1986. The decline in BCLA's intake interview no-show rate

from 1985 to 1986 combined with the study's comparatively high rate suggest that legal services clients seeking assistance with a divorce case are more likely to miss their scheduled intake appointments than legal services clients generally, but the underlying causes of both the study's and BCLA's no-show rates are unknown.

Client failure to pursue a case after referral

The figures in Table 3-1 show, by delivery mechanism and case type, the number of cases closed at 0 (after the initial study intake interview but before the initial attorney interview). These cases are not included in the 47 percent no-show rate for intake interviews referred to above. Voucher cases were closed at 0 if a client failed to pick up a voucher or if the client failed to select an attorney after picking up a voucher. Contract and staff program cases were closed at 0 whenever a contract or staff attorney returned the Case Service Report (CSR) form indicating that the client had failed to show up for the initial attorney interview. In effect, cases were closed at 0 if some initial intake occurred but the client never met with a lawyer.

The number of cases closed at 0 as a percentage of total case referrals was six percent for the staff attorney program, 13 percent for the contract mechanism and 33 percent for the

voucher mechanism.<sup>13</sup> These inter-mechanism differences are statistically significant, but their causes cannot be identified by the study. For example, it was not possible to tell whether the no-show rate in voucher cases resulted from access inconvenience; bothersome paperwork; misunderstood paperwork or confusion over paperwork; unfamiliarity with attorney selection; change of mind after reflection; considerations peculiar to clients receiving vouchers which caused them not to proceed; or some combination of the above.

Any future studies into delivery systems should include procedures for interviewing client no-shows and clients who fail to pursue a case after referral. To accomplish this, it is possible that clients will have to be told they are part of a study and then asked to consent to be interviewed later. Some data explaining the different failure to pursue rates for the mechanisms would contribute greatly to knowledge about client acceptance.

#### Case completion rates

The study identified significant inter-mechanism differences in case completion rates (see Table 3-2). Of all cases closed at some fraction greater than 0, the percentages closed via judicial resolution were 89 percent for vouchers,

---

<sup>13</sup>The project proposal of March 18, 1985 posed as the central test of the workability of the voucher mechanism: "Will eligible clients who are selected to participate in such a system actually choose to do so?" Apparently, 33 percent of the voucher recipients in this study chose not to do so.

80 percent for contracts and 51 percent for the staff attorney program. In addition, 75 percent of all fractionalized staff cases (those closed after at least some initial attorney-client contact but prior to decree) were closed at 1/4 (following the initial attorney interview but prior to the filing of any pleading), compared to 27 percent for contracts and 14 percent for vouchers. The percentages of all fractionalized cases closed by the three mechanisms at 3/4 were 71 percent for contracts, 73 percent for vouchers and 37 percent for the staff attorney program.

This evidence is consistent with expectations for results based on the greater economic incentive which private attorneys have to complete a case and to do so in a timely fashion.<sup>14</sup>

#### Case closure

When data collection ended in June 1987, some 20 months after case intake and referral began and eight months after those activities ended, the number of cases which remained open was substantially greater for the staff program than for either

---

<sup>14</sup>In the study, contract and voucher attorneys were paid according to what amounted to a sliding scale under which they received more for cases closed by decree than cases closed at some earlier stage.

The study assumed that clients regarded the judicial resolution of their divorce cases as their ultimate goal. The study did not attempt to determine whether merely seeing an attorney might have satisfied some of the client's needs or whether there might have been other unidentified but significant factors which affected the staff program's case closure results.

private attorney mechanism, as the following figures indicate (see also Table 3-1):

- Total study cases open in June 1987: 107.
- Staff cases open: 65 (61 percent of total open cases).
- Contract cases open: 23 (21 percent of total open cases).
- Voucher cases open: 19 (18 percent of total open cases).

Expressed as a percentage of net case referrals (gross case referrals minus the number of cases closed at 0), 25 percent of the staff program cases remained open in June 1987, compared to 10 percent for vouchers and seven percent for contracts. Similarly, of cases in which an attorney interview took place and which were not closed at 1/4, more than a third of all staff program cases were still open; comparable figures for contract and voucher cases are eight and 10 percent, respectively, and 40 percent of all contested cases were still open.

Consistent with this finding is the significantly greater amount of time which staff attorneys took to complete judicially resolved cases compared to private attorneys (see Table 3-3). For each of the case types handled by the staff program, average processing time per case, from initial interview to final decree, was more than 200 days. Average case processing times for the two private attorney mechanisms ranged from a low of 120 days for contract contested divorces with domestic violence to a high of 160 days for contract

contested divorces without domestic violence (see Table 3-3).<sup>15</sup>

#### Case classification

The case classification issue that arose in the study pertains primarily to the workability of compensated private attorney mechanisms rather than all legal services delivery systems. With most compensated private attorney delivery systems, the service fee paid will depend on the type of case to be handled. Accurate case classification, therefore, is critical to the cost of such models.

The study's original case management goal was 900 total cases referred out and closed by judicial decree. This number was to be divided equally among the nine case type/delivery mechanism categories. As Table 3-1 shows, while the study's total case referral goal was met, targeted numbers were not achieved in every case type/delivery mechanism category. In particular, projections of ECLA's annual volume of violence cases proved to be inaccurate.

Early in the study, an adjustment was made in the basis used by the project administrator to classify study cases as uncontested (Type A) or contested without violence (Type B).

---

<sup>15</sup>It is interesting to note that the average "attorney time" for the three voucher mechanism case types is inversely related to case complexity rather than directly related as one might expect.

During the first four or five weeks of client intake, the project administrator classified a case as Type A whenever she felt it appeared probable that the case would be uncontested (basing her judgments on her experience as a paralegal for BCLA's Divorce Section). Even though none of the cases which the administrator referred out as Type A were returned for reclassification as provided for by the study, the project director instructed her to change the basis of her classification of cases from a "probability" of being contested (or uncontested) to a "possibility" of such contest. That way, problems associated with reclassification could be kept to a minimum and the study's original design would not have to be altered in mid-course.

From both perspectives, the change was highly successful -- perhaps too successful. Only 21 cases in all were returned for reclassification during the study's 12 months of case intake and referral. In 20 of those cases, a child custody dispute developed, requiring reclassification, and in one case domestic violence occurred. It is possible, of course, that the study's low incidence of returned cases may be due to the project administrator's experience as a paralegal for BCLA's Divorce Section and her job skills, but it is also possible that some private attorneys reaped a "windfall"; that is, they were paid a Type B case fee for handling a case which turned out to be Type A. The possibility of such windfalls cannot be avoided with a voucher mechanism, but it can be factored into contract

price negotiations, especially if each contractor is hired to handle some cases of each type. This situation illustrates the unanticipated questions that arose as the study got underway that had to be resolved as data was being collected.

One other relevant statistic not reported in Table 3-1 is the number of cases which the project administrator classified as likely to involve a child custody dispute. These cases were not distributed among all three mechanisms, but rather were all retained by or referred back to the staff program.<sup>16</sup> Ninety-five, or 9.5 percent, of the study's 1,000 case referrals were so classified. When added to the 20 cases in which a child custody dispute developed after case referral, the total number of such cases comes to 115, or about 10 percent of all cases referred. These were quite likely the most complex and time-consuming divorce cases to handle, and

---

<sup>16</sup>It is unclear from the information provided by BCLA whether and to what extent the staff attorney who handled project cases was also responsible for child custody (Type D) cases. This is particularly important because there was only one attorney at BCLA handling all four types of cases (Cox, The San Antonio Voucher Study: A Progress Report, August 20, 1986, page 2). It is also unknown how many additional such cases were imposed on the BCLA staff as a result of this procedure. Voucher and contract attorneys were informed that no Type D cases would be referred to them and that they could refer back to BCLA any cases which turned into Type D cases. This knowledge on their part undoubtedly affected their willingness to participate in the project and the price for which they were willing to work. The requirement that BCLA handle Type D cases clearly imposed a cost and workload burden on the program which cannot be quantified by the study. It is also not possible to quantify the effect that handling Type D cases had on the staff's handling of other case types in the study.

their actual impact on the staff program was not measured in the study. In future studies, it would be advisable to account for these cases more directly.

## II. Peer Review

### Process

The study's peer review panel consisted of three attorneys in private practice in the San Antonio area, each certified in family law by the Texas Board of Legal Specialization.

Prior to evaluating the study's judicially resolved cases, the panel met and established procedural and substantive guidelines under which it would operate. The goals of the panel's procedural guidelines were twofold: First, the panel wanted to maximize consistency of grading by dividing all cases to be evaluated by case type and evaluating all cases of a particular type at one time. In all, six groups were formed -- one for each study case type with children and one for each type without children. Second, the panel wanted to assure random assignment of cases within each group among all three of its members. This was important because the number of cases to be reviewed required that each be evaluated by only one panelist, and random assignment eliminated the possibility of bias.<sup>17</sup>

---

<sup>17</sup>From time to time during the actual evaluation process, the entire panel did discuss problems which specific cases

The panel's grading scheme covering matters of substantive law called for evaluating every case in two ways: First, each case folder was reviewed to determine which items on a checklist of service dimensions were satisfied (see Appendix G). The checklist identified those service dimensions which the panel felt were basic to the handling of a Texas divorce case and assigned a specific number of points to each dimension, indicating its relative importance to overall service quality.<sup>18</sup> A percentage point score was computed for each case by dividing the number of points a case received by the total number of points it could have earned.<sup>19</sup>

It must be recognized that the criteria selected and the relative weights assigned to them affected the outcome of the quality review. For example, failure to obtain an enforceable

---

presented, but assignment of a final grade for each case was the responsibility of the reviewing panelist only.

<sup>18</sup>It should be noted that none of the attorneys handling cases were informed of the service dimensions upon which their case work would be judged, nor the relative weight that would be assigned to each dimension. As a result, if any delivery mechanism exhibited systematic substantive disagreements with the Quality Review Panel about relevant service dimensions or their relative weight, there would be an impact on that mechanism's total point score.

<sup>19</sup>When a service dimension did not apply to a particular case even though it did apply to the case group in general, the reviewing panelist marked "inappropriate" on the case evaluation sheet. If insufficient information was available to judge whether a service dimension was satisfied, the reviewing panelist marked "missing." The points assigned to any service dimension marked either "inappropriate" or "missing" were not included in the total number of points possible for that case.

child support order was given the highest weight of 30, while failure to specify visitation rights was given the lowest weight of 1. This relative weighing was developed by the panel without the participation of or review by attorneys experienced in contract or voucher delivery systems, clients or experts in poverty law. The panel members were selected on the basis of their recognized expertise as family law practitioners in the San Antonio area. They developed the review criteria for the study from their particular practice perspectives in an effort to define an appropriate standard of practice against which to measure the work of study attorneys.

Second, after reviewing a case folder and marking each service dimension as "adequate," "inadequate," "inappropriate" or "missing," the evaluator selected one of five possible professional review ratings (very good, good, average, poor or very poor) based on a subjective professional evaluation of the overall quality of service rendered. These ratings were quantified as follows: 5 = very good, 4 = good, 3 = average, 2 = poor, 1 = very poor (see Appendix G).

The panel pretested its grading system on a small sample of cases closed early in the study. Two questions were of primary concern to the panel: First, would all three panelists be able to apply the grading system consistently? Second, could the grading system be applied to all study cases? The results of the trial run answered both questions affirmatively.

The panel reviewed 462 divorce case folders.<sup>20</sup> Each folder contained an evaluation sheet (see Appendix H), a copy of the case decree (with the name of the attorney representing the study's client deleted to maintain the anonymity of the attorney and the delivery mechanism), a summary of the project administrator's initial intake interview and a completed case fact sheet containing the information which the panel said it needed to judge service quality. The folders were arranged in numerical order by case number within each case type group and divided among the three panelists on a rotational basis.

The study's peer review findings were analyzed in the context of the following four questions: 1) What quality of service was rendered in the study cases generally? 2) How did service quality differ between the study's three delivery mechanisms? 3) What service dimensions were most and least problematic among study cases generally? 4) How did the incidence of service deficiencies differ between the delivery mechanisms?<sup>21</sup>

---

<sup>20</sup>A total of 468 divorce cases were closed via judicial resolution. Three contract C cases, however, were closed by formal withdrawal of the attorney sometime after the case petition was filed but prior to the entering of the final decree. Therefore, they were not included in the study's quality review process. Judicial folders for two staff A cases could not be located at the Bexar County Courthouse, so they, too, were excluded from the quality review process. Finally, one voucher A case involved a paternity issue; thus, its judicial folder was closed to public scrutiny.

<sup>21</sup>Comparisons across case types within each delivery

It is important to remember that each case received two service quality grades: a percentage point score and a subjective professional review rating. The percentage point score indicates the percentage of total possible quality review points a case earned and the professional review score indicates the panel's subjective view of the overall quality of service rendered.

### Findings

Two factors influenced the conclusion which the study's Quality Review Panel reached concerning the overall quality of service rendered in study cases: the level of service quality on average and the variation in service quality from one case to another. Those results are presented in Tables 3-4 and 3-5.

The study cases on average earned 70 percent of all possible overall quality review points. The overall mean professional review rating of 2.82 for study cases was less than the 3.00 rating that the Quality Review Panel designated as "average." In view of these findings, the panel considered the quality of service rendered in study cases to be unsatisfactory. The low level and high variation of service

---

mechanism and between the study's three case types on average were complicated by possible attorney-related influences. Therefore, it is impossible to determine whether observed differences were due to case complexity or attorney-related influences or both. In view of this, neither intra-mechanism nor inter-case type differences are discussed in this report.

quality grades for all the study cases suggest that service quality may have been a serious problem regardless of delivery mechanism, at least in the judgement of the Quality Review Panel evaluating the study cases. Of the three mechanisms, staff program cases received the lowest mean percentage point score (60) and the lowest mean professional review rating (2.40). Voucher and contract cases received the same mean percentage point score (73), but the mean professional review scores differed, 3.07 for the voucher cases and 2.80 for the contract cases. As those scores indicate, none of the mechanisms performed better than barely above the "average" expected by the Quality Review Panel.

Table 3-6 illustrates how the delivery mechanisms scored for specific service deficiencies identified by the Quality Review Panel. Scores in Table 3-6 provided the basis for the quality review scores in Table 3-4. The various service deficiencies for which quality review points were deducted are listed in column 1 of Table 3-6. The number of points which the panel assigned to each service deficiency are presented in column 2 of Table 3-6, indicating how relatively serious the panel considered each deficiency to be. Finally, the percentages reported in columns 3 through 6 of Table 3-6 indicate the incidence of each service deficiency by delivery mechanism and for all study cases combined.

At first glance, some of the scores for all the mechanisms appear to be cause for particular concern. For example, in

almost 75 percent of all applicable cases, temporary orders were not prepared and filed. In more than 50 percent of applicable cases, a separate employer's order to withhold income was not prepared and filed. Social security numbers for each spouse were not included in more than 70 percent of all case decrees. Slightly fewer than 70 percent of all decrees failed to provide for the division of marital debts, and more than 80 percent failed to provide for the allocation of any tax liabilities. In any kind of legal matter, the facts of the case determine the specific steps that are appropriate for an attorney to take. The quality review checklist did not provide for a more in-depth evaluation of cases to determine the appropriateness of all the steps identified by the Quality Review Panel as potentially important.

Compared to the two private attorney mechanisms, the staff program received the poorest service quality grades in the following areas (see Table 3-6): lack of prompt filing of divorce petition, lack of prompt resolution of case, lack of prompt entry of judgment, failure to make record of final hearing, lack of temporary orders, inconsistencies within decree, lack of enforceable child support, lack of employer's order to withhold income, lack of division of debts and lack of allocation of tax liability. The voucher mechanism received the poorest service quality grades in the following areas: failure to make record of final hearing, lack of defined visitation rights, lack of defined duties of managing and

possessory conservator, inappropriate child support and lack of permanent injunction or protective order. The contract mechanism received the poorest service quality grades in the following areas: inadequate attorney time input, inappropriate format of decree, lack of social security number for spouses, lack of child support past 18 and lack of division of property.

### III. Service Cost Estimates

A principal objective of the study was to determine the relative cost-efficiency of the three delivery mechanisms tested. However, the study's findings are not conclusive on this issue because the study did not collect completely comparable cost data for all three delivery mechanisms and because relative cost rankings differ depending on which data estimates are used as the basis for comparison (see Tables 3-7, 3-8 and 3-9).

Hourly costs varied widely among and between the delivery mechanisms for judicially resolved cases (see Table 3-9). On this measure, the staff program was the least expensive for all types of cases except voucher attorneys in Type A cases. Contract attorneys were the most costly in each category of cases. In Type C cases, the contract attorney cost was 2.5 times the voucher attorney cost and four times the staff program cost.<sup>22</sup>

---

<sup>22</sup>Other study findings with regard to reported attorney

In the original study design, service costs per case closed for each of the two private attorney mechanisms were assumed to be equal to the attorney fee paid. Three factors influenced that fee: the type of case handled, the delivery mechanism and the status of the case at closure. The fees paid for judicially resolved voucher and contract cases are presented in Table 3-7.

Then, since staff program attorneys are not paid a fee per case as are private attorneys, an estimate of per case service costs was calculated for them that would have some comparative relationship to the fee-based service costs identified for the private providers. Two different estimates were calculated for comparison purposes (see Table 3-7). One is based on the staff attorney estimates of time spent in disposing of the 100 divorce cases in the study closed to judicial resolution by the staff program and the other is based on an attempt to allocate a pro rata portion of the BCLA total budget to the staff members engaged in handling these cases.

The time-based estimate for the staff program was calculated by multiplying reported time spent on each case by

---

hours for judicially resolved cases produced some interesting data (see Table 3-8), particularly the relatively high coefficients of variation (ratios of standard deviation to mean), the magnitude of differences in reported attorney hours on average across the study's delivery models for the same case type and the relatively low reported attorney hours on average for staff and contract Type C cases (contested divorces with domestic violence).

the appropriate hourly wages paid by BCLA: (attorney hours x attorney hourly wage) + (support staff hours x support staff hourly wage). The results were \$81 for Type A cases, \$90 for Type B cases and \$88 for Type C cases.

The budget-based estimate for the staff program was calculated in four steps on the basis of BCLA budget expenditure data and case closure statistics for the program's Divorce Section. First, the 1986 hourly wages for the section's attorney, paralegal and secretary were multiplied by 37.5 hours (BCLA's official work week) to obtain weekly wage estimates. Those estimates, in turn, were multiplied by 52 to obtain annual salary estimates.<sup>23</sup> Second, BCLA's annual budget figures show that employee fringe benefit expenditures amount to 21.7 percent of total wages paid, so the annual salary estimates were multiplied by 1.217 to obtain a total employee expense estimate for the Divorce Section. Third, total Divorce Section employee expenses were divided by total program employee expenses to determine what percentage of program non-personnel expenses to allocate to BCLA's Divorce Section. Fourth, employee expenses plus non-personnel expenses for the three staff members of BCLA's Divorce Section were divided by the total number of divorce cases closed via decree in 1986. The result was \$313 per case closed. This figure was

---

<sup>23</sup>Hourly rather than annual wage figures were requested, along with budget expenditure data, so that time-based estimates could be calculated.

used as an estimate for all three types of divorce cases in the study.

The time-based and budget-based formulas thus formulated produced quite different results (see Table 3-7). The budget-based estimates turned out to be three and four times greater than the time-based estimates, and they exceed every private attorney fee paid except one (for a judicially resolved contested divorce with domestic violence handled by a voucher attorney).

Further close analysis is hampered by the absence of data the significance of which could not be appreciated until after the study was completed.

For example, it may not be correct to assume that service cost per case closed in each of the private attorney mechanisms is equal to the attorney fee paid. The provision of legal services involves the expenditure of attorney, secretarial and paralegal time regardless of the delivery mechanism used. Determining the providers' cost of those legal services depends on the availability of accurate time-keeping records for those personnel. The Case Service Report (CSR) designed for the study inquired as to the amount of time spent by attorneys and support staff on each case.

No adjustment for overhead costs was included in the estimates for the three delivery mechanisms. While such an adjustment should be included in a calculation of the full cost of the program staff's time, the omission may be appropriate in

making comparisons between the staff program and voucher and contract mechanisms. The firms providing those services may have used marginal cost analysis (charging all overhead to other billed hours) to determine their fees for the study cases or they may have perceived themselves to be selling unused, or excess, time for which any fee would be better than none.<sup>24</sup>

The study was not designed in a way that would permit an estimate of overhead costs to be calculated separately for each mechanism. It is not known whether the fee-based per case service costs for the contract and voucher attorneys reflects their overall overhead and administrative costs. Also, the study did not determine whether the participating private attorneys felt their compensation was adequate to justify their continued participation in voucher mechanisms sponsored by BCLA.

Comparable cost must be considered in light of two distinct factors: first, the total cost to the service provider in each mechanism; and second, the purchaser of the provided services. In the study, the Legal Services Corporation provided the funds for all mechanisms. The LSC purchased the contract and voucher services from private attorneys and directly funded the services of the staff program through its regular funding of BCLA. The study did not attempt to determine whether the total cost of providing the services was covered by the fees

---

<sup>24</sup> See McIndoo and O'Steen, How to Make Greater Profits by Charging Lower Fees, videotape produced for the ABA Special Committee on the Delivery of Legal Services, 1988.

received. The voucher and contract attorneys' actual cost per hour of service included office overhead operating costs (unless marginal cost analysis was used) plus a profit element which, though absent in the staff program, is nevertheless a real cost to the contract or voucher providers in rendering the service. These costs would require separate accounting in the analysis to assure comparability between the three mechanisms. For this reason, it is inaccurate to conclude, as was at first thought in designing the study, that service costs per case closed for each of the study's two private attorney mechanisms are necessarily equal to the attorney fee paid. That is true only from the point of view of the part purchaser-part provider Legal Services Corporation.

No information was obtained on the service cost of the attorneys and support staff involved in the contract or voucher mechanisms, although an effort was made to supply the information for the staff program in the absence of any usual price for services rendered. Cost figures for the contract and voucher mechanisms also appear to have omitted administrative costs incurred by the Legal Services Corporation in processing contract attorney payments and to the Bexar County Bar Association in processing voucher attorney payments. Future studies in which relevant data is collected will be required before total cost of service of different systems can be compared with certainty. Another aspect of workability of these mechanisms -- that is, whether the participating

attorneys would again participate at the same fee levels or whether other attorneys could be found who would -- was not considered in the study.

A closer analysis of the time and budget-based cost estimates for the staff program also indicates the need for significant additional data. For example, with respect to the time-based estimate, the hourly wage used in the calculation effectively assumes that each of the 1,950 hours worked by Divorce Section personnel is "billable." On reflection, it is apparent that time should be subtracted in the calculation for such things as vacation, sick leave and administrative activities to determine an accurate hourly wage rate for "billable" time during the year.

Similar difficulties arise in the budget-based estimate. This estimate does not account for all time spent by the staff program's Divorce Section during the study on interviewing "no shows" and working on cases closed prior to final decrees or still pending at the end of the study's data collection period. Table 3-2 indicates that the staff program invested considerably more time in those cases than did the other two delivery mechanisms.<sup>23</sup> By its nature, the budget-based estimate assumes that the characteristics of both the 100 study

---

<sup>23</sup>Such cases constituted 68 percent of the total staff program cases in the study (189 of 279), compared to 46 percent of the voucher cases (152 of 328) and 36 percent of the contract cases (108 of 298).

cases handled by BCLA's Divorce Section and the 500 non-study cases handled by the divorce section during the same period were the same. However, that assumption is not justified, especially since a number of the non-study cases involved complicating custody issues. There is no data available from the study on the amount of time required to handle the non-study cases.

Because it is based on a percentage of the total BCLA budget, the budget-based estimate does not allow for costs to the staff program of client community education and similar services required by good practice and the ABA Standards for Providers of Civil Legal Services to the Poor. Also, the budget-based analysis is unable to distinguish among the three types of study cases in allocating service costs, although the time-based estimates for the staff program and data from the other two delivery mechanisms generally suggest that contested cases and cases involving violence foster high service costs. For these reasons, the single cost figure first used in the budget-based estimate now appears suspect.

Table 3-1

A Summary of Case Referrals and Closure by Case Type<sup>1</sup>

	Mechanism and Case Types									
	Contract			Voucher			Staff			Total
	A	B	C	A	B	C	A	B	C	
Gross Number of Cases Referred Out	105	112	81	116	124	88	96	106	77	905
Number of Cases Closed at 0	12	12	15	33	37	37	4	5	9	164
Net Number of Cases Referred Out	93	100	66	83	87	51	92	101	68	741
Number of Cases Closed	85	89	66	75	78	45	77	72	47	634
Number of Cases Open	8	11	0	8	9	6	15	29	21	107

<sup>1</sup>Case Type A = Uncontested Divorces

Case Type B = Contested Divorces without Domestic Violence

Case Type C = Contested Divorces with Domestic Violence

Table 3-2

Number of Cases Closed by Case Type and Fraction<sup>1</sup>  
(Case status as of June 30, 1987)

Case Type	Fractionalized Status of Case When Closed				Subtotal	No-Shows	Open	Total
	1/4	1/2	3/4	1				
<b>Contract Model</b>								
Type A	1	0	2	82	85	12	8	105
Type B	5	1	17	66	89	12	11	112
Type C	7	0	15	44	66	15	0	81
TOTAL	<u>13</u>	<u>1</u>	<u>34</u>	<u>192</u>	<u>240</u>	<u>39</u>	<u>19</u>	<u>298</u>
<b>Voucher Model</b>								
Type A	1	1	0	73	75	33	8	116
Type B	1	2	7	68	78	37	9	124
Type C	1	0	9	35	45	37	6	88
TOTAL	<u>3</u>	<u>3</u>	<u>16</u>	<u>176</u>	<u>198</u>	<u>107</u>	<u>23</u>	<u>328</u>
<b>Staff Model</b>								
Type A	27	9	1	40	77	4	15	96
Type B	26	3	6	37	72	5	29	106
Type C	19	1	4	23	47	9	21	77
TOTAL	<u>72</u>	<u>13</u>	<u>11</u>	<u>100</u>	<u>196</u>	<u>18</u>	<u>65</u>	<u>279</u>
GRAND TOTAL	<u>88</u>	<u>17</u>	<u>61</u>	<u>468</u>	<u>634</u>	<u>164</u>	<u>107</u>	<u>905</u>

<sup>1</sup>Case Type A = Uncontested Divorces  
Case Type B = Contested Divorces without Domestic Violence  
Case Type C = Contested Divorces with Domestic Violence

Table 3-3  
Case Processing Time by Case Type and Delivery Mechanism

Case Type <sup>1</sup>	Mean (and, Standard Deviation of) Number of Days It Took...		
	Project Administrator to Process Study Cases <sup>2</sup>	Clients to Select Attorneys <sup>3</sup>	Attorneys to Handle Study Cases
<b>Contract Mechanism</b>			
Type A	12 (10)	24 (32)	127 (43)
Type B	15 (8)	11 (7)	160 (98)
Type C	10 (7)	14 (11)	120 (66)
<b>Voucher Mechanism</b>			
Type A	29 (15)	10 (8)	155 (83)
Type B	32 (22)	14 (18)	138 (78)
Type C	26 (15)	10 (10)	128 (47)
<b>Staff Program</b>			
Type A	14 (8)	5 (3)	226 (90)
Type B	13 (10)	6 (4)	215 (70)
Type C	13 (10)	5 (2)	201 (57)

<sup>1</sup>Case Type A = Uncontested Divorces

Case Type B = Contested Divorces without Domestic Violence

Case Type C = Contested Divorces with Domestic Violence

<sup>2</sup>Calculated as the difference between the day on which the project administrator interviewed each client and the day on which the case was referred out. For voucher cases, the referral date is the day on which the client picked up his or her voucher. For the other two mechanisms, the referral date is the day on which the project administrator notified the client that his or her case had been accepted and that he or she was to contact a particular law office for service.

<sup>3</sup>Calculated as the difference between the case referral date and the date of the client's first interview with his or her attorney.

<sup>4</sup>Calculated as the difference between the date of the client's first interview with an attorney and the date on which the divorce decree was signed by a judge. These differences were calculated for petitioner cases only.

Table 3-4  
 Percentage of Quality Review Points Received  
 by Delivery Mechanism and Case Type<sup>1</sup>

Case Type <sup>2</sup>	Staff	Delivery Mechanism Voucher	Contract	All Delivery Mechansias Combined
A	.66 (.09) 38	.72 (.14) 73	.65 (.12) 82	.68 (.13) 193
B	.60 (.17) 37	.76 (.15) 67	.77 (.10) 66	.73 (.15) 170
C	.50 (.16) 23	.67 (.18) 35	.82 (.11) 41	.69 (.20) 99
All Case Types Combined	.60 (.15) 98	.73 (.16) 175	.73 (.13) 189	.70 (.15) 462

<sup>1</sup>The figures presented in this table are the mean (top), standard deviation (in parentheses) and number of cases evaluated (bottom).

<sup>2</sup>Case Type A = Uncontested Divorces  
 Case Type B = Contested Divorces without Domestic Violence  
 Case Type C = Contested Divorces with Domestic Violence

Table 3-5  
Professional Review Ratings by  
Delivery Mechanism and Case Type <sup>1</sup>

Case Type <sup>2</sup>	Staff	Delivery Mechanism Voucher	Contract	All Delivery Mechanisms Combined
A	2.68 (.62) 38	3.01 (.99) 73	2.26 (.68) 82	1.63 (.87) 193
B	2.24 (.89) 37	3.19 (.91) 67	2.98 (.71) 66	2.91 (.91) 170
C	2.17 (.78) 23	2.94 (1.14) 35	3.60 (.93) 40 <sup>3</sup>	3.03 (1.12) 98
All Case Types Combined	2.40 (.80) 98	3.07 (.99) 175	2.80 (.91) 188	2.82 (.95) 461

<sup>1</sup>The figures presented in this table are the mean (top), standard deviation (in parentheses) and number of cases evaluated (bottom). The quality ratings are based on a scale of 1 to 5, with 1 = very poor, 2 = poor, 3 = average, 4 = good, and 5 = very good.

<sup>2</sup>Case Type A = Uncontested Divorces  
Case Type B = Contested Divorces without Domestic Violence  
Case Type C = Contested Divorces with Domestic Violence

<sup>3</sup>An evaluator inadvertently omitted a quality rating for one of these cases.

Table 3-6

The Incidence of Service Deficiencies by Delivery Mechanism<sup>1</sup>  
(By percentage of cases handled by delivery mechanism)

Service Deficiency	Relative Importance of Each Service Deficiency <sup>2</sup>	Delivery Mechanisms			All Mechanisms Combined
		Staff	Vouchers	Contracts	
1. Lack of prompt filing of divorce petition	1-3	89%	47%	31%	49%
2. Lack of prompt resolution of case	1-3	42	33	34	35
3. Lack of prompt entry of judgement	1-3	69	16	25	31
4. Inadequate attorney time input	3	31	6	32	22
5. Failure to make record of final hearing	4	26	29	19	24
6. Lack of temporary orders	5 or 10	88	66	71	73
7. Inappropriate format of decree	2	8	5	31	16
8. Inconsistencies within decree	1	40	20	30	28
9. Lack of social security number for spouses	4	71	58	82	71
10. Lack of defined visitation rights	1	7	16	6	10
11. Lack of defined duties of managing and possessory conservator	5	2	6	1	3
12. Lack of enforceable child support	30	17	8	8	10

Table 3-6 (continued)

Service Deficiency	Relative Importance of Each Service Deficiency <sup>1</sup>	Delivery Mechanisms			All Mechanism Combined
		Staff	Vouchers	Contracts	
13. Lack of employer's order to withhold income	10	93%	58%	38%	57%
14. Inappropriate child support	10	— <sup>3</sup>	15	6	— <sup>3</sup>
15. Lack of child support past age 18	5	6	29	61	37
16. Lack of division of property	4	3	3	8	5
17. Lack of division of debts	4	87	70	59	69
18. Lack of allocation of tax liability	4	98	87	67	81
19. Lack of permanent injunction or protective order	20	57	60	24	44

<sup>1</sup>The percentages reported in this table were calculated by dividing the number of cases with the service deficiency by the number of cases for which the service dimension was applicable.

<sup>2</sup>The figures reported in this column are the number of points which the peer review panel's grading scheme assigned to each service deficiency, then indicating its relative importance to overall service quality.

<sup>3</sup>Case percentages are not given for the staff program because in the majority of staff cases the Peer Review Panel had insufficient information to judge the appropriateness of the child support amounts specified in the case decrees.

Table 3-7

Service Costs Per Case Closed Via Decree by Delivery  
Mechanism and Case Type

Case Type <sup>1</sup>	Staff Time-Based Estimates	Staff Budget-Based Estimate	Delivery Vouchers	Mechansims Contracts
A	\$81	\$313	\$120	\$101
B	90	313	280	225
C	88	313	360	265

<sup>1</sup>Case Type A = Uncontested Divorces

Case Type B = Contested Divorces without Domestic Violence

Case Type C = Contested Divorces with Domestic Violence

Table 3-8  
Reported Attorney Hours for Judicially Resolved Cases<sup>1</sup>

Case Type <sup>2</sup>	Staff	Delivery Mechanism Vouchers	Contracts
A	2.70 (.67) 40	4.51 (2.37) 73	1.67 (.55) 82
B	3.16 (.83) 37	6.24 (3.08) 68	4.83 (1.67) 66
C	2.96 (.96) 23	7.27 (3.88) 35	2.05 (1.15) 41

<sup>1</sup> The figures presented in this table are the mean, standard deviation (in parentheses), and number of judicially resolved cases.

<sup>2</sup> Case Type A = Uncontested Divorces  
Case Type B = Contested Divorces without Domestic Violence  
Case Type C = Contested Divorces with Domestic Violence

Table 3-9

Hourly Costs Per Mechanism Per Case Type for  
Judicially Resolved Cases

Based on mean attorney-reported time as shown in Tables 3-7 and 3-8

Case Type	Staff	Mechanism Voucher	Contract
A	\$30	\$24	\$60
B	28	45	47
C	30	50	129

## CHAPTER 4

## CONCLUSIONS AND RECOMMENDATIONS

The major purposes of the study were to determine whether the voucher mechanism would work in practice alongside other existing delivery mechanisms and to evaluate quality effectiveness and cost efficiency of all three mechanisms: vouchers, competitive-bid contracts and a staff attorney program.

Unfortunately but inevitably, given the study's pilot nature, many questions were answered only partially or not at all. Definitive answers to the primary questions the study raises must await further study. However, the study did produce significant preliminary data that helps identify key issues concerning compensated mechanisms that merit such follow-up investigation.

First, the study provides interesting evidence regarding the performance of attorneys providing legal services to the poor. The work of the Quality Review Panel here, pursuant to study design, seems to confirm the utility of external peer review. However, the lack of involvement by attorneys experienced in contract or voucher systems, clients or experts in poverty law in selecting the criteria or determining the weights assigned to the criteria require caution in interpreting the results of the panel's work. It seems

probable that a local legal services program would find external peer review by local attorneys helpful in identifying areas in which the quality of program work could be improved when that peer review is based on criteria which reflect the programs' priorities and the needs of their clients.

Second, as to workability of the voucher mechanism, the study demonstrated that vouchers, when limited to representation in non-complex domestic relations cases, can be used, but the fact that more than a third of the clients directly assigned to voucher attorneys in the study did not pursue their cases raises serious questions about the effective workability of this delivery mechanism. The study did not examine any issues regarding the client choice features of the voucher mechanism or any possible price or quality effects that might arise from competition among attorneys for vouchers. Moreover, whether voucher attorneys would continue over time to accept vouchers for legal services that are to them uneconomic was not studied and remains unknown. The same uncertainty applies to the contract attorneys participating in the study.

Third, as to quality effectiveness, the Quality Review Panel in the study was organized appropriately and operated effectively. However, its results were perhaps affected by the fact that it was not formed until several months after the beginning of case acceptance and referral. The Quality Review Panel's findings on the work of all three mechanisms are troubling. The level of service delivery for poor persons in

many of the cases handled by all three delivery mechanisms was not up to a standard identified by the panel as acceptable. To confirm this apparent general deficiency, and to identify the reasons for it, will require further study.

Fourth, as to cost efficiency, efforts to determine the comparative cost of service of the three mechanisms largely failed because the study did not capture the full economic costs of each mechanism in a way that allowed direct comparisons of those costs. Internal cost data for the voucher and contract mechanisms was essential to compare internal cost data for the staff program. It should be remembered that the amount of the payments under the contracts and for the vouchers were accepted by the attorneys with the explicit understanding that, if a case became complex, it would revert back to the staff program. This may have affected the willingness of the private bar to participate at the prices paid. This data can readily be made available and analyzed more clearly on a comparative basis in future studies.

No policy recommendations should be made solely on the basis of the San Antonio study since it is clear that additional "experimental" (rather than demonstration) research on the relative cost efficiency and quality effectiveness of compensated private attorney mechanisms and the staff attorney system is needed to answer the questions raised by the study's results. In those future studies, efforts should be made to identify the most cost-efficient and highest quality legal

services programs in the country to compare their performance against that of voucher and contract delivery systems. Any future studies should include a workable assessment of client satisfaction and perspectives of participating attorneys as to the viability of continued involvement. If possible, any future study should include San Antonio as well as other geographic sites. San Antonio should be included to examine the workability of compensated private attorney mechanisms over time while other geographic sites are examined to test the applicability of this study's findings to other legal services programs. Consideration should also be given in future studies to including a pro bono component and to studying the impact that paying for simple divorce cases such as those studied here might have on the current ability to often have those cases handled at no fee by pro bono attorneys or through self-representation with the assistance of self-help clinics, for example.

In sum, the findings and experience of the study show that further research must be conducted on ways to improve both the amount and quality of legal services to the poor by all delivery systems.

## APPENDICES

## APPENDIX A

## Biographical Information on Steven R. Cox

## STEVEN R. COX

## EDUCATIONAL BACKGROUND:

Degree	University	Date	Major
B.S.	University of Wisconsin	June 1966	Economics
M.A.	University of Michigan	April 1968	Economics
Ph.D.	University of Michigan	January 1971	Economics

## WORK EXPERIENCE:

August 1975 - present	Associate Professor of Economics, Arizona State University
January 1978 - August 1978	Special Assistant to the Chief of the Antitrust Division of the Arizona Attorney General's Office (on half-time leave from Arizona State University)
August 1973 - August 1974	Economist, Bureau of Economics, Federal Trade Commission, Washington, D.C. (on full-time leave from Arizona State University)
August 1970 - August 1975	Assistant Professor of Economics, Arizona State University

## PROFESSIONAL AND HONORARY SOCIETIES:

American Economic Association  
Law and Society Association  
Faculty Associate Program of the Danforth Foundation  
Phi Kappa Phi

## AREAS OF INTEREST:

Industrial Organization  
Antitrust Policy  
Economics of Advertising  
The Legal Services Industry

## COURSE TAUGHT:

Macro and Microeconomic Principles (lower division undergraduate)  
Government and Business (upper division undergraduate)  
Contemporary Microeconomic Issues (upper division undergraduate)  
Industrial Organization and Antitrust Policy (graduate)  
Managerial Economics (graduate)

## JOURNAL EDITED:

Review of Industrial Organization, editorship began September 1987.

## PUBLICATIONS AND PAPERS

## Articles Published:

- "The New Game Plan and Old Problems," Arizona Business 16 (November 1971), pp. 3-9.
- "Executive Compensation, Firm Sales, and Profitability," Intermountain Economic Review 4 (Spring 1973), pp. 29-39 (with D. Shauger).
- "Inflation and Business Pricing Practices, 1964-69," Arizona Business 20 (June/July 1973), pp. 3-8 (with P. Luckhardt).
- "The Poor, Near-Poor and Non-Poor of Phoenix," Arizona Business 20 (October 1973), pp. 10-16 (with J. Zelenski).
- "An Industrial Performance Evaluation Experiment," Journal of Industrial Economics 22 (March 1974), pp. 199-214.
- "Transaction vs. List Price Data: A Comment on Testing the Administered Price Hypothesis," Industrial Organization Review 1 (1973), pp. 210-15.
- "Computer Assisted Instruction and Student Performance in Macroeconomic Principles," Journal of Economic Education 6 (Fall 1974), pp. 29-37.
- "Antitrust Policy Planning and Industry Performance Evaluations," Antitrust Bulletin 19 (Fall 1974), pp. 531-41.
- "Why Eradicating Urban Poverty Requires a Long Term Multi-Program 'War,'" The American Journal of Economics and Sociology 34 (July 1975), pp. 249-66.
- "A Case for Government Intervention in the Information Marketplace," Industrial Organization Review 4 (1976), pp. 105-111.
- "Industrial Organization Research and the Academic Economist," Industrial Organization Review 4 (1976), pp. 83-87 (with D. Penn).
- "The Synthetic Household Detergent Industry," Nebraska Journal of Economics and Business 15 (Summer 1976), pp. 41-58.
- "Firm Market Share, Advertising, and Profitability," Intermountain Economic Review 7 (Spring 1976), pp. 34-41 (with J. Kiholm).
- "Increasing Competition in the Computer Industry," Arizona Business 23 (August/September 1976), pp. 17-22 (with D. Bartek and R. Riedesel).

- "On Eradicating Urban Poverty (Reply)," The American Journal of Economics and Sociology 36 (January 1977), pp. 99-104.
- "The Long Run Problem of Financing the Social Security System," The American Journal of Economics and Sociology 37 (October 1978), pp. 397-410.
- "Legal Service Pricing and Advertising--the Phoenix Lawyers Survey," Arizona Bar Journal 14 (May 1979), pp. 28-37 (with W.C. Canby, Jr. and A.C. DeSerpa).
- "Legal Service Pricing and Advertising in Phoenix," Arizona Business 26 (June/July 1979), pp. 10-16 (with W.C. Canby, Jr. and A.C. DeSerpa).
- "Consumer Information and the Pricing of Legal Services," Journal of Industrial Economics 30 (March 1982), pp. 305-18 (with A.C. DeSerpa and W.C. Canby, Jr.).
- "Some Evidence on the Early Price Effects of Attorney Advertising in the U.S.A.," Journal of Advertising: The Quarterly Review of Marketing Communications 1 (October/December 1982), pp. 321-31.
- "The Impact of Comparative Product Ingredient Information," The Journal of Public Policy and Marketing 2 (1983), pp. 57-69 (with Kenneth A. Coney and Peter F. Ruppe).
- "The Pricing of Legal Services: A Contractual Solution to the Problem of Bilateral Opportunism," The Journal of Legal Studies 14 (1985), pp. 167-183 (with Janet K. Smith).
- "Attorney Advertising and the Quality of Routine Legal Services," Review of Industrial Organization, Volume 2, November 4, pp. 340-354 (with John R. Schroeter and Scott L. Smith).
- "Advertising and Competition in Routine Legal Services Markets: An Empirical Investigation," The Journal of Industrial Economics (September 1987), pp. 49-60 (with John R. Schroeter and Scott L. Smith).
- "A Case for Government Intervention in the Information Marketplace," Industrial Organization Review 4 (1976), pp. 105-111.
- "Industrial Organization Research and the Academic Economist," Industrial Organization Review 4 (1976), pp. 83-87 (with D. Penn).
- "The Synthetic Household Detergent Industry," Nebraska Journal of Economics and Business 15 (Summer 1976), pp. 41-58.
- "Firm Market Share, Advertising, and Profitability," Intermountain Economic Review 7 (Spring 1976), pp. 34-41 (with J. Kiholm).

- "Increasing Competition in the Computer Industry," Arizona Business 23 (August/September 1976), pp. 17-22 (with D. Bartek and R. Riedesel).
- "On Eradicating Urban Poverty (Reply)," The American Journal of Economics and Sociology 36 (January 1977), pp. 99-104.
- "The Long Run Problem of Financing the Social Security System," The American Journal of Economics and Sociology 37 (October 1978), pp. 397-410.
- "Legal Service Pricing and Advertising--the Phoenix Lawyers Survey," Arizona Bar Journal 14 (May 1979), pp. 28-37 (with W.C. Canby, Jr. and A.C. DeSerpa).
- "Consumer Information and the Pricing of Legal Services," Journal of Industrial Economics 30 (March 1982), pp. 305-18 (with A.C. DeSerpa and W.C. Canby, Jr.).
- "Some Evidence on the Early Price Effects of Attorney Advertising in the USA," Journal of Advertising: The Quarterly Review of Marketing Communications 1 (October/December 1982), pp. 321-31.
- "The Impact of Comparative Product Ingredient Information," The Journal of Public Policy Marketing 2 (1983), pp. 57-69 (with Kenneth A. Coney and Peter F. Ruppe).
- "The Pricing of Legal Services: A Contractual Solution to the Problem of Bilateral Opportunism," The Journal of Legal Studies 14 (1985), pp. 167-183 (with Janet K. Smith).
- "Attorney Advertising and the Quality of Routine Legal Services," Review of Industrial Organization, Volume 2, November 4, pp. 340-354 (with John R. Schroeter and Scott L. Smith).
- "Advertising and Competition in Routine Legal Services Markets: An Empirical Investigation," The Journal of Industrial Economics (September 1987), pp. 49-60 (with John R. Schroeter and Scott L. Smith).
- "Competition and Advertising Restrictions among Professionals: The Bates Case," in The Antitrust Revolution (Lawrence White and John Kwoka, editors), forthcoming.

Book Published:

Current Economic Problems: A Book of Readings (Homewood: Richard D. Irwin, 1972) (with R. Brandis).

Papers in Proceedings:

"Some Reflections on the Possible Use and Nature of Advertising by Health Care Professionals," Proceedings of a National Symposium on Advertising by Health Care Professionals in the 80's, Federal Trade Commission, December 1985, pp. 63-73.

**Papers Presented at Professional Meetings:**

- "Executive Compensation and Firm Performance," Rocky Mountain Social Science Association Meetings, April 1972.
- "An Experiment with Computer Games in Macroeconomic Principles," Western Economic Association Meetings, April 1972.
- "The Poor, Near-Poor, and Non-Poor: An Economic Contrast," Rocky Mountain Social Science Association Meetings, April 1973.
- "Antitrust Policy Planning," Midwest Economic Association Meetings, April 1974.
- "Consumer Product Quality Comparison Information," Southern Economic Association Meeting, November 1974.
- "Consumer Information and Competition in the Detergent Industry," Midwest Economic Association Meetings, April 1975.
- "The Synthetic Organic Household Detergent Industry," Atlantic Economic Society, September 1975.
- "Advertising and Market Structure: An Analysis of Covariance," Atlantic Economic Society, October 1976.
- "Legal Service Pricing and Advertising: Some Preliminary Survey Results," Southern Economic Association Meetings, November 1978.
- "The Price Effects of Attorney Advertising Regulations," Law and Society Meetings, June 1982.
- "The Pricing of Legal Services: A Contractual Solution to the Problem of Bilateral Opportunism," American Economic Association Meeting, December 1983 (with J. K. Smith).
- "The Effects of the Advent of Self-Help Law on Legal Services Markets," Law and Society meetings, June 1987.

**GRANTS RECEIVED:**

- "A Pilot Study of the Effects of Attorney Advertising on Legal Service Pricing," National Science Foundation, Spring 1978, \$51,046.
- "The Market Effects of Attorney Advertising," National Science Foundation, Spring 1980, \$192,000.
- "An Economic Analysis of Two Alternative Voucher Plans for Delivering Legal Services to the Low Income," American Bar Association, Fall 1982, \$2,000.
- "Past Experiences with Voucher and Prepaid Plans: A Literature Review," American Bar Association, Summer 1983, \$10,000.

"A Proposal to Study the Cost and Quality Effectiveness of Three Alternative Legal Service Delivery Systems," American Bar Association, Spring 1984, \$30,000.

"Problems Associated with the Use of Self-Help Law Materials," American Bar Association, Fall 1984, \$12,000.

"Self-Help Law: Its Many Perspectives," American Bar Association, Fall 1985, \$45,000.

"A Comparison of the Cost and Quality Effectiveness of Three Alternative Legal Service Delivery Systems," American Bar Association and Legal Services Corporation, Fall 1985, \$267,000.

A report has been written for each of the above listed Research Grants, with the exception of the last one which is currently being written.

**CONSULTING:**

Arizona Attorney General's Office  
Federal Trade Commission, Bureau of Consumer Protection  
Federal Trade Commission, Cleveland Regional Office  
American Bar Association

APPENDIX B

Voucher-Related Materials

VOUCHER CLIENT INFORMATION SHEET

IT IS IMPORTANT YOU KNOW THAT:

1. Your legal service voucher WILL pay all of your attorney's fee.
2. Only attorneys on the San Antonio Voucher Panel list have agreed in advance to accept your case. Other attorneys may or may not help you with your divorce.
3. You WILL have to pay some court costs. They should not be more than \$44. Your attorney will explain these costs to you.

You should take special care in picking an attorney to help you. You may want to talk to a number of attorneys before deciding on one to help you.

Please give your voucher to your attorney at your first meeting. He/she will return the attached postcard to Ms. Terry Workman at Legal Aid. That way we at Legal Aid will learn whom you picked to help you with your divorce.

IT IS IMPORTANT THAT YOU TELL YOUR ATTORNEY AND MS. TERRY WORKMAN:

1. if you decide to drop your case; or
2. if you change your address or phone number.

Ms. Terry Workman may be reached at the Legal Aid offices. Call 227-0111.

Please keep all appointments with your attorney and others at his/her office. They will be able to help you most if you cooperate with them.

INFORMACION PARA CLIENTES SOBRE EL COMPROBANTE

ES IMPORTANTE QUE USTED SEPA QUE:

1. Su comprobante de servicio legal SI PAGARA todos los gastos de su abogado.
2. Solo abogados en la lista de abogados del Comprobante de San Antonio (San Antonio Voucher Panel) se han puesto de acuerdo en anticipado con aceptar su pleito. No se puede asegurar que otros abogados acepten su pleito de divorcio.
3. USTED tendra que pagar algunos gastos de la corte. No deben llegar a mas de \$44. Su abogado le explicara los gastos.

Se debe pensar bien al escoger un abogado que le ayude. Usted querra hablar con varios abogados antes de seleccionar uno que le ayude.

Favor de entregar el comprobante a su abogado en la primera reunion. El devolvera a la tarjeta postal incluida a la Sra Terry Workman de Legal Aid. De esta manera nosotros de Legal Aid sabremos el nombre del abogado que escogio para ayudarle con el pleito de divorcio.

ES IMPORTANTE QUE USTED AVISE A SU ABOGADO Y A LA SRA TERRY WORKMAN:

1. si decide dejar el pleito; o
2. si cambia de direccion o telefono.

Puede ponerse en contacto con la Sra Terry Workman en las oficinas de Legal Aid. Llame al 227-0111.

Favor de cumplir con todas las citas que hace con usted su abogado y otros de su oficina. Ellos podran ayudarle mas si usted se esfuerza a cooperar con ellos.

VOUCHER ATTORNEY INFORMATION SHEET  
 DIVORCE CASE TYPE A - UNCONTESTED

COMPLETE AND RETURN POSTCARD UPON ACCEPTANCE OF CASE.

CHANGE IN CLIENT'S STATUS

Client met the income eligibility requirements of Bexar County Legal Aid Association when this voucher was issued. If you learn of a change in the client's indigent status at any time, please notify Ms. Terry Workman at 227-0111.

ATTORNEY OBLIGATIONS

Voucher reimbursement is subject to the case fractionalization schedule (on back of page). Amount to be paid to attorney will be the appropriate case fraction times the maximum value of this voucher. Once a voucher case is accepted, attorney agrees to see the case to its completion (unless a child custody dispute develops, in which event attorney is to notify Ms. Terry Workman). Also, attorney agrees to accept voucher reimbursement as PAYMENT IN FULL of attorney's fees due for legal service rendered in this case.

COURT COSTS

Client will pay court costs. The following arrangement has been worked out with the District Clerk for all Legal Aid clients: a) client will pay \$44 District Clerk fee if financially able; b) a pauper's oath will be signed to cover remaining court costs. This voucher will constitute proof of client's indigent status. In the event client is unable to pay any court costs, s(he) will sign a pauper's oath to cover all court costs.

SUBMISSION OF VOUCHERS FOR PAYMENT

Upon completion of case activity, the case service report form attached and the original copy of the voucher must be completed and sent to:

Ms. Terry Workman  
 Bexar County Legal Aid Association  
 434 S. Main Avenue, Suite 300  
 San Antonio, TX 78204

PAYMENT CHECKS

Payment will be issued within 10 working days after the completed case service report form and voucher is received.

## CASE FRACTIONALIZATION SCHEDULE

- 1) .25 - a case closed after the initial client interview and counseling as to available legal and social options;
- 2) .50 - a case closed after the initial client interview leading to the filing of the initial pleading;
- 3) .75 - a case closed after the filing of the initial pleading and additional work, including work with counseling and social services agencies, or after the withdrawal of court filings upon additional client consultation;
- 4) 1.00 - a case closed through judicial resolution.

Number \_\_\_\_\_

A LEGAL SERVICE VOUCHER

DIVORCE CASE TYPE C - CONTESTED WITH VIOLENCE

Good for legal service rendered in connection with the contested divorce with domestic violence case of the client whose name and signature appear below.

This voucher is not transferable to another person or for another case.

See attorney information sheet attached for voucher instructions and terms.

Case must be opened within 30 days of date of client signature in order for voucher to be valid.

Maximum value of voucher is THREE HUNDRED SIXTY DOLLARS (\$360)

Questions: Contact Ms. Terry Workman, Bexar County Legal Aid Association,  
434 S. Main Avenue, Suite 300, San Antonio, TX 78204  
(512) 227-0111

Client Name	Attorney Name and State Bar Number
Client Signature	Attorney Signature
Date	Street Address
	City, State ZIP
	Telephone
	Date

ORIGINAL  
84

## APPENDIX C

## Case Service Report Form

## CASE SERVICE REPORT FORM

To Be Completed by Project Supervisor

- 1) Client Identification Number \_\_\_\_\_
- 2) Law Firm Code \_\_\_\_\_
- 3) Type of Case \_\_\_\_\_ (Code Number)
  - 161 - Uncontested Divorce
  - 164 - Contested Divorce with No Domestic Violence
  - 166 - Contested Divorce with Domestic Violence
- 4) Referral Date \_\_\_\_/\_\_\_\_/\_\_\_\_ (Month/Day/Year)

## Client Background Questions

- 5) Age of client \_\_\_\_\_ (Years)
- 6) Sex of client \_\_\_\_\_ Male \_\_\_\_\_ Female
- 7) Racial background of client
  - \_\_\_\_\_ White (Non-Hispanic) \_\_\_\_\_ White (Hispanic)
  - \_\_\_\_\_ Black \_\_\_\_\_ American Indian (Native American)
  - \_\_\_\_\_ Asian (Oriental) \_\_\_\_\_ Other (Please Specify: \_\_\_\_\_)
- 8) Primary spoken language of client
  - \_\_\_\_\_ English \_\_\_\_\_ Spanish \_\_\_\_\_ Other (Please Specify: \_\_\_\_\_)
- 9) Is client physically handicapped?
  - \_\_\_\_\_ Yes
  - \_\_\_\_\_ No
- 10) Residence of client: City \_\_\_\_\_  
County \_\_\_\_\_
- 11) Has client ever sought assistance from a legal aid office in the past?
  - \_\_\_\_\_ Yes (Go to Question 12)
  - \_\_\_\_\_ No (This completes the project supervisor's part of the form.)
- 12) Approximately how many times has client had any case handled by a legal aid office in the past?  
\_\_\_\_\_ (Number of Cases Handled)

To Be Completed by Attending Attorney

- 13) Name of Attorney \_\_\_\_\_
- 14) Date Case Opened (i.e., first interview with client) \_\_\_\_\_
- 15) Date Case Closed \_\_\_\_\_ (Month/Day/Year)
- 16) Case Fractionalization \_\_\_\_\_ (Code Number) - See Information on Back
- 17) Please estimate as best you can the amount of attorney and staff time (to within 1/4 hour increments) spent on this case:
 

Worker	Hours
Attorney	_____
Secretary	_____
Paralegal(s)	_____
Receptionist	_____
Other (Please Specify: _____)	_____
- 18) Amount of Court costs paid by client \$ \_\_\_\_\_

**A Case Fractionalization System for the  
San Antonio Voucher Study**

A divorce case may be closed at any number of different levels of development. For the purposes of the San Antonio Voucher Study, a four part case fractionalization.

Uncontested divorce cases are to be fractionalized according to the following schedule:

- 1) .25 = a case closed after the initial client interview;
- 2) .50 = a case closed after the initial client interview leading to the filing of the initial pleading;
- 3) .75 = a case closed after any hearings are held and/or the withdrawal of court filings upon additional client consultation;
- 4) 1.00 = a case closed through judicial resolution.

Contested divorces with no domestic violence are to be fractionalized according to the following schedule:

- 1) .25 = a case closed after the initial client interview;
- 2) .50 = a case closed after the initial client interview leading to the filing of the initial pleading;
- 3) .75 = a case closed after the filing of the initial pleading and additional work, or after the withdrawal of court filings upon additional client consultation;
- 4) 1.00 = a case closed through judicial resolution.

Contested divorces with domestic violence are to be fractionalized according to the following schedule:

- 1) .25 = a case closed after the initial client interview and counseling as to available legal and social options;
- 2) .50 = a case closed after the initial client interview leading to the filing of the initial pleading;
- 3) .75 = a case closed after the filing of the initial pleading and additional work, including work with counseling and social services agencies, or after the withdrawal of court filings upon additional client consultation;
- 4) 1.00 = a case closed through judicial resolution.

## APPENDIX D

## Client Satisfaction Survey Questionnaires

Voucher Cases

## A Client Survey

Dear Client:

Recently, an attorney in private practice helped you with your divorce. Now we would like you to tell us how you feel about the service you received.

Please take a few minutes to answer the questions in this survey. Your feelings about the kind of legal service you received are very important. Your answers will help us make sure that all clients of legal aid receive good service.

When you finish, please mail your answers to us. We will keep them private. Use the envelope provided. It is addressed and needs no stamps.

Call me at 227-0111 if you have any questions or need help in answering our questions.

Thank you for your help.

Sincerely yours,

Terry Workman  
Project Supervisor

## A Client Survey

1. Who helped you with your divorce?

(Name)

 I do not recall.

2. Did you have any problem seeing or talking to your attorney or anyone else at Legal Aid when you tried to reach them?

 Yes (Please explain: \_\_\_\_\_) No

3. About how many times did you talk with anyone at your attorney's office about your divorce?

\_\_\_\_\_ (Number of times)

---

The next few questions ask how you feel about the way your attorney handled your divorce case.

---

4. How satisfied are you that your attorney kept information about your divorce private?

 Very satisfied  
 Satisfied  
 No strong feelings  
 Dissatisfied  
 Very dissatisfied

5. How satisfied are you that your attorney treated you with respect?

 Very satisfied  
 Satisfied  
 No strong feelings  
 Dissatisfied  
 Very dissatisfied

PLEASE TURN TO NEXT PAGE

6. How satisfied are you that your opinions were important to your attorney?
- Very satisfied
- Satisfied
- No strong feelings
- Dissatisfied
- Very dissatisfied
7. How satisfied are you with the quality of service you received?
- Very satisfied
- Satisfied
- No strong feelings
- Dissatisfied
- Very dissatisfied
8. How satisfied are you with the way your divorce case turned out?
- Very satisfied
- Satisfied
- No strong feelings
- Dissatisfied
- Very dissatisfied
9. Would you pick this attorney again to help you with a legal problem?
- Yes, even if I had to pay for part or all of the help.
- Yes, if someone else paid for it.
- Probably not even if the help were free.
- Definitely not.
10. Please tell us why you would or would not pick this attorney again for legal help.
- 
- 
- 

THANK YOU VERY MUCH FOR YOUR HELP

## CUESTIONARIO PARA CLIENTES

Estimado Cliente:

Recientemente, un abogado de la Asociación de Ayuda Legal del Condado Bexar le ayudo a usted con su divorcio. Ahora, quisieramos que usted nos contara sus reacciones al servicio que recibio.

Agradecemos su ayuda en contestar las preguntas de este cuestionario. Sus sentimientos respecto a la clase de servicio legal que recibio son muy importantes. Sus respuestas nos ayudaran a asegurar que todos los clientes de ayuda legal reciban buen servicio.

Cuando usted termina, favor de mandarnos las respuestas. Las guardaremos confidenciales. Sirvase usar el sobre incluido. Ya tiene la direccion y no necesita estampillas.

Si tiene preguntas o necesita ayuda en contestar nuestras preguntas, llame usted al 227-00111.

Gracias por su ayuda.

Muy sinceramente,

Terry Workman  
Supervisora del proyecto



10. Que tan satisfecho/a esta usted con la calidad de servicio que recibio?

- Muy satisfecho/a
- Satisfecho/a
- No tengo opinion (Me da igual)
- Descontento/a
- Muy descontento/a

11. Que tan satisfecho/a esta usted con el resultado de su pleito de divorcio?

- Muy satisfecho/a
- Satisfecho/a
- No tengo opinion (Me da igual)
- Descontento/a
- Muy descontento/a

12. Escogeria usted de nuevo a este abogado para ayudarlo/a con un problema legal?

- Si, Aunque tuviera que pagar parte o todos los gastos.
- Si, si fuera gratis.
- Pienso que no, aunque la ayuda fuera gratis.
- No, en absoluto.

13. Favor de decirnos por que (o por que no) escogeria de nuevo este abogado para ayuda legal.

---



---



---

MUCHAS GRACIAS POR SU AYUDA

## APPENDIX E

Case Fact Sheet  
and Supplemental Case Service Report

## CASE FACT SHEET

Case Identification Number: \_\_\_\_\_

- 1) The client in this case was the:
  - a) petitioner \_\_\_\_\_
  - b) respondent \_\_\_\_\_
  
- 2) The client is employed by:  
\_\_\_\_\_ (Name of client's employer)
  
- 3) The client's monthly income is:  
\_\_\_\_\_ (Dollars of income per month)
  
- 4) The spouse is employed by:  
\_\_\_\_\_ (Name of spouse's employer)
  
- 5) The spouse's monthly income is:  
\_\_\_\_\_ (Dollars of income per month)
  
- 6) The number of children of the marriage is:  
\_\_\_\_\_ (Number of children of marriage)
  
- 7) The custodial parent is the:
  - a) petitioner \_\_\_\_\_
  - b) respondent \_\_\_\_\_
  
- 8) The amount of temporary child support awarded to the custodial parent per month is:  
\_\_\_\_\_ (Dollars of temporary child support per month)
  
- 9) The amount of final child support awarded to the custodial parent per month is:  
\_\_\_\_\_ (Dollars of final child support per month)

10. The types of community property involved in this case are (please check all that apply):

- a) real estate \_\_\_\_\_
- b) automobiles \_\_\_\_\_
- c) life insurance \_\_\_\_\_
- d) household goods and personal property \_\_\_\_\_
- e) retirement/employee benefits \_\_\_\_\_
- f) unsecure debts \_\_\_\_\_

11) The dates on which major case developments occurred are:

- \_\_\_/\_\_\_/\_\_\_ initial client interview with Terry Workman
- \_\_\_/\_\_\_/\_\_\_ case referred to an attorney
- \_\_\_/\_\_\_/\_\_\_ initial client interview with attorney
- \_\_\_/\_\_\_/\_\_\_ petition filed
- \_\_\_/\_\_\_/\_\_\_ final hearing
- \_\_\_/\_\_\_/\_\_\_ decree signed

12) The means by which service of process was achieved was:

- a) personal service \_\_\_\_\_
- b) citation by publication \_\_\_\_\_
- c) waiver of citation \_\_\_\_\_

13) The pleadings/documents prepared and filed for this case are (please check all that apply):

- a) petition \_\_\_\_\_
- b) temporary restraining order \_\_\_\_\_
- c) temporary orders \_\_\_\_\_
- d) answer \_\_\_\_\_
- e) counterclaim \_\_\_\_\_

- f) interrogatories \_\_\_\_\_
- g) depositions \_\_\_\_\_
- h) subpoenas \_\_\_\_\_
- i) inventory \_\_\_\_\_
- j) proposed division of property \_\_\_\_\_
- k) monthly expense sheet \_\_\_\_\_
- l) decree \_\_\_\_\_
- m) employer order to withhold income \_\_\_\_\_
- n) motion to enter \_\_\_\_\_
- o) motion for contempt \_\_\_\_\_
- 14) The final hearing in this case was:
- a) a contested hearing \_\_\_\_\_
- b) an uncontested hearing \_\_\_\_\_
- 15) The issues which were problematic in this case are (please check all that apply):
- a) Division of property \_\_\_\_\_
- b) Valuation of property \_\_\_\_\_
- c) Characterization of property \_\_\_\_\_
- d) Child support \_\_\_\_\_
- e) Paternity \_\_\_\_\_
- f) Other (please specify: \_\_\_\_\_)
- 16) The time the attorney personally spent on this case was:  
 \_\_\_\_\_ (Number of hours)
- 17) The total amount of attorney and staff time devoted to this case was:  
 \_\_\_\_\_ (Number of hours)

18) A record was made of the final hearing:

- a) Yes \_\_\_\_\_
- b) No \_\_\_\_\_

19) The opposing counsel was:

\_\_\_\_\_ (Name of opposing counsel)

20) The judge was:

\_\_\_\_\_ (Name of Judge)

21) The signatures on the decree are:

- a) client's \_\_\_\_\_
- b) client's attorney \_\_\_\_\_
- c) spouse's \_\_\_\_\_
- d) spouse's attorney \_\_\_\_\_
- e) judge's \_\_\_\_\_

## A Supplement to the Case Service Report Form

Client Name: \_\_\_\_\_

Case Identification Number: \_\_\_\_\_

## PLEASE INDICATE:

- 1) Your best estimate of the monthly income received by this client's spouse:  
 \_\_\_\_\_ (Dollars of income per month)
- 2) The name of the spouse's employer:  
 \_\_\_\_\_ (Name of spouse's employer)
- 3) The types of community property involved in this case (please check all that apply):
- |  |       |
|--|-------|
| a) real estate                           | _____ |
| b) automobiles                           | _____ |
| c) life insurance                        | _____ |
| d) household goods and personal property | _____ |
| e) retirement/employee benefits          | _____ |
| f) unsecure debts                        | _____ |
- 4) Whether the final hearing in this case was:
- |                           |       |
|---------------------------|-------|
| a) a contested hearing    | _____ |
| b) an uncontested hearing | _____ |
- 5) Which of the following issues, if any, were problematic in this case are (please check all that apply):
- |                                 |       |
|---------------------------------|-------|
| a) Division of property         | _____ |
| b) Valuation of property        | _____ |
| c) Characterization of property | _____ |

d) Child support \_\_\_\_\_

e) Paternity \_\_\_\_\_

f) Other (please specify: \_\_\_\_\_)

6) Any additional comments you wish to make with regard to this case:

---

---

---

---

## APPENDIX F

Divorce Questionnaire  
and Case Intake Card

## DIVORCE QUESTIONNAIRE

THE INFORMATION YOU GIVE IN THIS QUESTIONNAIRE IS FOR OUR USE ONLY AND WILL NOT BE GIVEN OUT TO ANYONE.

IT IS IMPORTANT FOR YOU TO ANSWER ALL THE QUESTIONS AS FULLY AND HONESTLY AS YOU ARE ABLE.

PLEASE PRINT CLEARLY

1. Write your full name \_\_\_\_\_
2. If female, write your maiden name \_\_\_\_\_
- 2a. What is your social security number \_\_\_\_\_
3. Your address is \_\_\_\_\_  

	Number	Street	
City	State	Zip Code	
- You are living \_\_\_ by yourself \_\_\_ with your husband or wife  
 \_\_\_ with parents \_\_\_ with another relative \_\_\_ with a friend
4. What is your telephone number \_\_\_\_\_
5. Are you a U.S. citizen? \_\_\_ Yes \_\_\_ No  
 If not, do you have a \_\_\_ Visa \_\_\_ work pass \_\_\_ other
6. How old are you? \_\_\_ What is your date of birth? \_\_\_\_\_  
 Where were you born? \_\_\_\_\_  

	City	State
--	------	-------
7. How long have you lived in Texas? \_\_\_\_\_
8. Write your husband's (or wife's) full name? \_\_\_\_\_
9. Where is your husband (or wife) living?  

	Number	Street	City	State	Zip Code
--	--------	--------	------	-------	----------
10. He or she is living \_\_\_ by himself/herself \_\_\_ with you  
 \_\_\_ with parents \_\_\_ with another relative \_\_\_ with a friend



Were any of the above children born before the marriage?  Yes  No  
 If yes, list their names:

---



---



---

Do you have other children born during this marriage that are not children of your husband (or wife)?  Yes  No

If yes, list the following:

NAME	SEX	DATE OF BIRTH	PLACE OF BIRTH	CHILD'S ADDRESS
------	-----	---------------	----------------	-----------------

---



---



---

17. Are you paying any medical bills for a child that is sick right now?  Yes  No if yes, give the name of the child:

What is wrong with your child: \_\_\_\_\_

How long has the child been sick: \_\_\_\_\_

How much are you paying in monthly medical bills? \_\_\_\_\_

18. Does any child have a physical or mental disability?  Yes  No

Any child with a physical or mental disability can get support beyond their 18th birthday. If yes, please list any such physical or mental handicap like epilepsy, T.B., hearing, vision, speech, heart, lung or bone problems, or mental retardation that any of your children might have:

CHILD'S NAME

TYPE OF HANDICAP

_____	_____
_____	_____

4

19. Does any child of yours have any property like savings accounts, land, motorcycles, cars? \_\_\_ Yes \_\_\_ No If yes, give the following:

DESCRIPTION OF PROPERTY

VALUE

\_\_\_\_\_

\_\_\_\_\_

20. Are you (if male, your wife) pregnant? \_\_\_ Yes \_\_\_ No

If yes, when is the baby due? \_\_\_\_\_

Month

Year

21. Do you want custody of your children? \_\_\_ Yes \_\_\_ No

Does your husband (if male, your wife) plan to fight for the children? \_\_\_ Yes \_\_\_ No

22. Have you or your husband (if male, you or your wife) ever been to court for custody or child support for the children? \_\_\_ Yes \_\_\_ No

If Yes,

When? \_\_\_\_\_

Month

Year

What happened in court? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

23. Is your husband (or wife) working? \_\_\_ Yes \_\_\_ No

If yes, for whom does he (or she) work?

\_\_\_\_\_

Name of Employer

\_\_\_\_\_

Address

What does he (or she) do here? \_\_\_\_\_

How long has he (or she) worked here? \_\_\_\_\_

How many hours a week does he (or she) work? \_\_\_\_\_

How much is he (or she) paid per hour? \_\_\_\_\_

How much does he (or she) take home clear? \_\_\_\_\_

5

24. If your husband (or wife) is not working, does he (or she) get:
- |                    |                              |                             |                   |
|--------------------|------------------------------|-----------------------------|-------------------|
| Social Security    | <input type="checkbox"/> Yes | <input type="checkbox"/> No | How much \$ _____ |
| Retirement         | <input type="checkbox"/> Yes | <input type="checkbox"/> No | How much \$ _____ |
| Veterans Admin.    | <input type="checkbox"/> Yes | <input type="checkbox"/> No | How much \$ _____ |
| SSI Disability     | <input type="checkbox"/> Yes | <input type="checkbox"/> No | How much \$ _____ |
| Child Support      | <input type="checkbox"/> Yes | <input type="checkbox"/> No | How much \$ _____ |
| AFDC               | <input type="checkbox"/> Yes | <input type="checkbox"/> No | How much \$ _____ |
| Unemployment Comp. | <input type="checkbox"/> Yes | <input type="checkbox"/> No | How much \$ _____ |
25. Is your husband (or wife) paying out child support to children of a prior marriage?  
 Yes  No If Yes, how much and how often? \_\_\_\_\_

26. Does your husband (or wife) have a criminal record?  Yes  No  
 If Yes, what type of record? \_\_\_\_\_

27. Does your husband (or wife) have a physical or mental handicap?  
 Yes  No

If Yes, list the type of handicap: \_\_\_\_\_

ANYTHING YOU AND YOUR HUSBAND (OR WIFE) BOUGHT DURING THE MARRIAGE IS COMMUNITY PROPERTY, EXCEPT FOR THAT PROPERTY INHERITED OR GIVEN TO YOU.

28. Did you and your husband (or wife) buy a house or land during the marriage?

Yes  No

A. Where is the property? \_\_\_\_\_  
 Address

City

State

B. When did you buy the property? \_\_\_\_\_  
 Month Year

C. What is the value of the property? \_\_\_\_\_

6

D. Is the property paid for?  Yes  No

If not, how much is owed? \_\_\_\_\_

How much are the monthly payments? \_\_\_\_\_

Do you or your husband (or wife) have any other houses or land?

Yes  No

29. Do you or your husband (or wife) own a car, truck, van or motorcycle?

Yes  No If Yes, give the following:

<u>Year</u>	<u>Model</u>	<u>License #</u>	<u>Whose name is title in</u>	<u>Who has it</u>
-------------	--------------	------------------	-----------------------------------	-------------------

---



---



---

30. Do you or your husband (or wife) have bank accounts?  Yes  No

If Yes, give the following:

<u>Name of Bank</u>	<u>Account #</u>	<u>Balance</u>	<u>Title Under Whose Name</u>	<u>Savings, Checking, Draft or Share</u>
-------------------------	------------------	----------------	-----------------------------------	--

---



---



---

31. Is your husband (or wife) in a retirement plan?

If yes, give the following:

Who is (or will) pay the benefits? \_\_\_\_\_

Who is (or will) receive the benefits? \_\_\_\_\_

When did your husband (or wife) start working for this person or company?

_____	_____
Month	Year

32. Do you expect to receive a tax refund for this year?  Yes  No

If Yes, how much? \$ \_\_\_\_\_

33. Please list other property of value like furniture, appliances, jewelry and so on.

Item	Value	Purchase Date	Who has it
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

34. List the property you want the court to give you.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

MY ANSWERS TO THESE QUESTIONS ARE TRUE AND CORRECT TO MY BEST KNOWLEDGE  
AND BELIEF

\_\_\_\_\_  
YOUR NAME

\_\_\_\_\_  
DATE

ATTENTION:

PLEASE BRING THIS QUESTIONNAIRE TO YOUR APPOINTMENT.

Applicant				
Address				
Phone	(Age) D.O.B.		Soc. Sec. No.	
Single	Md.	Sep.	Div.	Wid.
Name of Spouse				
Spouse's Address				
Family Member	Employed		Net Per	
Ages				
Dep. Child				Other Deps.
Real Estate				
Autos?				
Other Property?			Bank Acct?	
Major Debts?				
Nature of Case				
1.				
2.				
3.				
Adverse Party				
Address			Phone	
SOURCE OF CASE				
Legal				Prev. Srvd.
Other				
App. Made by				
Address			Phone	
Se a Lawyer?				
Ac opt.	Accept. Cond.	Div. Sec.		
Referred to				
Refused: Finan.	Type Case	A/C Rel	Rec. Close	Other
Referred to				
Closed	Advice	More	Plead	Ct. Ap.
Reopened				
Reopened				
APPT.	INTERVIEWED BY		ATTY. ASSIGNED	URGENT
ARRIVE				
START				
FINISH				
WAS AFFIDAVIT TAKEN? YES _____ NO _____				
QUESTIONNAIRE? YES _____ NO _____				

## APPENDIX G

## Peer Review Grading System

## PART I:

For "A" and "B" cases with children, begin with 100 points and add or subtract points according to the following criteria:

For "C" cases with children, begin with 125 points and add or subtract points according to the following criteria:

- (1) Prompt filing: measured from date of initial client interview with attorney to the date of filing petition:
 

(a) 0 to 9 days	0
(b) 10 to 30 days	-1
(c) 31 to 60 days	-2
(d) 61 days or more	-3
  
- (2) Prompt resolution: measured from date of filing of petition to date of final hearing:
 

(a) 60 to 89 days	0
(b) 90 to 120 days	-1
(c) 121 to 180 days	-2
(d) 181 days or more	-3
  
- (3) Prompt entry of judgment: measured from date of final hearing to date of entry of decree:
 

(a) 1 - 14 days	+1
(b) 15 - 30 days	0
(c) 31 - 60 days	-2
(d) 61 days or more	-3
  
- (4) Attorney time spent:
 

(a) For "A" cases, less than 2 hours	-3
(b) For "B" cases, less than 3 hours	-3
(c) For "C" cases, less than 4 hours	-3
  
- (5) Extra credit time: if there is anything in the Case Fact Sheet evidencing services rendered in the following areas, each item of service will be worth an additional 2 points:
 

(a) interrogatories	
(b) deposition	
(c) subpoenas	
(d) inventory	
(e) proposed division of property	
(f) monthly income sheet	
(g) extra motions on hearings	
  
- (6) Failure to make record at final hearing -4
  
- (7) Client signature on decree +1

(8) Lack of temporary support order	-5 (for "A" and "B" cases) -10 (for "C" cases)
(9) Inappropriate format of decree	-2
(10) For each inconsistency within the decree	-1
(11) Lack of Social Security numbers	-4
(12) Lack of defined visitation	-1
(13) Lack of defined duties of managing and possessory conservators	-5
(14) Lack of enforceable child support provision	-30
(15) Lack of employers order to withhold income	-10
(16) Inappropriate child support amounts	-10
(17) Inclusion of address notification provision	+1
(18) Lack of child support past age 18	-5
(19) Lack of property division	-4
(20) Lack of debt division	-4
(21) Lack of allocation of tax liability	-4
(22) Other: we may add or subtract points for unusual circumstances on a discretionary basis, however, all numbers of panel must agree on a case-by-case basis.	
(23) For "C" cases only, lack of permanent injunction or protective order	-20

## PART II:

<u>Quality Rating</u>	<u>Percentage of Total Possible Points Earned</u>
(1) Very poor	64% or less
(2) Poor	65 - 69%
(3) Average	70 - 79%
(4) Good	80 - 94%
(5) Very good	95% or more

## APPENDIX H

## Peer Review Evaluation Sheets

## Peer Evaluation Grade Sheet

## Case Types A or B With Children

Case Identification Number \_\_\_\_\_

Beginning Number of Points

100

## Evaluation Criteria:

Prompt Filing	_____
Prompt Resolution	_____
Prompt Entry of Judgment	_____
Sufficient attorney time input	_____
Extra credit for interrogatories depositions subpoenas inventory proposed division of property monthly income sheets extra motions on hearings	
Record made of final hearing	_____
Client signetura on decrea	_____
Temporary ordars	_____
Appropriate decree format	_____
No inconsistencias within decree	_____
Social Security numbers of spouses include in decree	_____
Visitation rights defined	_____
Duties of managing and possessory conservators defined	_____
Enforceable child support provision	_____
Employer's order to withhold income	_____
Appropriate amount of child support	_____
Inclusion of address notification provision	_____

**Overall Evaluation of Quality of Service Rendered:**  
(Check appropriate response)

- Very good
- Good
- Average
- Poor
- Very poor

**Major reason(s) for overall evaluation:**

Mr. RAVEN. I appreciate your interest in it. We should supply you with what you need to satisfy you.

Mr. FRANK. If you will submit it to Mr. James, he will have the option of submitting for the record what he thinks is proper.

Mr. JAMES. Yes.

Mr. RAVEN. We put into the record what we think is appropriate.

Mr. JAMES. Mr. Greco, I didn't make an accusation. I am just reading what was in the letter from the—Mr. Cox. I don't know the facts on it at all, nor do I pretend to. I want that clear. I am making no accusation, especially against the Florida bar.

Mr. GRECO. I wish the LSC Board members would follow the same procedure.

Mr. FRANK. Mr. Staggers.

Mr. JAMES. Mr. Powers, the Massachusetts legal system is not federally funded at all?

Mr. POWERS. Only State funding.

Mr. JAMES. In that particular case, you sent out a survey. What was the nature of the questions you asked? Do you have samples of them with you?

Mr. POWERS. I do not have samples with me. There were three different elements of the study. One was the telephone survey of 1,082 low-income households around the State. We asked those people a series of about 70 questions having to do with uses of attorneys and instances when they might have needed attorneys.

I can certainly supply you with a questionnaire. We also sent written questionnaires to legal service providers that were quite extensive and evaluated that information.

The third element was face-to-face interviews with about 350 people around the State.

Mr. JAMES. Here are three questions I heard were on your survey:

(1) Do you owe anyone money you cannot pay?

(2) Have you ever had roaches in your home?

(3) Have you ever had problems getting credit?

Do you know if those three questions were included?

Mr. POWERS. They were questions of that nature. I can't tell you that those were the exact quotes.

Certainly, for example, the second question, renting an apartment in Massachusetts that is infested with roaches is a violation of the health code. That clearly gives rise to the—a potential legal action.

That is why that question and other questions like that were on the survey.

Mr. JAMES. I built a house 8 years ago out of brick inside and out, took great pains to design it. It was not inexpensive. Would you believe that within a week I had those little critters, you know.

Could you believe it? My law partners couldn't help me at all. They had their own problems.

Mr. POWERS. We might not have asked that question in Florida. We did in Massachusetts.

Mr. JAMES. Thank you.

Mr. FRANK. Mr. Staggers.

Mr. STAGGERS. Mr. Raven, last time you were before the committee I expressed some of the problems we were having in West Vir-

ginia. In your statement on five and six, you talk about how there is need to file these lawsuits. I would ask that you look at the situation and maybe get back in touch.

The correspondence I have is that you are looking into it. I do see on page 6 that you do have information about resolutions of legal disputes short of litigation, and you would be happy to provide that to the subcommittee.

I will renew my request. I asked you last time you were here. I would like to get as much information as I can because that is the main problem that we are having. That is the main problem this member is having with legal services.

Mr. RAVEN. I understand that. I found out that was going to happen at the Honolulu meeting and I didn't want to wait that long. I put some time in myself this week.

I looked as early as you can in that time. I was quite surprised to see that in most of these actions which are brought under the Agricultural Work Load Protection Act, section 184, it provides for fees against respondent if they violate the act.

I am told by my grant people that do this work invariably whenever they can, negotiate before filing a lawsuit. But they do it because they want to get the fees because the provision for awarding the fees is in determining the amount of damages to be awarded the court is authorized to consider whether an attempt was made to resolve the issue in dispute before attempt at litigation.

I further understand under the Job Services Complaint System rules that provides for mediation and very specific and very quick timing in that. I further find that the growers in Maryland brought an action, Washington County Fruit Growers Association against Brachs, civil action No. HAR 85910, District of Maryland, to have that declared unconstitutional.

I further find that in Pennsylvania, Dickson Law School had a mediation procedure for growers and workers for some time on this.

I have a statement from the growers and also the people representing workers. They are going to do away with it. I understand there has been a great effort to try and mediate these matters.

Some of them can't be mediated because the person is going to be leaving within a few days.

I also understand that most of these cases are won. That is the extent of my research so far.

But I am going to look into it further because I think one thing we all owe to each other in this business, and we have not done enough of, there is a lot of charges about what goes on and very little specific following up.

I am going to see that one of our committees or I am going to appoint a new one to find out every migrant case where someone has a complaint and we are going to check it out. To my surprise, I find, one, that most attorneys that bring these matters against growers first do attempt to mediate them unless it is a situation or it would be against their client's interest.

I find out, one, that the growers don't see to—they talk about that, but they don't seem to like it. I find out, third, that most of the cases that are brought are won.

Mr. STAGGERS. If I could interrupt you, I think you are now starting to reiterate your points, and that is all very interesting.

I still renew my request which I asked the last time, and you say that you have that now in your statement. Maybe you don't have it.

I am reading your statement on page 6.

Mr. RAVEN. I wanted to get it for you.

Mr. STAGGERS. You do have models that would be available. I don't know what the growers are like that you did your research on. I am telling you my personal experience. I am just renewing my request that you say you have this information about the models, about negotiations.

If you have already come to some sort of conclusion that this isn't worth your time, tell me.

Mr. RAVEN. It is very worth my time. We owe it to you to get you that material. I am going to get it to you.

Another thing I have is the papers from the Legal Services Corporation when they considered this whole matter in 1986, and the opinion letter of the then-general counsel, later president, when he said the thing seemed to be going all right.

If you could do more arbitration, fine, but they were not going to make a change. It is a question of getting it together, but I am personally doing that. And the fact that I only have 10 days less, I will do it if I have to do it after then, but I will get it to you.

Mr. FRANK. Mr. Smith.

Mr. SMITH of Texas. Thank you, Mr. Chairman.

I would like to correct the record in regards to something Mr. Greco said.

Mr. Greco, you may or may not have intended to come across as you did. But you stated that Mr. Wallace had said in his testimony that he is past the point where Legal Services Corporation should be abolished.

That implies that he was once, that he has changed his mind. Point of fact, I believe he testified that both formally and today he is opposed to the abolishment of the Legal Services Corporation.

You mentioned a couple of times you are a practicing attorney in Boston. What is your hourly rate?

Mr. GRECO. My hourly rate, and my law firm fixes the rates in accordance with the prevailing rates in the legal community and all firms—

Mr. SMITH of Texas. What is your personal hourly rate?

Mr. GRECO. The last time I checked my hourly rate, I think was \$225 an hour.

Mr. SMITH of Texas. If a partner in a well regarded Washington law firm with 15 years of experience where to charge \$200 an hour, would that seem excessive to you?

Mr. GRECO. You have to give me more information, Mr. Smith. If you are talking about hiring Mr. Cooper as I heard this morning, then I would give you an answer very similar to the answer I heard from the committee.

Mr. SMITH of Texas. I was trying to get you to be objective on the facts and not biased, which you just admitted to being. Are you going to answer the question as to whether or not you think \$200 is

a reasonable fee for a Washington attorney who has 15 years of experience and connected with a reputable law firm?

Mr. GRECO. Before I can answer your question, Mr. Smith, I would have to find out the quality of services that that lawyer provides.

Mr. SMITH of Texas. Suppose the quality of services was good?

Mr. GRECO. If, as I normally expect of the people who work with me, that they have the highest standards, as well as competence, \$200 an hour in the city of Washington is not unreasonable.

Mr. SMITH of Texas. Thank you.

Mr. Loines, in your testimony you said in reference to Mr. Wear's statement that 16 examples of alleged fraud and abuse, "does not make the case that fraud and abuse exists." Considering that those 16 cases may involve thousands of dollars of misuse of public funds, just how many examples in your opinion would it take to come up with a case for misuse of public funds or abuse?

Mr. LOINES. Let me answer you this way. Any abuse, misuse of funds and certainly any fraud that is found in any situation should be dealt with and remedied. My point is that Mr. Wear and other people in the Corporation are attempting to make the case that this program is riddled with corruption, fraud, waste, and that simply is not the case.

Mr. SMITH of Texas. I don't think I ever heard him say that. What he specifically testified to is 16 examples to which your exact phrase is, "That doesn't make the case." I am wondering how many cases of fraud and abuse it would take to make the case that it exists.

Mr. LOINES. I assume if presented with a sufficient number that I would recognize that it constituted fraud and abuse.

Mr. SMITH of Texas. Is 16 not a sufficient number to recognize?

Mr. LOINES. Not as far as the point that Mr. Wear was attempting to make.

Mr. SMITH of Texas. So 16 is not enough for you?

Mr. LOINES. Not to conclude that the program is riddled with fraud and abuse.

Mr. SMITH of Texas. I think that is your phrase and maybe that is your reference point, as well. Mr. Powers, I would like to ask you some questions about something we skipped over, the methodology in regard to the study that you have conducted which I assume is probably similar to the methodology used in other studies or one perhaps by the American Bar Association itself.

You say your study was based upon three sources of information. The first source, low-income households. The second source includes interviews, face-to-face interviews with persons knowledgeable, including legal services providers, and a questionnaire to 50 legal services.

Given who you contacted and the vested interest they may have, it is no surprise to me that you came up with the fact that only 15 percent of the legal needs of the poor were being met. The surprise to me is that you came up with that large of a percent.

My question for you is based upon the actual wording of the questions themselves, which you were nice enough to provide us. Let me read a couple of the questions into the record.

One question, No. 4, is in the last 5 years, have you or anyone in your household had any kind of problem which you thought needed a lawyer's help? And then in a second section of the questionnaire you provide a list of potential problems that a low-income family might have experiences that could possibly benefit from the advice of a legally trained person. I emphasize "might" and "could possibly."

And finally, you say this section addressed specific problems that respondents did not themselves identify as being legal in nature, with the emphasis upon the fact that they did not themselves identify it. My question to you is given what I would argue is the clear bias of those questions, it seems to me that you probably come up with 100 percent of the people interviewed would say they had some kind of problem that demanded some type of legal help.

I would like to ask you specifically what percentage of the people, the respondents to this questionnaire said that they needed legal help?

Mr. POWERS. Well, if you let me go back a little bit and explain the background of some of this and then try to respond to your question. What we did in the face-to-face interviews was talk to 350 people around the State that included directors of United Ways, presidents of county bar associations, judges, clerks—

Mr. SMITH of Texas. That is all in there, and I understand that.

Mr. POWERS. But you picked out only legal services providers, and I wanted to point out we talked to more people than that. The purpose of the survey—

Mr. SMITH of Texas. How many people did you talk to in the telephone survey?

Mr. POWERS. One person in each of 1,082 separate households.

Mr. SMITH of Texas. And were those people asked the questions I just read into the record?

Mr. POWERS. Yes.

Mr. SMITH of Texas. And what percentage of those 1,082 said that—admitted that they had need for legal assistance?

Mr. POWERS. If you will allow me to refer to the study just for a moment.

Mr. SMITH of Texas. Sure.

Mr. POWERS. We asked two different sets of questions, of course. One was whether people had specifically recognized that in the last 5 years they had needed a lawyer. And the other questions were not in terms of whether people thought they needed a lawyer for those instances but whether the things that we mentioned had occurred in the lives of the individuals that we were talking to.

Mr. SMITH of Texas. If they answered in the affirmative and said yes, they might have experienced something that could possibly, again, the word from the question, benefit from the advice of a legally trained person, not even a lawyer, was that counted as a possible reply? A "yes" in terms of the surveys results?

Mr. POWERS. The questions were phrased in this manner, Mr. Smith—

Mr. SMITH of Texas. Answer my question first.

Mr. POWERS. I have to tell you how the questions were asked because what you just said is not how the questions were asked. They were asked, have you had a problem in the last 5 years getting

medical assistance because you did not have enough money to pay for it? That was the question.

Mr. FRANK. Medical assistance?

Mr. POWERS. That was one of the questions, Mr. Frank, have you needed—I am sorry. Have you attempted to get food stamps, for example, and not been able to get it? If someone answered yes to that question—

Mr. SMITH of Texas. Did you ask this question, in the past 5 years have you or anyone in your household had any kind of problem which you thought needed a lawyer's help? Could you answer that question?

Mr. POWERS. That was in the section of the questionnaire entitled, "Recognized Needs."

Mr. SMITH of Texas. How many replied to that?

Mr. POWERS. Two hundred sixty-one positive responses out of the 1,082 households.

Mr. SMITH of Texas. What about the question in the section of the questionnaire where you gave a list of potential problems that a low-income family might have experienced that could possibly benefit from the advice of a legally trained person, what percentage replied to those lists of examples?

Mr. POWERS. We found, let's see, we asked—

Mr. SMITH of Texas. In other words—and again, I point out that this list that you presented were specific problems that the respondents did not themselves identify as being a problem to them.

Mr. POWERS. That is correct.

Mr. SMITH of Texas. If they didn't come up with anything, you said what about this group of problems. Have you encountered any situations where you needed legal help for those, is that correct?

Mr. POWERS. We asked them if those events occurred in their lives. The questions were designed to find out if certain things had happened in the lives of poor people, that is a "period." The second point is that legal trained people would recognize that you could use a lawyer for those things.

We didn't ask the respondents if they knew they needed a lawyer for those particular instances. But what we found when we surveyed the 1,082 households was that they reported 5,015 positive responses to the unrecognized legal needs section of the questionnaire.

Mr. SMITH of Texas. Repeat that again.

Mr. POWERS. Five thousand, one hundred and fifteen positive responses from the 1,082 households that we surveyed. That averages?

Mr. SMITH of Texas. Five positive responses per household.

Mr. POWERS. Over a 5-year period because that is the length of time. So it is .94 legal problems per household per year.

Mr. SMITH of Texas. So virtually 100 percent of the people that you questioned said there was a time where they either needed legal help or thought that they might need legal help.

Mr. POWERS. That is not exactly correct. Not every household had problems. I could go through this—

Mr. SMITH of Texas. The high 90 percentile, would you say? If the average is 5 positive responses per household, one would think

it was something on the order of the high 90 percentile would have at least said yes on one occasion. Have had one positive response?

Mr. POWERS. We found that several households had multiple problems. For example, households with children—

Mr. SMITH of Texas. Would you assume that it would be the high 90 percentile?

Mr. POWERS. No, there were households that had no legal problems.

Mr. SMITH of Texas. I will allow for that in some instances but not in the high percentage of instances.

Mr. POWERS. Well, there were—out of the 1,082, there were 108 households which had no legal problems.

Mr. SMITH of Texas. So roughly 90 percent had some legal problems. Would it be easier to just take 90 percent of poor households in America and say that is how many need legal services?

Mr. POWERS. We were not interested only in the gross quantity but also the precise nature of the instances.

Mr. SMITH of Texas. Mr. Powers, it seems to me, I cannot imagine any fewer than 90 percent of any group of respondents that you would ask these two questions to saying they didn't need legal services. I think the questions are so broad, so suggestive that the 90 percent figure doesn't surprise me at all.

My guess is that you could ask 90 percent of any group and come up with the same result, which makes me quite frankly look for other means to determine what percentage of poor households really need legal help.

Mr. POWERS. Mr. Smith, had we stopped with that, I might agree with you, but we analyzed the data further to see which problems had the greatest incidence of need, where that need was located and analyzed that against the services being provided.

So that as we provide funding and as we provide assistance to programs, we can direct their services in the most—and help them direct their services in the most critical areas.

Mr. SMITH of Texas. Let me ask you another question. Do you feel yourself, based upon your experience, that the poor have greater need than the population in general for legal services, or do they have less of a need than the population as a whole for legal services?

Mr. POWERS. The poor people in this country, Mr. Smith, are the most dependent part of the population on government, and therefore their lives are governed by rules that don't apply to us. That gives rise to more legal needs, I think, than the population as a whole.

[Information submitted for the record follows:]

JUL 31 1989

**MASSACHUSETTS LEGAL ASSISTANCE CORPORATION**  
 20 West Street - Boston, Massachusetts 02111 - 617-574-9258

26 July 1989

Representative Barney Frank  
 1030 Longworth House Office Building  
 Washington, D.C. 20515-4321

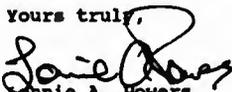
Dear Representative Frank:

Thank you for the opportunity to appear before the sub-committee on Administrative Law and Governmental Relations of the Judiciary Committee last week. Your strong support for the continuation of the Legal Services Corporation is most appreciated.

The hearing should encourage the President to appoint a qualified board, supportive of the purposes of the Legal Services Corporation. As you properly made quite clear, no reauthorization of LSC should occur without a confirmed board.

Enclosed is a copy of a letter to Congressman Lamar Smith further responding to some of his concerns regarding legal needs studies. Please let me know if I can answer any further questions you may have or if I can provide you with additional information.

Yours truly,

  
 Bonnie A. Powers  
 Executive Director

LAP/bvc

Enclosure

Bonnie A. Powers, Esq., Executive Director

Nancy B. Beecher, Chair - Max Valterra, Esq., Vice Chair - Michael P. Edgerton, Esq., Treasurer - John Curtin, Jr., Esq., - Mary Ann Driscoll, Esq.  
 Priscilla R. Ford - John C. Gates, Esq. - Karen E. Ledington, Esq. - Alex Moschella, Esq. - David E. Rideout, Esq. - Albert Robinson

# MASSACHUSETTS LEGAL ASSISTANCE CORPORATION

20 West Street - Boston, Massachusetts 02111 - 617-574-9258

26 July 1989

Representative Lamar Smith  
422 Cannon House Office Building  
Washington, D.C. 20515-4321

RE: Hearings on the Legal Services Corporation

Dear Representative Smith:

Last week during the hearing on the Legal Services Corporation conducted by the sub-committee on Administrative Law and Governmental Relations of the Judiciary Committee, you expressed considerable interest in the Massachusetts legal needs study. This letter will further clarify the reasons behind the study and the results which have come from it.

It is certainly true, as you pointed out, that most poor people have legal problems. It is therefore not surprising that about 90% of those interviewed through the telephone survey reported having problems for which the services of an attorney would be useful. It is also true that no one in our society has a lawyer for every problem for which an attorney might be able to address.

However, as discussed in my written testimony, obtaining specific information about the legal issues faced by poor people was a much more important goal of the legal needs study than was determining the gross percentages of unmet legal needs. No one seriously believes that it is possible or even advisable to merely increase the funding for civil legal services in Massachusetts sixfold to attempt to address the 320,000 discrete legal problems documented by the study.

It is possible and absolutely necessary that the services provided by legal assistance organizations in this State and throughout the country be targeted at the most critical legal needs of those persons who are eligible to receive services. In Massachusetts, and in the other states which have done or are now doing legal needs studies, one of the primary goals was to identify gaps in existing services to help ensure that services are directed at the most pressing legal needs of poor people.

Lamar A. Powers, Esq., Chairman  
Nancy B. Brecher, Chair; Max Wilbertz, Esq., Vice Chair; Michael F. Igoe, Esq., Secretary; John Carter, Jr., Esq.; Mary Ann Howard, Esq.;  
Priscilla R. Ford; John C. Cohen, Esq.; Karen E. Washington, Esq.; Alan Marchello, Esq.; Donald F. Robson, Esq.; Albert Robinson

Rep. Lamar Smith  
26 July 1989  
Page Two

Achieving that goal requires that continuing attention must be paid to the changing legal needs of the poor to ensure that the legal problems addressed are the most critical and that the types of representation provided are the most effective. Because this is a continuing effort, we cannot declare victory at any particular point. We can demonstrate that the legal needs study has influenced programs in Massachusetts to examine the services they have been providing and, where appropriate, to shift the focus of those services. My written testimony filed with the Committee contains several examples of how programs have responded to the legal needs study.

The responsiveness of the legal services providers in Massachusetts to the legal needs study demonstrates anew that decisions regarding the type and manner of legal services to be provided to eligible clients are best made at the local level. These local decisions are made by boards of directors composed of attorneys and persons eligible to receive free legal services. One of the core issues behind the efforts of the current six member majority of the Legal Services Corporation Board to impose competitive bidding is their desire to set local priorities from Washington. This idea is antithetical to the expressed desire of this same majority of the Board of Directors to have those eligible for legal services be involved in making decisions regarding the services they will receive. It is also a rather blatant attempt to centralize a program which Congress has clearly determined should be locally controlled.

It is clear that bureaucratic decisions made inside the Beltway often do not reflect the reality of life around the country. If the current problems with the Department of Housing and Urban Development have not taught us anything else, they have been a powerful reminder that programs which become too centralized ignore the desires of local areas, can be and often are subject to exploitation by those who run them and are not capable of meeting the needs of the people for whom the programs were designed. Recognizing that all programs have their imperfections, it seems much more reasonable to believe that attorneys who practice in a local area and poor people who live their lives in that area have a much better opportunity to understand what kinds of legal services they need than do a group, even if well intentioned, of Washington bureaucrats.

We all recognize that in these times the public funds available for even the most worthwhile projects are limited. It is therefore most important that the funds for civil legal services be spent in the way that best responds to the legal needs of eligible clients. Legal needs studies can help us understand and

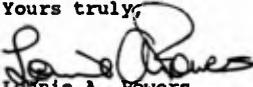
Rep. Lamar Smith  
26 July 1989  
Page Three

identify the most critical legal needs of the poor. The boards of local programs have, and in the vast majority of cases appropriately exercise, the power to direct the efforts of the non-profit organizations they run towards the most critical of those legal needs.

The Legal Services Corporation Act contemplates a national program operating within policies established by Congress and by the Legal Services Corporation Board but with high degrees of local responsibility for implementing those policies to best meet the legal needs of the poor. The support, not only of clients but also of the organized bar and the public throughout the country, for federal funding for civil legal assistance derives in large measure from the structure of the program and the thoughtful manner in which local boards of directors and local programs have carried out their responsibilities. Legal needs studies have been and can continue to be helpful in the process of local decision making. They are no substitute for thoughtful priority setting processes but they do provide necessary and useful information.

I appreciate the opportunity which I had to testify regarding legal needs studies and to respond to your questions. Please let me know if I can answer any further questions which you might have or provide you with additional information.

Yours truly,



Lonnie A. Powers  
Executive Director

LAP/bvc

cc: Representatives Barney Frank

Mr. SMITH of Florida. OK. Thank you, Mr. Chairman. No other questions.

Mr. FRANK. Mr. James, do you have a further question?

Mr. JAMES. Yes, what your experience was with a number of class actions found within Massachusetts—

Mr. POWERS. I cannot give you a precise number. It is quite low in terms of the overall case load.

Mr. JAMES. One or two percent at the most?

Mr. POWERS. I cannot give you—

Mr. JAMES. Under 10 percent?

Mr. POWERS. I suspect it is well under 10 percent. I would have to do some research.

Mr. JAMES. How many corporations or how many different corporations are incorporated throughout the United States that are funded by the Federal Government? Does anyone know that?

Mr. FRANK. How many grantees?

Mr. POWERS. Approximately 320.

Mr. JAMES. How many years have they been in existence now? Fifteen? Has any individual been prosecuted for improper conduct for taking money, an attorney or a corporation or anyone?

Mr. FRANK. Staff advises us that there have been some prosecutions.

Mr. JAMES. OK. There have been a few. Has there been—does anyone know of any system designed to help check up on this as a double check of the grantee?

Mr. POWERS. Every legal services grantee and every grantee that my organization gives money to has to submit an audit by an outside CPA every year, and I would submit that the CPA would be responsible for identifying any such instances and bringing it to the attention of the Board of Directors.

Mr. FRANK. It is apparently a nationwide requirement.

Mr. JAMES. And all the corporations started are still the same corporations. Is that correct? Or do they drop off?

Mr. FRANK. There have been some replacements. I don't know the percentage.

Mr. JAMES. Have any of the 300 corporations been disciplined in any way?

Mr. POWERS. Yes, sir.

Mr. JAMES. What types of disciplines have been involved?

Mr. FRANK. I am sure that we can get all of that information. The reason partly I would say in defense of our staff is that this wasn't until recently the jurisdiction here and I am sure the records exist, and we can get them.

Mr. JAMES. Somebody was complaining about attorney-client privilege being breached.

Mr. FRANK. No, it was personnel records.

Mr. JAMES. That is why the Corporation cannot get the information from the individual corporations. Someone was testifying as to that.

Mr. FRANK. No, they were talking about not attorney-client but the personnel records.

Mr. JAMES. All right. Thank you very much.

I would like to say one thing. I think we all know that we have indigents out there without service. The questions is the amount of

money, whether it is 15 percent, 25 percent, or 30 percent, my experience out there is that the average person doesn't have enough wherewithal to hire an attorney the number of times, forgetting indigent, as far as—we know they don't.

But the normal person doesn't have the funds. You have to be—the funds to get the legal advice at the times they need it. So that is a problem for all of us. But it is much worse, I believe, for the poor. And I do agree with you that the lower the educational level, the lower their income, the more likely there is to have a legal problem.

I don't think the survey is a good way to find out because I don't think they know when they have a legal problem in many cases.

I just want—we all agree. The question is where do we get the money?

Mr. FRANK. I would like to join the gentleman from Florida. There is a serious need out there, unfortunately we are a long way from the luxury of deciding when we reach—when the poor will no longer need help. The question for us is what is the most we can afford and how can we structure it.

We will hear from the next panel now. Mr. Eckel.

**STATEMENT OF KEITH ECKEL, PRESIDENT OF PENNSYLVANIA FARMERS ASSOCIATION, AND MEMBER OF THE AMERICAN FARM BUREAU FEDERATION BOARD OF DIRECTORS**

Mr. ECKEL. Mr. Chairman, I would submit my written remarks for the record with one correction and that is at the end of the first or at the end of the fourth paragraph where I indicate that I have a personal interest since I have been sued, and it is indicated that it was by the LSC grantee Friends of Farm Workers, that is incorrect. I have been sued by the Florida Rural Legal Services. So I want to make that correction for the record.

Recognizing the need to expedite the hearing, I will dispense with reading my remarks and trust that the committee will, in fact, look at those very closely and give attention to those.

Mr. FRANK. We will put them in the record.

Mr. ECKEL. I would hope that the committee will indulge me if I show emotion in this issue because the farmers I represent in Pennsylvania and across this Nation have suffered greatly as a result of the activities of the LSC grantees that I refer to, into my report.

I have seen firsthand neighbors and friends of mine who have gone out of business perhaps as a result of a lawsuit but more often than not as a result of the fear of the lawsuit coming to their doorstep. I have listened intently to the committee with great respect and agreement and to the witnesses who talk about equal access to justice and our justice system not being just for the poor or for the rich.

I represent family farmers in Pennsylvania who certainly could not be characterized as being rich. One of the problems that we have with the filing of class action lawsuits and the resolution of those suits and it has been indicated that most of those suits are settled before they are finally adjudicated by a court, there is a simple reason for that.

I notice the committee was concerned about the \$80,000 in legal fees that was paid outside of the committee for general counsel. Most of our farmers involved in this litigation are looking at those kinds of bills, and they cannot pay them, and so they settle the case whether they are right or whether they are wrong. They do not have the wherewithal to keep their farm and pursue the cost of that litigation.

I have been one of those in Pennsylvania that have been actively involved in attempting to bring about mediated solutions to the problems involving Legal Services Corporation litigation. Recognizing the growers' problem of not being able to pursue the lawsuit and second, recognizing that in many cases the workers' interests are also not served, filing suits months after workers have left the worksite does not in any way benefit them if that problem cannot be pointed out at the moment that it exists and a solution worked out with that grower where the worker will benefit from the solution.

And second, we have record of numerous workers where settlements have been made and yet those workers have never received the financial compensation because they cannot be located. I would suggest to this committee that I have a strong concern with workers, as well as with farmers. The very well being of my farming operation is dependent upon the harvesting of my products with those workers.

This afternoon, I had hoped to be home at 4 o'clock to begin our sweet corn harvest, and I would be working with our workers at that time at home. I understand full well their problem. I would suggest to you today that the activities of some Legal Services Corporation grantees has created an atmosphere of fear in rural Pennsylvania and rural America, fear on the part of legitimate, honest, responsible growers who are striving to comply with intricate and stringent Federal regulations and to meet the needs of their workers, but who have had to go out of business because they could not handle the litigation cost.

I want to personally urge the committee to look very strongly at the need for mediation and administrative relief prior to the filing of long-term litigations that take 2 or 3 years to resolve the problem. I think that is extremely important to us.

Many of the class action suits that have been filed with consequences to growers really have been attacks on decisions made by the Department of Labor with the two programs and really represent a continued effort, in my opinion, on the part of the legal services grantees who opposed the inclusion of the H-2 program with immigration reform to now attempt to defeat that program in practice.

In the judicial area where they filed with the legislative body, who bears the cost of that again? The farmer producer who is litigated against and in many cases cannot, in fact, bear those costs.

Mr. Chairman, in your own State where the fastest growing H-2 program exists, I have spoken with Marvin Peck, who is involved with that program, a producer in Massachusetts who indicates that their litigation fees have skyrocketed in the past few years as a result of the activities of the Legal Services Corporation grantees.

I have a strong interest in the welfare of workers, the welfare of farmers and equal access to justice. I am not one of those growers, nor do I believe that there are many of those growers, as represented by a previous testifier before this committee, who would resent court action in improving the living conditions of workers.

I strongly believe that those workers are entitled to those living conditions that are fair and sufficient and adequate, and I would invite this committee to come to Pennsylvania to my operation and visit some of those operations that have closed out of fear without any litigation being filed against them. Visit their facility. You make the judgment whether or not it was proper to close them down, and in many cases, and a 3- or 4-generation farming operation.

I urge the committee, also, to strongly consider the aspect of competitive bidding. It is very remote in my mind to believe that with 300 and some funded agencies that there are not some cases where another group might better expend the funds of the Federal Government more efficiently to the benefit of the poor and the indigent.

It only seems to make sense to me in all of our Government contracts that we would be looking forward to competitive bidding as a more efficient use of our dollars.

Mr. Chairman, I bring to this committee an emotional expression for a very serious problem that is confronting rural America. It is touching farmer after farmer across this Nation. It is causing them anguish and concern, and in many times it is costing them their livelihood.

When I agreed to testify before this committee, one of our staff members asked me, are you not afraid to appear? The history has been that you can expect litigation against you some time after your testimony. I have confidence in this committee and in our system that that is not the intent nor long will be the practice, and I appreciate the opportunity to fairly present my views and the views of American Farm Bureau before your committee.

Thank you, Mr. Chairman.

[The prepared statement, with attachments, of Mr. Eckel follows:]

**STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION  
TO THE HOUSE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE LAW  
AND GOVERNMENTAL RELATIONS  
WITH REGARD TO REAUTHORIZATION OF THE  
LEGAL SERVICES CORPORATION**

**Presented by  
Keith Eckel, President, Pennsylvania Farmers Association  
and Member, AFBF Board of Directors**

**July 19, 1989**

Mr. Chairman, Congressman James, thank you for the opportunity to speak with the Committee regarding reauthorization of the federal legal services program. My name is Keith Eckel and I appear before you today on behalf of the American Farm Bureau Federation, upon whose national Board I serve, and on behalf of the Pennsylvania Farmers Association, of which I am the President.

The American Farm Bureau Federation represents 3.5 million member farmers in 50 states and Puerto Rico; or, about four out of five farmers in the United States. The Pennsylvania Farmers Association is affiliated with AFBF and represents 23,000 farm families in the Commonwealth of Pennsylvania.

I am a working farmer myself, involved in a partnership with my brother in an operation which encompasses both grain and vegetables. We grow tomatoes as our primary crop. These are very labor intensive and we are wholly dependent on seasonal labor for the harvest and processing of our crop.

It is in the context of growers' problems with LSC-funded migrant advocacy activities that I come before you today. I have both an organizational and a personal interest in solving problems caused by legal services grantees. I bring a personal perspective to the issue because I have been sued by the local LSC grantee agency, Friends of Farmworkers, out of Philadelphia and Camden, New Jersey.

Over the past years, the American Farm Bureau Federation has presented many statements to congressional committees regarding the experiences of agricultural employers in dealing with Legal Services staff attorneys. Our problems have yet to be addressed. The confrontation and harassment continues as strongly today as five years ago.

Let me acknowledge right away that the vehicles Legal Services attorneys use to sue growers are not the jurisdiction of either your Subcommittee or the Judiciary Committee. Those are the Migrant and Seasonal Agricultural Worker Protection Act, or MSPA, and the Fair Labor Standards Act, or FLSA. But that is almost beside the point and I'm not here

today to discuss the failings of these laws. Ironically enough, MSPA was negotiated and agreed upon by growers, migrant activists, the Reagan Administration Labor Department and other interested groups. We realize that amendments to MSPA need to be pursued through the Education and Labor Committee.

However, equitable limitations on the behavior of the migrant activist attorneys is your business. Your committee has the ability to grant us relief from the Migrant Legal Action Program (MLAP) and state grantees' agenda which includes affecting social change through targeted litigation. It is in that context that I share with you our thoughts on some badly needed reforms in the federal legal services program.

First, we believe that the program as it exists today is flawed. Congress should repeal the current Act and begin with a new approach. In a moment I will comment on specific reform initiatives, but first I would like to outline the nature and extent of the growers' Legal Services problems as we see them.

It is our view that the current Legal Services program has been allowed to operate without proper checks and balances. Congress has made it clear that Legal Services attorneys are not to engage in a number of practices, including lobbying, union-organizing, and participating in political demonstrations. In actual practice, these statutory restraints have been largely ignored or scorned openly by LSC grantees, who claim they are using non-federal funds to pursue these activities.

Farm Bureau can document many instances of migrant legal services attorneys engaging in questionable activities:

Many examples of grantees participating in union organizing exist. These include the International Farm Workers' Union which the Texas Rural Legal Aid (TRLA) participated in 1984, and the farmworker strikes organized in the late 1970s and early 1980s in Florida by Florida Rural Legal Services (FRLS).

In 1981 the Migrant Legal Action Program (MLAP) organized a series of one-day miniconferences around the country to "provide training and discussion intended to improve networking and coalition building in support of farmworkers." We do not know how much money MLAP spent to run these seminars, but it was at a time that eligible clients were being turned away, allegedly because funds were not available to help them with their problems. We feel that federal tax dollars would have been better spent on helping individual farmworkers with their problems, rather than on coalition activities.

MLAP, and its state affiliates, lobby Congress state legislatures and federal agencies frequently, such as during negotiation of the 1985 EPA farmworker pesticide protection regulations and the 1986 Immigration Reform and Control Act.

-3-

We believe that MLAP was investigated for financial irregularities in 1985, but only a fraction of the money was recovered and the individuals involved were not prosecuted.

Agricultural producers spend inordinate amounts of money defending class action suits. Much of the litigation that growers are forced to undertake involves administrative rulemaking challenges to the H-2A temporary foreign worker program. MLAP, and other grantee agencies, usually represent large, well-funded organizations such as NAACP and AFL-CIO. We fail to see how these meet the criteria of eligible clients.

Further, the H-2A program was exhaustively debated in Congress and this Committee, and was approved in the 1986 immigration reform bill. At that time it was violently opposed by farmworker advocates who now attempt, it seems, to undermine Congressional intent through repetitive court challenges. LSC-funded grantee attorneys have made it clear that they intend to effectively abolish the H-2A program by making growers who employ H-2A workers targets of massive litigation.

These activities go far beyond solving the simple, day-to-day legal problems of farmworkers.

Litigation defense costs are driving growers out of business. Farm Bureau is still developing nationwide figures. I do have partial data for Pennsylvania which is typical of a state whose agricultural industry has been targeted by legal services. The figures illustrate the terrific economic damage done by predatory LSC-funded litigation.

Pennsylvania has two major areas of fruit and vegetable production. Both have experienced unprecedented legal activity since the 1983 passage of MSPA. Last year, PFA undertook to survey growers to determine the extent of the problem. A number of growers detailed for us their experience with Friends of Farmworkers (FoF), the local LSC affiliate. While we do not have comprehensive figures, we do know that seventeen growers in the major fruit growing area, south central Pennsylvania, have spent almost \$800,000 in the past four years defending themselves and settling cases brought by FoF. Many of these growers have gone out of business because of the financial burden. Interestingly, only one of these cases involved court-awarded damages; for \$9,000.

In my area of Pennsylvania, the north central counties, there is or used to be significant field vegetable production, mostly tomatoes. There used to be almost three thousand acres under production; now there is only about two thousand. There used to be about 950 migrant jobs; now there are only 700. The migrant worker payroll used to be about \$1.5 million, now it is about \$1.1 million. The community has lost about \$2.76 million in income, which represents lost tax revenues and diminished services and employment opportunities. This has come about because, of the twelve growers in the area, five have been put out of business by LSC litigation, or by fear of being sued.

The fear caused by legal services lawyers is real. In fact, I was cautioned by my staff that coming here today would expose me, as it has growers in the past, to retaliatory litigation. My response to that is that if I cannot exercise my Constitutionally-guaranteed right to petition my elected representatives to redress a grievance, then something is, indeed, badly wrong with the system.

The sad fact is that, while there are doubtless problems in agricultural employment, we fail to see how driving farmers out of business, and eliminating jobs, helps migrant farmworkers. It almost seems, sometimes, that grantee attorneys believe that the best solution to agricultural employment problems is to eliminate employment.

Agricultural employers are really no different than any other employer group. The vast majority of agricultural employers are making a conscious effort to keep abreast of laws and regulations and to stay in compliance.

We believe that the best interests of both the farmers and the workers would be served by regularized procedures to resolve problems short of filing or threatening lawsuits. We are confident that the vast majority of agricultural employers want to do what is required by law and what is just and right for their employees.

We have tried to work with FoF. In fact, as a result of suggestions made by Congressman Bill Goodling, we have tried to establish a worker/grower mediation system with FoF. I wish that I could tell you it worked; unfortunately, it has not. I spent time again last week in negotiations about its structure and basic groundrules.

It's clear to Farm Bureau that it's time for a major overhaul of the legal services program.

Congressman Combest, and twenty-seven other Members of the House, introduced H.R. 2884 last week and it contains many careful suggestions for addressing these problems through major reform of the federal legal services program. It should serve as an excellent discussion vehicle for a reauthorization initiative.

The bill precludes attorneys from becoming involved in lobbying or political activities, or union organizing, or the solicitation of clients. The focus would be on delivery of day-to-day legal services which would return the program to the original Congressional intent: helping poor people with their legal problems.

It would require competition for grants. This would eliminate presumptive refunding of current grantees and permit the Corporation management to select those agencies who offer indigent clients the best services for the money spent.

-5-

The bill requires grantee attorneys to pursue meaningful negotiation and exhaustion of administrative solutions prior to undertaking litigation on behalf of migrant workers. This would eliminate many of the growers' problems. Too, the prohibition on class action suits would provide much-needed relief from the constant barrage of H-2A litigation. Recovery of damages and the provision of a private right of action would be helpful to growers and grower association targeted by LSC-funded attorneys.

One of the key provisions is the record keeping requirement. At present it is hard to know the extent and appropriateness of LSC-funded litigation since the attorneys are not obligated to account for their time.

An equally important provision is the proposal to reconstruct the Legal Services Corporation as an Administration within the Department of Justice. The accountability required of federal employees would eliminate many of the abuses we have observed LSC-funded attorneys and staff engaging in, such as those I outlined earlier.

This is not an inclusive or exhaustive list. There may be other improvements which would alleviate the abuses. Farm Bureau is pleased that the Subcommittee has begun its work on a comprehensive legal services reform measure and looks forward to working with you to arrive at meaningful solutions to the significant problems growers experience.

I hope that I have profiled the problem and serious extent of the economic and social pain that it's causing. I will be happy to answer any questions, either now or for the record.

Thank you, Mr. Chairman, for your time and courtesy in allowing Farm Bureau to appear before you today.



**FRIENDS OF FARMWORKERS, INC.**

*Legal Services for Farmworkers*  
 3168 Kensington Avenue, 4th Floor  
 Philadelphia, PA 19134-2463  
 215-427-4885

19 W. High Street, 2nd Floor  
 Gettysburg, PA 17325  
 717-337-1544

P.O. Box 877  
 104 E. State Street, 2nd Floor  
 Kennett Square, PA 18348  
 215-444-8331

July 18, 1989

Paul Drollist  
 Congressmen Bruce Morrison  
 United States House of Representatives  
 Washington, D.C.

Re: Testimony of Keith Eckel  
 Pennsylvania Farmers Association

By FAX (202) 225-4890

Dear Paul,

You have asked for information concerning likely issues which may be raised by Keith Eckel, President, Pennsylvania Farmers Association.

Bonhomme v. Meeelaine

Mr. Eckel is a principal in the Fred Eckel and Sons farm operation in Leckwenne county Pennsylvania. Roger Rosenthal of the Migrant Legal Action Project has agreed to forward to you a summary of a decision in Marcel Bonhomme et al. vs. Nathaniel Meeelaine, et al. United States District Court, Southern District of Florida, Case No. 81-2894-Civ-JE. Mr. Meeelaine was a farm labor contractor working at the Fred Eckel and Sons farm operation and that lawsuit concerned issues arising from Mr. Meeelaine's employment of workers in Pennsylvania in the summer of 1981. Mr. Eckel may argue that he was dismissed from this proceeding. The dismissal of Mr. Eckel was on the basis of jurisdiction of the Florida District Court over Mr. Eckel and had no relationship to the claims on the merits. The attorneys for the plaintiffs in that case were Florida Rural Legal Services, Inc.

Sherpe v. Roth

As you are aware the Pennsylvania Farmers Association appears to take the position that Mr. Philip Roth, of Apple Valley Farms, Inc. has been subject to retaliation because of his testimony before the Subcommittee on Labor Standards, Committee on Education and Labor, United States Congress House of Representatives on July 13, 1987 in Biglerville, Pennsylvania.

**FRIENDS OF FARMWORKERS, INC.**

July 18, 1989

Page 2

You are also aware that we categorically deny this.

Mr. Eckel has described Mr. Roth as one of the farmers who has tried the hardest to comply with federal laws affecting farm workers, and has complained that he has been harassed in lawsuits despite this.

My testimony in the Biglarville hearing at pages 33 through 37 and in accompanying attachments discussed prior history of contacts with Mr. Roth through 1983. Exhibit "F" to the testimony included a Settlement Agreement resulting in injunctive relief in the matter of Elana Chandler et al. v. Apple Valley Farms, Inc. et al. United States District Court Middle District of Pennsylvania Civil Action No. CV-84-1573.

On March 2, 1989 in response to a U.S. DOL Freedom of Information Act Request we were supplied with a copy of a 1984 MSPA investigation by the U.S. DOL Wage and Hour Division. At page 2 thereof the U.S. DOL concluded:

"AgEr Phil Roth did not make an accurate record of hours worked by the 34 migrants when they worked on piece rate harvesting apples. He merely devised a "chart" correlating hours to number of bushels of apples picked."

See attached. This document was not included in the materials annexed to the 1987 hearing.

In May 1988 Friends of Farmworkers, Inc. filed Sharpe v. Roth United States District Court, Middle District of Pennsylvania, Civil Action Index No. 88-0814, which was assigned to the Hon. Sylvia Rambo. That matter was brought on behalf of eight individual plaintiffs alleging violations of the federal Migrant and Seasonal Agricultural Worker Protection Act and the federal Fair Labor Standards Act (minimum wage). The matter was only filed after months of unsuccessful attempts at settlement negotiation during which the defendant never offered any money in settlement.

That matter was set for trial in March 1989. Friends of Farmworkers, Inc. filed our Pre-Trial Memorandum in this matter on February 23, 1989. Amongst the allegations which Friends of Farmworkers, Inc. was prepared to prove at trial according to the Pre-Trial Memorandum were:

1. Plaintiffs disputed the accuracy of payroll records and wage statements for the defendants as to hours worked for the period from December 1987 to February 18, 1988 when plaintiffs worked pruning fruit trees. Prior to February 10, 1988 defendants routinely recorded

**FRIENDS OF FARMWORKERS, INC.**  
**July 18, 1989**  
**Page 3**

starting times for work by plaintiffs of at least one hour later to two and one-half hours later than the time plaintiffs generally began work. From December 1, 1987 through February 17, 1988 defendants engaged in a practice of charging plaintiffs for a lunch break of one-half hour on every day when plaintiffs were credited by defendants with having worked 4 or more hours in the day. As a result of these two payroll practices, plaintiffs estimate that the payroll records of the four plaintiffs for which defendants maintained records during the period December 1, 1987 to February 17, 1988 understate their actual hours worked by approximately 145 hours.

2. Plaintiffs were prepared to establish that defendant Philip Roth knew two women plaintiffs performed labor on defendants' behalf in December 1987 raking brush pruned by their husbands and that on at least one occasion in December 1987 defendant Roth instructed one woman plaintiff whom he now denies employing as to proper pruning when he observed her pruning branches on an apple tree in the row where her husband was performing work.
3. Plaintiffs sought unpaid minimum wages of \$222.78 for one woman who was not paid for her work and \$329.98 for another woman who was not paid for her work. Total unpaid minimum wages of \$603.70 were sought for all eight plaintiffs. Plaintiffs sought additional damages for violations of the Migrant and Seasonal Agricultural Worker Protection Act and Pennsylvania statutes.

On Thursday March 2, 1989 a pre-trial conference was held on this matter after it had been set for a firm trial date of Monday March 6, 1989. After consistently refusing to offer any amount in settlement of this matter, and after having filed a proposed counterclaim (which the Court refused to accept on jurisdictional grounds) alleging abuse of process, the defendants informed the Court that they were interested in settlement discussions.

According to a "Statement of Undisputed Facts for Plaintiffs' Motion to Enforce Oral Settlement Agreement" filed with the Court on April 17, 1989 by the end of the discussions on March 2, 1989 the defendants' counsel believed that an

...agreement had been reached whereby defendants would pay \$12,000 to plaintiffs and their counsel, and would agree not to sue plaintiffs and Friends of Farmworkers, Inc. for abuse of the Court's process in this case, in return for which plaintiffs would provide releases of

FRIENDS OF FARMWORKERS, INC.  
 July 18, 1989  
 Page 4

all claims such as to preclude further litigation by plaintiffs against defendants based upon past transactions or occurrences.

Par. 27, page 10. The parties also stipulated that the defendants' counsel on March 3, 1989 informed the Court's clerk that there appeared to be agreement as to settlement terms. Par. 62, page 18. Based thereon the firm trial date was continued.

By letter dated March 10, 1989 the defendants' counsel stated that "defendants consider that there is currently no agreement, tentative or otherwise, as to any settlement of this case. The matter since late March 1989 has been pending before the Court on "Plaintiffs' Motion to Enforce Oral Settlement Agreement". In the event that this is denied the matter will be restored to the trial calendar.

#### Mediation

Mr. Eckel may also complain about the "failure" of legal services programs to engage in pre-litigation dispute resolution. As you may recall this was a purported claim at the Biglerville hearings which was attempted to rebut there.

We have attempted for several years to participate in a voluntary mediation and dispute resolution program in the Northeastern Pennsylvania fresh market tomato industry where Mr. Eckel's farm is located. Unfortunately, from the point of view of all concerned this system to date has been a failure.

Our most recent problems included having a worker beaten up in September 1988 six days after participating in a mediation session where he was the chief spokesperson for a group of workers with complaints. The farmers' (including Mr. Eckel's) chief complaint has been that complaints have not been brought in season. However, our experience is that our clients have suffered retaliation and discrimination when they have brought complaints in season.

We intend to continue to be available to utilize the chief mediator to help resolve disputes, but I doubt that anyone could argue it is a success. We would be happy to discuss other problems with this system.

If you require any further information do not hesitate to contact me.

Vary truly yours,

*Arthur N. Read*  
 Arthur N. Read, Esquire

## Combined FLSA/MSPA Narrative for:

Apple Valley Farms, Inc. (AgER)  
 R.D. #1, Box 3  
 Fairfield, PA 173

Joe Lee Craws, FLC.  
 P.O. Box 316  
 Lake Hamilton, FLA 33851

page 1 of 5

**COVERAGE: AgER FLSA:** Subject is an orchard growing apples, peach cherries, and grapes. The subject is a member of the Knouse Foods coop, which processes the fruit and ships it OOS. The period of invest. under FLSA is different than the MSPA SIP because the complaint alleges MW violations for 1983. Thus, the FLSA investigation covers both the 1983 and 1984 apple harvest seasons (8/83 to 10/84), while the MSPA inv. was limited to the current, 1984 apple harvest season.

**AgER MSPA:** Phil Roth, owner of estab, contracted with FLC Joe Lee Craws to provide a crew of 34 migrant workers to harvest his apple crop. Craws is paid for each bushel of apples picked by his crew, and for each hour they work, when they work by the hour. In 1983 he was paid a total of \$ by Mr. Roth.

**FLC FLSA:** The FLC's crew is engaged in harvesting apples which shipped to Knouse Foods for processing and shipment OOS. Craws actively supervises the crew in the fields, and at least one of his sons, Merion Russel (who is also a registered FL works as a tractor driver and foreman over the crew. AgER Roth prepares individual paychecks for the workers, but gives all the checks to FLC Craws for distribution and allows the FLC to make deductions for camp clean-up and meals. FLC Craws charges crew members \$3 per week for camp clean-up and employs one of the crew to clean the camp. Craws also charges crew \$47/wk for meals. The CO's concluded that AgER and FLC were joint employers of the migrant crew.

**PRIOR HISTORY: AgER FLSA:** FLSA investigations were conducted in tandem with FLCRA investigations in 1975 to 1981 and no FLSA violations were disclosed.

**AgER FLCRA:** 1975: 4(c), AgER hired Joe Craws as a crew leader. Craws was not registered.  
 1976: No Violation.  
 1977: 4(c), AgER hired FLC Craws whose card was not in full force and effect. Craws controlled the camp but did not have HA for the camp.  
 1978: Investigation begun but not completed. AgER would not allow COs to conduct private interviews and CO's obtained a warrant, but the crew left the area before the CO's were able to interview workers and complete the investigation.  
 1979: NV  
 1980: NV  
 1981: NV  
 1982: No investigation.  
 1983: No investigation.

**FLC FLSA:** No prior investigation.

## COMBINED FLSA/MSPA NARRATIVE

Appia Valley Farms, Inc. - AgER  
Joe Lee Craws - FLC

page 3 of 5

PRIOR HISTORY (cont): FLC/FLCRA: 1979: 4(a). FLC was not reg.  
1976: NV  
1977: 4(a) FLCs reg. was not in "full force and affect" He  
controlled the labor camp at Appia Valley, but did not  
have NA.  
1978: Investigation begun but not completed for some reasons  
given under this section for AgER.  
1979: 3(b)(12) Housing & H charged for several missing door  
window screens, and trash cans too close to facility.  
1980: NV  
1981: N/V  
1982: No investigation.  
1983: No investigation.

STATUS OF COMPLAINT: Complainant Info: Complaint from  
was received by the  
AO alleging numerous MSPA/FLSA violations by AgER and FLC. CO's  
were able to substantiate some of the violations, as listed below  
in this section. They were not able to substantiate the the FLC  
sold beer, wine, etc at an excessive profit, or that workers  
even purchased these items from the FLC at all. One of the 15 was  
interviewed and he said they had bought some cigarettes from FLC. CO's  
also were not able to substantiate that crew members were forced  
to buy meals from Craws, although most did. Camp is less than  
a mile from Fairfield, where there is a grocery store, diner, and  
restaurant, and was indicated they could walk into town if they  
didn't want to eat FLC's food.

AgER FLSA: Sec. 11, RR: AgER Phil Roth did not make an accurate  
record of hours worked by the 34 migrants  
when they work on piece rate harvesting apples. He merely de-  
vised a "chart" correlating hours to numbers of bushels of apples  
picked. This was confirmed in interview with AgER as  
who is the timekeeper/bin counter. CO's asked Mr.  
Roth for a copy of the chart, and he acknowledged its existence,  
but refused to show it to the CO's unless they gave him a copy  
of their interview with

In addition, AgER permitted crew members to pick on a single pick  
ticket. He allowed the two workers to determine who would get  
credit for the bins picked that day.

Three pairs of workers picked on a single ticket for the pa

Sec 8, MW: MW violations occur for one of two reasons. The actual  
hours worked by migrants exceeded the hours recorded  
by AgER when working piece rate, and piece rate earnings were not  
sufficient to cover actual hours worked at MW. Also, AgER allowed  
the FLC to deduct an excessive amount of money for meals to the  
crew members. FLC deducted \$47 per week, but CO's determined the  
actual cost to be \$20.52. CO's determined this by gross  
receipts kept by the cook for a nine day period.

COs used as actual hours of work the average obtained in interview  
with migrants, and found an average of 8.9 hours worked per day  
instead of the 8 hours recorded by AgER. This seems to be more  
than reasonable, as the COs also transcribed hours worked by the  
AgER's regular field men who worked with the migrants, and found  
that their average hours were more than 8.9 per day.  
Migrants interviewed who were used in the average for reconstruct

## COMBINED FLSA/MSPA NARRATIVE

Apple Valley Farms, Inc. - AgER

Joe Lee Crews - FLC

page 3 of 4

STATUS OF COMPLIANCE: AgER FLSA (cont): ing actual hours worked

In 1983, AgER paid a year end bonus, and the CO's computed the weekly average of this bonus for each worker and gave credit for it towards MW owed. Back-up material w:  
were copies of payrolls, and FLC's record of debts for  
current year, 1984.

24 ess are due \$1,925.83 MW.

AgER MSPA: 201(d)(1) and 201(d)(2): AgER failed to make and maintain accurate records of hours worked by the migrany crew and also failed to provide a complete pay stub. AgER's pay stub did not show the basis upon which wages were paid (rate or the hours worked).

FLC FLSA: As mentioned previously, CO's determined a joint employment relationship to exist between FLC and AgER, thus FLSA violations as reported under AgER section above apply here too. However, CO's determined that prime responsibility for MW payment should lie with AgER, as he made individual checks for ess, but then allowed Crews to make add'l and excessive deductions for food.

FLC MSPA: 201(e) FLC did not provide this info as required until after arriving in PA.

201(d) FLC did not make a record of deductions for meals prior to 1984. Actually, it appeared that he only made up the 1984 record after CO's asked him for it, since it was all in the same ink and only extended forward since 8/31/84. FLC also had no record to justify the deduction he made for meals the migrants.

201(e) FLC did not provide AgER with a record of deductions he made from workers pay for meals and camp clean-

DISPOSITION: FLC: FC held with FLC Crews on 10/17/84 at Apple Valley Orchards. At that time, the violations were fully explained to him. He agreed to comply in the future. He said he didn't disclose conditions of empl. before coming to PA because he wasn't sure of them, but in future he will find out and disclose them in advance. Re excessive deductions for meals, the lack of MK needed to justify cost and his not providing AgER with copy of the deductions, Crews said he would comply with this in the future by not providing any meals to anyone. Sales of beer, wine, cigarettes was also discussed with FLC, who denies selling th items. CO's explained 531.31 precludes him from charging for these items. Transportation \$50 of MSPA also discussed because during the investigation, several crew members mentioned transportation being provided in an unregistered green station wagon. CO's called Bureau of Motor vehicles and found it registered, to Helen Cheesebrough, who is Crews' sister. Crews denies the sis sister for him in an FLCE capacity, and said that she provided transporte for a few of her "friends", and that he neither controlled this or Cheesebrough a "fee" of any kind for it. Cheesebrough was interviewed and she verified this. CO's also discussed with Crews his

## COMBINED NARRATIVE - FLSA/MSPA

Apple Valley Farms, Inc. AgEr  
Joe Lee Crews - FLC

page 4 of 4

DISPOSITION (cont): responsibility for MW violations as a joint employer with the AgEr. However, the CO's are first looking to AgEr for SW payment for reasons discussed earlier.

AGER: FC held 10/17/84 with owner Phillip Roth at his pecking violations were fully explained. He agreed to comply in future with both MSPA and FLSA. He said he has already abandoned the use of his "chart" to record hours of work based on no. of bins picked, and has begun to accurately record hours of work. In future he will also show hours worked on pay stubs, along with rate of pay.

Re payment of BWe, Mr. Roth said he would make a decision whether or not to pay after he knew the final amount, and was given copy of the comps. He asked for a MW credit for the fair value of housing he provides the migrant crew, and provided the COs with which shows Mr Roth's cost of maintaining the camp to be about \$17 per week per occupant. The CO's told Mr. Roth that they didn't believe he could claim credit for this, since the posted notice of terms and conditions of employment said that there was no charge for housing. Thus, if the CO's were to allow him to credit this against wages owed, he would be committing a breach of his contract. Mr. Roth was advised that the CO's would contact the AAD though, for a determination of this AAD Snow was contacted, and he said that in his opinion, the COs could not give AgEr MW credit for cost of maintaining the camp. Mr. Roth was called on 10/18 and informed that the AAD said that MW credit could not be given for cost of the camp.

58 and copies of comps sent to AgEr Roth on 10/24/84. Co also called Roth on phone that week to ask if he had any questions re the comps. Roth said that he had talked to some of the migrant crew members for who COs showed BWe due to excessive meal charges, and the migrants told him they didn't buy meals from FLC. He said he was going to submit info to CO Royer that week showing migrants who he felt should not have had BWe computed for excessive meal charges.

Roth never submitted the info he said he was going to send, and did not respond to CO's request as to whether he intended to pay the BWe, so On 11/14/84 COs Royer and Szymanski visited the farm. Mr. Roth at that time told the CO's he felt the comps were too high. CO's explained to him that hours used were those obtained from interviewing crew members, since his own records did not reflect actual hours worked. Roth said the CO's had no proof of this. CO's reminded Roth that they knew of the chart he had fabricated to correlate hours worked to bushels of fruit picked so that it would look like migrants were paid MW, when in fact they were not. Roth responded by saying that they would have to prove this. He also made excuses that in some weeks hours used in comps should be reduced due to daylight saving time when it got dark at 4:00. CO's told Mr. Roth that we were now in middle of November, and it does not get dark until about 5:00

Mr. Roth gave the CO's 4 documents signed by 4 crew members saying they either did not buy meals at all in 83/84 or that they bought only one meal a day.

COMBINED NARRATIVE- MSPA/FLSA

p 3 of 3

Apple Valley Farms, Inc (AgER)  
Joe Lee Crews (FLC)

DISPOSITION: AgER (cont):

Mr Roth told the CO's that the crew has gone back to FLA, and if he has asked FLC Joe Crews to have to other crew members sign PAPERS for the meals.

Mr. Roth told the COs that he would not agree to pay the BWA, or that if necessary, he would go through as many appeals as necessary.

CO Recommendation:

10500 Reg. CO  
C. J. Byrnes

11/15/84

Witness:



**FRIENDS OF FARMWORKERS, INC.**

*Legal Services for Farmworkers*

3156 Kensington Avenue, 4th Floor  
Philadelphia, PA 19134-2483  
215-427-4885

18 W. High Street, 2nd Floor  
Gettysburg, PA 17325  
717-337-1644

P.O. Box 877  
104 E. State Street, 2nd Floor  
Kennett Square, PA 19348  
215-444-9331

October 14, 1988

Re: 1988 Agreement for Resolution  
of Grower-Worker Disputes

Dear Sirs:

This is to confirm and elaborate upon conversations with the office of Sal Cognetti, Jr. and Karl Drown of the Pennsylvania Farmers Association notifying of the existence of disputes.

FRIENDS OF FARMWORKERS, INC.  
 October 14, 1988  
 Page 2

arising from the 1988 harvest season and the procedures adopted to provide for appropriate access to farm workers thereunder.

This letter in its initial draft form has also been reviewed in a telephone conference call on October 14, 1988 with Keith Eckel, Rich Pallman, and Pennsylvania Farmers Association representatives.

The principal concern addressed by this notice of dispute is to address in advance problems that arose from this season which substantially interfered with the functioning of the Dispute Resolution process so as to prevent their recurrence in the future.

This "Notice to Workers" attached hereto as Attachment "1" was agreed upon with the representatives of the growers and was to have been distributed to each of the workers. That notice stated in part:

"If you are unable to resolve complaints directly with your crewleader or this farm, a mediation program has been developed where persons outside the farm will try to help resolve your problems. You have the right to receive assistance in presenting these complaints and trying to resolve them.

"If you need such assistance contact Amy Weigand, Friends of Farmworkers..."

These notices with their accompanying non-retaliation clause, which stated "this farm will not retaliate against any person for making a complaint under this procedure", expressed the essence of the first phase of the dispute resolution procedure which was that workers had the right to "receive assistance in presenting...complaints and trying to resolve them".

In practice our experience during the 1988 harvest season was that this was not true. If effective agreements to genuinely protect persons with complaints and provide for free access by workers to Friends of Farmworkers outreach staff are not reached, there seems little purpose in continuing to agree in the future to participate in this mediation process.

Below are some of the examples that raise our concerns.

Trotter's Hotel

We learned during the season that Trotter's Hotel in Hoosier, PA was the housing location for workers employed at one or more

**FRIENDS OF FARMWORKERS, INC.**  
**October 14, 1988**  
**Page 3**

of the farms operating in the area. We subsequently confirmed that a farm labor contractor who identified herself as "Minerva Garcia" and had a bus with a disclosure form indicating that persons transported on that bus were employed at the "Landaiedel Farm" was living at the motel with workers in her farm labor crew.

In addition, based upon conversations with farm labor contractor Maria Garcia and farm workers at the Keith Eckel Diamond camp it was our belief that workers employed at the Eckel farm were being housed at the Trotter motel.

On the first and the second occasions Amy Weigand went to talk to workers at the Trotter's Motel they indicated that they believed the arrangement as to their rental was that the rent at the motel was to be partially subsidized by the "farm", although they did not know the name of the farm at which they were employed. Several workers on those visits expressed concerns about conditions at the motel especially overcrowding and the cost of housing there.

By the next occasion when Amy Weigand returned to the motel it appeared to her that workers had been pressured not to speak to her about any concerns they might have about their work. On that night when Amy Weigand attempted to speak to workers, Minerva Garcia attempted to follow her and to listen to her conversations with workers. While Amy was talking with some of the workers at that motel in their room that night, the wife of the motel manager came in and told her that she would have to leave within five minutes.

On September 7, 1988 Amy Weigand went again to the motel and spoke to Minerva Garcia and looked at Minerva Garcia's bus in order to see the work disclosure for Minerva Garcia's crew. While Amy was at the bus, she was informed by the manager of the motel that she was not allowed to visit guests at the motel without the motel manager's permission. He then told her she did not have permission and ordered her to leave.

The actions of Minerva Garcia effectively prevented employees of grower participants in this dispute resolution agreement from obtaining assistance from Amy Weigand and Friends of Farmworkers in resolving any disputes they may have had with their employers. We consider this to interfere with the intent of the Dispute Resolution Agreement.

#### Landaiedel Farms

Amy Weigand and attorney Mark Finnegan had similar problems with free access to workers to provide them assistance in trying

FRIENDS OF FARMWORKERS, INC.  
 October 14, 1988  
 Page 4

to resolve their complaints at the Lendsiedel Farms.

While Friends of Farmworkers staff were meeting with a group of workers privately in a room in a trailer at the farm labor camp, Mr. Lester Lendsiedel and his son, and attorney Sal Cognetti, Jr. and an individual introduced as his son, came into the trailer and demanded to speak with them. Workers were very intimidated by this.

Amongst other problems workers there were told by the farm's attorney during a group meeting that they did not require the assistance of Friends of Farmworkers and that they should deal directly with the farm or the farm's attorney.

Eckel Farms (Diamond Camp)

During attempts by Amy Weigand to talk to workers at the Keith Eckel Diamond camp in Tunkhanok there were repeated problems with farm labor contractor Maria Garcia. Ms. Garcia repeatedly insisted that workers had no complaints and at first insisted that Amy Weigand should leave. Ms. Garcia then attempted to listen to conversations between Amy Weigand and the workers which made it impossible for such persons to communicate freely.

W. Thompson Brothers, Inc.

There was an unsuccessful attempt to mediate a dispute arising at this farm on behalf of several individual workers who were concerned at the small amount of work made available to them during their first three weeks of work.

The principal "defense" to this mediation process was an insistence that workers had been in some way pressured to make claims that they had no interest in. Workers with such claims were subjected to a mediation process over Friends of Farmworkers objections in which they were publicly identified as trouble makers in front of a group of "witnesses".

Six days after the mediation session the lead spokesperson for the group of workers who had initiated the mediation was beaten by one of the "witnesses" brought to the mediation session by the farm.

The next day when Amy Weigand returned to the Thompson Brothers farm to meet with the worker who had been beaten, she was ordered by Warren Thompson and his attorney to leave the farm labor camp. When Amy Weigand refused to leave, the farm's attorney returned and instructed the farm labor contractor's wife, Maria Cano to follow her around the camp and to listen to

FRIENDS OF FARMWORKERS, INC.  
 October 14, 1988  
 Page 5

every conversation that she had with workers. The farm's attorney then told her that she was not allowed to privately meet with workers at the farm.

Because of the pre-existing federal court Order governing the Thompson farm, Friends of Farmworkers, Inc. was forced to seek the assistance of the Court simply to be able to have any opportunity to speak to clients without such interference.

#### Relief Sought

There were in fact numerous serious concerns expressed by workers to Friends of Farmworkers, Inc. during the course of the 1988 harvest season. However, the problems detailed above totally destroyed any effective opportunity for the in season mediation process the grower community has indicated it sought through this year's Dispute Resolution agreement.

Where clients are subjected to physical assault after making complaints, and where there are repeated attempts to interfere with free access to farm workers any purported desire to see a free and open mediation in season process is meaningless.

We seek the assistance of the mediator to structure procedures designed to insure that there will be no repeat of incidents similar to these. If that is not possible there is little point in continued participation in the mediation process.

We anticipate that those issues on behalf of clients of Friends of Farmworkers which the season's Dispute Resolution process were unable to resolve will have to be resolved through the legal process. However, we would like to work together to salvage a meaningful dispute resolution process for the future.

Very truly yours,

Arthur N. Read, Esquire

COMMENTS REGARDING THE MARYLAND LEGAL AID  
BUREAU MIGRANT PROGRAM IN RESPONSE TO  
TESTIMONY PRESENTED TO THE SUBCOMMITTEE ON  
ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS  
OF THE HOUSE COMMITTEE ON THE JUDICIARY

Prepared by Gregory S. Schell

This is a response to the statement made by Congresswoman Beverly Byron on July 19, 1989 to the House Judiciary Subcommittee on Administrative Law and Governmental Relations. In her comments, Congresswoman Byron made a number of assertions regarding the activities of the migrant farmworker division of the Maryland Legal Aid Bureau between 1983 and 1985. I was managing attorney of the farmworker division from 1983 through 1988.

Congresswoman Byron's charges divide into two categories. First, she suggests that various improprieties occurred during the course of the Legal Aid Bureau's representation of migrant workers in actions against certain western Maryland orchards. Secondly, Congresswoman Byron contends that the decline of the orchard industry in western Maryland is directly attributable to these actions by the Legal Aid Bureau. These assertions are incorrect.

Congresswoman Byron's suggestion that the Legal Aid Bureau brought frivolous or unfounded cases is at odds with numerous decisions made by the courts and administrative agencies. In her comments, she specifically mentions a grower's refusal to hire domestic workers who failed a ladder test. This practice was declared unlawful, both by the United States District Court (Bernett v. Hepburn Orchards, Inc., 106 Lab. Cases ¶ 34,913 (D.

Md. 1987)), and a federal administrative law judge (Miller v. Hepburn Orchards, Inc., No. 85-JSA-2 (June 5, 1986)). Most of the Legal Aid Bureau's actions on behalf of domestic farmworkers against various western Maryland growers were based on the orchard's refusal to hire domestic workers or the employer's unlawful dismissal of domestic workers. Ironically, the majority of the domestic workers rejected by one employer, Fairview Orchards, were year-round western Maryland residents and constituents of the Congresswoman. I am enclosing copies of all three federal court decisions involving western Maryland growers as well as a number of the administrative decisions against them.

We must also respond to the Congresswoman's assertions concerning the number of cases filed. At first blush, the number of complaints and lawsuits may appear staggering, but upon further review, it is not nearly as imposing. The 155 administrative complaints were all filed through the job service complaint system at 20 C.F.R. §§ 658.400, et seq. Under the job service complaint system, each individual complainant must file his or her own individual complaint. Thus, the 155 complaints are only an indicia of the number of workers who filed complaints. If these had been federal lawsuits, we obviously would have combined claimants bringing similar claims into a single lawsuit.

There were not 155 separate administrative proceedings; indeed, we made every effort to combine job service complaints

involving similar issues. Thus, the Swanger administrative hearing included 18 of the 155 complaints and the Miller administrative decision involved five separate workers. With respect to the lawsuits, six involved the failure of the western Maryland growers to pay the required piece-rates and adverse effect wage rate in the 1983 harvest. We agreed with the growers' attorneys to consolidate these cases into the Frederick County Fruit Growers Association v. Brock litigation, which was then pending before Judge Kiser in the Western District of Virginia.

With respect to the decline of the western Maryland fruit industry, the enclosed article from the July 30, 1989 Hagerstown (Maryland) Herald-Mail is instructive. The extension agents and other experts interviewed by the reporter point to poor management practices by the orchards and market forces as the principal causes for the decline in Maryland's apple production. The 1985 spring freeze, which destroyed the entire western Maryland peach crop, seriously impacted those growers who depend on peach production for 30% or more of their income (e.g., Hepburn Orchards and Rinehart Orchards).

I agree with the analysis set forth in the enclosed article, based in large part on my familiarity with the finances of Fairview Orchards Associates. Until 1986, Fairview was Maryland's largest apple producer, with roughly 1000 acres in fruit production. The orchard closed in 1987, long after it had settled its cases with the Legal Aid Bureau. During the

course of our settlement discussions with Fairview's West German owners and its accountant, we learned that the orchard had been in a steady decline since the late 1970's. The orchard changed hands several times between 1975 and 1982 and little maintenance and replanting was undertaken during this period. The average production on Fairview's operations fell a full 50% between 1975 and 1983, largely due to the increasing age of the treestock in the orchard. In 1984, before most of the litigation involving Fairview was under way, the orchard had an operating loss of \$500,000. The new owners undertook a massive re-planting program designed to replenish the aging orchard stock. However, deer ate many of the young trees, rendering the effort unsuccessful.

The legal expenses argument should also be addressed. Throughout the litigation, both in the courts and at the administrative level, the western Maryland growers paid absolutely no legal expenses. These legal expenses were paid by the Farm Labor Executive Committee ("FLEC"). FLEC was organized in the late 1970's by various east coast apple growers participating in the temporary foreign labor ("H-2") program. It was managed by Steven Karalekas, an attorney in Washington who, through 1985, represented the east coast H-2 growers in virtually all of their labor matters. According to Fairview's owner, FLEC funded all of the litigation involving the western Maryland growers, apparently figuring that the issues raised there were of importance to the general

membership of the organization. Thus, while the western Maryland growers themselves apparently were responsible for paying the judgments entered against them, they did not have to shoulder the legal bills run up by Mr. Karalekas and his partner, Thomas Wilson, during the course of the litigation.

The involvement of FLEC explains the absolute failure of pre-filing settlement efforts in the western Maryland cases. Although the Legal Aid Bureau offered to settle every one of these cases before filing either a lawsuit or an administrative complaint, often for very small sums (\$100 or even less), the orchardists refused to ever make a pre-filing settlement offer.

A good example of this situation occurred with respect to our representation of Kent Osbourne. Mr. Osbourne was a crewleader who brought 14 workers to Fairview in 1983. He was fired after three days on the job. We immediately called Mr. Karalekas in an effort to have Mr. Osbourne reinstated. Mr. Karalekas advised us that the orchard would not reinstate Mr. Osbourne and instead was going to sue Mr. Osbourne, (who was penniless and judgment-proof), under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). In fact, Fairview did sue Mr. Osbourne. We represented him and counterclaimed on his behalf. The case was ultimately settled, with Mr. Osbourne receiving a sizeable settlement amount. If Fairview had been willing to negotiate at the time the dispute arose, it could have avoided this litigation.

Finally, I wish to express in the strongest possible terms

my outrage at the Congresswoman's suggestion that the activities of the Legal Aid Bureau caused one grower (George Gardenhour, Jr.) to commit suicide. The subcommittee should insist that Congresswoman Byron present some evidence for this incredible assertion. In fact, Mr. Gardenhour apparently had a long history of depression, and problems relating to this condition, rather than litigation, probably prompted his suicide. Mr. Gardenhour's dealings with the Legal Aid Bureau were very limited. The Legal Aid Bureau handled only one case against Mr. Gardenhour, Clarke v. Gardenhour Orchards, Inc., 108 Lab. Cases (CCH) ¶ 35,070 (D. Md. 1987). The farmworkers prevailed in the litigation and were awarded a total of approximately \$7000. I frankly cannot believe that a concern over a relatively small lawsuit prompted Mr. Gardenhour's suicide.

Therefore, in sum, the Congresswoman has seriously misrepresented both the nature and the results of the Legal Aid Bureau's representation of migrant workers in cases against western Maryland fruit producers. I am disappointed to find the Congresswoman repeating these inaccurate statements, since she refused to meet with me and the executive director of the Legal Aid Bureau in 1986 when these problems first came to her attention. Thus, she has not had the opportunity to hear the full story regarding these matters. I am providing this information so that the Subcommittee does not suffer from a similar lack of information.

# HERALD MAIL

Hagerstown, Md. Sunday, July 30, 1969

## A fallen industry

Expert says apple growers were too slow to change

By TERRY HEADLEE  
Staff Writer

Orchardists who have clung to traditional methods for producing apples and have refused or been slow to switch to more modern growing techniques are primarily responsible for the demise of the apple industry in Maryland, a state fruit specialist says.

"There's a lot of blame to go around, but I think the basic reason is that many growers haven't changed with the times and now they're taking it on the chin," said Chris Walsh of the University of Maryland Cooperative Extension Service in College Park.

The once thriving apple business has been cut by more than half in the past decade alone in Maryland, according to state and federal agricultural statistics.

As recently as 1958, the state produced 3.1 million bushels of apples with more than half of that being harvested in Washington County.

The figure slipped to a statewide low in 1957 of 243,000 bushels, primarily because two large orchards in Washington County closed down a year earlier, killing about 2,000 acres of apple trees.

Since then, a debate has raged on as to what caused the drastic decline in apple production.

Many growers, including those at Fairview and Heubers orchards, placed most of the blame on lawsuits and grievances heaped on

### Shrinking harvests

Maryland apple crops from 1976 to 1988, in millions of pounds.

1 bar = 10 million lbs.



represented by state Legal Aid Bureau attorneys.

"They used legal bills and unrealistic regulations for hiring labor prevented them to shut down."

Their views are shared by U.S. Rep. Beverly S. Ryan, D-Md., who two weeks ago submitted two congressional bills to curb lawsuits and grievances.

Other orchardists say finding good pickers had become increasingly more difficult in recent years. Still others say the market price for processed apples hasn't kept pace with rising costs.

Please turn to APPLE, A2

## Apple production predicted off by 40%

By TERRY HEADLEE  
Staff Writer

Washington County is still Maryland's leading apple producer, but the last three years haven't been kind.

From 1966 to 1967, the number of apples harvested in the county dropped by more than half. That decline was primarily because the state's two largest orchards near Hancock, Fairview and Heubers orchards, went out of business after the 1966 harvest season.

From 1962 to 1967, the number of apple orchards in the county slid from 42 to 43 while the acreage shriveled from 4,354 acres to 1,100, according to the latest census data from the U.S. Department of Commerce.

During the same five-year per-

iod, apples picked in the county dropped sharply from 1.3 million bushels — or 54 million pounds — to an all-time low of 47,000 bushels. A bushel holds about 43 pounds of apples.

Fruit experts say they don't expect the situation to get much better in 1968 and it's not because more orchards are going out of business.

Drought conditions in 1967 and 1968, coupled with a deadly spring frost earlier this year, will hurt much of the apple crop this fall, they said. Growers have complained that their trees lacked blooms in the spring, a prime indicator that apple production will be off.

Please turn to HARVEST, A2

A2

The Herald-Mail  
Sunday, July 29, 1968

# Apple

Continued from A1

Walsh said he believes several factors are involved in Maryland's decline in apple production. But at some point, the growers had to come to realize that they weren't going to make money if they didn't change.

Changes include replacing trees of least every 20 years and switching from the traditional apple trees to dwarf and semi-dwarf trees.

Growers can save a considerable amount of labor costs simply by switching to the dwarf and semi-dwarf trees with new plantings. Walsh said. The trees only grow to eight to 12 feet high, which makes them easier to pick and prune than the traditional apple trees that top out at 25 feet.

In some cases, ladders aren't needed to pick the fruit from the trees.

"Any grower that wants to stay in business now has to modernize," Walsh said. "You can't afford to pay someone to go up and down a ladder. It can't be done. They'll be bankrupt by the year 2000."

## Labor shortages

It's also getting tougher to hire labor to enter orchards, he said.

"That will be a problem more growers may face," Walsh said. "Some pickers will not go to ancient orchards and climb ladders and try to make money when they can go somewhere else and pick from the ground."

Growers in Washington state, which produces half of the nation's apples, have been using the dwarf trees for decades and have prospered because of it, he said.

In Washington County, decisions to modernize should have been made during the 1970s so that small portions of the orchards could be replanted each year with "hot varieties" demanded by consumers.

While some of the county's smaller growers have switched to more modern techniques, several of the larger orchards didn't.

"I think we coasted along with these big problems for too long," Walsh said. "And in the last couple of years, interest rates went up, prices went down and there was a wave of bankruptcies."

Walsh said that while Legal Aid lawsuits may have hurt some growers, he doesn't share the opinion that they are solely responsible.

Attorneys for the Legal Aid Bureau in Maryland had not only one grower case for discriminatory hiring practices against migrant workers while Legal Services attorneys in West Virginia have never lost a suit.

"I think Legal Aid has over-aggressively pursued some cases, but again, as we see above the law," Walsh said. "If the large orchards had modernized their industry rather than taking on Legal Aid, they never would have got to the point where they were blaming Legal Aid."

## The growers' side

Terry Hepburn, whose family owns a 1,000-acre orchard near Hancock, said he was drawn into suits and grievances until he quit the business.

Hepburn and Fairview orchards, which both closed in 1967, had more than 100 grievances filed again them which cost \$200,000 plus in fines and settlements.

"They got us down to the point where we couldn't fight in court and you have to say, 'Is this really worth it?'" Hepburn said in a recent interview.

Hepburn said the courts and Legal Aid will result in him hiring domestic workers, rather than foreign help. The result was that he couldn't find enough help and that the domestic pickers were slower and less reliable than the Jamaicans.

"They wanted us to be a private settlement program for the federal government," Hepburn said. "And it didn't matter if they could do the work or not. You just can't compete with those kinds of man-hours. He adds were stacked against us."

Former Maryland Legal Aid attorney Greg Scholt, who worked on many of the suits and grievances, particularly with Fairview, said the orchard was already in financial trouble before any suits were filed.

"They weren't planting any new trees and I know for a fact, because Fairview opened their files to us, that their productive stock of trees dropped 50 percent during the 70s," Scholt said. "These guys were losing money big time. I mean big time, before we ever came in the scene."

Scholt said he believes an over-production of apples in the Northwest is causing financial woes in orchards stretching from Maryland to Washington.

"Apple growers are losing money all up and down the Shenandoah Valley and Washington State," Scholt said. "That's not my fault. It's not, it's unfortunate, but that's economics — that's not Legal Aid." Another factor hurting local orchardists is that the bulk of their annual crop has been sold as processed fruit, such as apple sauce and pie filling, rather than the more profitable fresh fruit market, experts say.

Richard Helfebower Jr., regional specialist at the University of Maryland Cooperative Extension Service, said the Appalachian area from Virginia to Pennsylvania has been "overplanted" with orchards geared more toward producing processed fruit.

"A lot of our orchards are feeding the processing plants, and that hasn't allowed for much growth," Helfebower said.

Some local orchardists are planting dwarf trees which are traditionally used for the more lucrative fresh fruit market that requires larger, more favorable apples.

Helfebower, however, said the changeover has been slower in Washington County, compared to Cecil and Carroll counties.

"We're in a world of change and they're in an industry that's slow to change."

## Changing with the times

One grower considered by Walsh to be in the next generation of growers is Robert Black, who owns Catalina Mountain Orchard near Thurmont.

Black, who took over his father's orchard when he opened in the early 1940s, has only dwarf trees and sells only fresh fruit.

"I've never said to be new experimenting with other dwarf trees."

"Our ultimate goal is to be able to pick everything from the ground," Black said of his production new productive the trees are. They cut down on costs to prune and pick them. You can make better time with less labor with our dwarf trees."

John Rinehart, a Smithburg area grower who chairs the Maryland State Apple Commission, said he has cut 90 percent of his production acreage and has turned toward planting semi-dwarf trees to stay competitive.

Rinehart said he also has diversified his 275-acre orchard and has shifted more to the fresh fruit market.

The grower said he doesn't see the family-owned business shutting down and selling out to developers, like some other growers, since he sees it interested in keeping up the third-generation business.

But he admitted, the decision isn't an easy one.

"With the different (development) pressure, it's a tough decision to know if you want to go out and plant a young orchard, which takes six to eight years before it starts paying for itself," Rinehart said. "It's a tough decision to make."

Fruit experts say the Shenandoah and Cumberland valleys have lost a considerable amount of orchard acreage in the past 10 years.

In the four-state area of Pennsylvania, Maryland, West Virginia and Virginia, as much as 14,000 acres of orchards, most of which produced apples, are not being used commercially, Walsh said.

The figure becomes more startling considering that most of that acreage loss is in 11 counties, including Franklin County, Pa.; Washington and Frederick counties in Maryland; and Berkeley and Jefferson counties in West Virginia, Walsh said.

All of this bothers fruit specialists, like Helfebower, who says: "We're slowly losing a commodity I wish we could hang on to."

Walsh is more blunt about Maryland's apple future.

"I'm concerned the state will look like north Jersey in 10 years," Walsh said. "There's nobody putting on the brakes for a lot of this development going on agricultural land."

"From a consumer point of view, the question isn't 'Will there be apples on the shelves?' The question is: 'Is there going to be any green space left.'"

# Harvest

Continued from A1

Richard Marini, a Virginia state fruit extension service agent, predicted that apple production will be off by 40 percent in the Mid-Atlantic region that includes Maryland, Virginia, West Virginia and Pennsylvania.

"This was a bad spring frost, but I'm blaming a lot of it on the drought the last two summers," Marini said. "I think that's a big reason a lot of trees just didn't bloom this year."

Statewide, Maryland figures to have one of its worst apple crops ever in 1968, said John Rinehart, a Washington County orchardist who chairs the Maryland State Apple Commission.

The apple commission projected in June the state's harvest would hover around 700,000 bushels during 1968.

If the prediction holds true, "this will be the smallest Maryland crop in quite a few years," Rinehart said.

For most of the 1960s, Maryland averaged about 2 million bushels a year until 1967, according to the state Department of Agriculture. Washington County, which still annually produces about half of the state's apple crop, probably will harvest only about 25,000 bushels this fall.

"That's a substantial drop considering the county produced more than four times that — 1.4 million bushels — just a decade ago."

It also is a long way off from its heyday in the 1920s when the county was once labeled the nation's biggest producer of apples for a century.

A July 3, 1972 article in the Baltimore News American newspaper

announced a headline that claimed Washington County as the largest fruit growing county in the United States.

Just a year earlier, the rural county had hundreds of orchards spread over 12,254 acres — nearly six times today's acreage.

Those days are long gone, but the demise of the apple industry in Washington County and Maryland won't be noticed much by consumers, fruit experts say.

For the most part, fruit specialists say there likely will never be a shortage of apples — whose production has increased by 25 percent worldwide in the last decade.

About half of the United States' annual apple production comes from Washington state, which is expected to pick approximately 115 million bushels this fall alone, Rinehart said.

Neighboring states also dwarf Maryland in apple production.

Pennsylvania has averaged about 12 million bushels during the past five years, according to Marini.

Since 1963, Virginia has averaged close to 11 million bushels a year and West Virginia has harvested about 8 million bushels.

Even with the 2 million bushels picked in 1968 figured in, Maryland still averaged only about 1.5 million bushels for the past five years.

"Even with the 2 million bushels picked in 1968, Maryland is producing only one-eighth of 1 percent of the nation's apple crop."

"Maryland plays a very small role in the overall picture as consumers aren't going to see any differences," said Chris Walsh, extension fruit specialist for the University of Maryland at College Park.

[§ 34,913] *Demora Bennett et al., Plaintiffs v. Hepburn Orchards, Inc., Defendants.*  
United States District Court, District of Maryland, No. J11-84-991, April 14, 1987.

**Migrant and Seasonal Agricultural Worker Protection Act**

**Farm Labor Contractors—Compliance with Agreement—Omissions, Misleading Statements.**—Job orders issued by an orchard owner failed to adequately disclose the full terms of employment where one year they omitted reference to a performance test applicants were required to pass and where the next year the reference was misleading. The test itself was not shown to be job-related. Workers who met the minimal criteria as described in the job orders were unlawfully denied employment when they failed the test. AWPA, Sections 201(a) and 301(a).

Back references: § 22,331 and 22,334.

**Farm Labor Contractors—Damages—Failure to Hire.**—Applicants denied employment in conformance with a contractor's job orders were entitled to damages based on lost wages, and travel and lodging costs since they had come to the place of employment based on the misleading job orders. Statutory damages of \$400 per violation were appropriate even for workers who had not presented testimony as to their actual costs. AWPA, Section 504.

Back reference: § 22,343.

Gregory S. Schell, Keith Talbot, Susan Compernelle, Legal Aid Bureau, Inc., Salisbury, Maryland, Thomas F. Wilson (Snyderfarth, Shaw, Fairweather & Geraklion), Steven Karalickas & McCahill, Washington, D.C., for Defendants.

**[Statement of Case]**

The instant amended complaint, filed on behalf of twenty-six migrant and seasonal agricultural workers and joined by nine others,<sup>1</sup> alleges violations of rights secured by the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §§ 1801 et seq., the Wagner-Peyster Act, 29 U.S.C. §§ 49 et seq., and the common law of contracts. This case was tried to the Court on July 9, 10 and 11, 1985, and the parties subsequently submitted

an array of post-trial briefs with responses and replies thereto at the Court's request. The parties also filed various post-trial motions—defendant's motion to dismiss claims of nonestimating plaintiffs, defendant's motion to strike plaintiffs' proposed findings of fact and conclusions of law, plaintiffs' motion for prejudgment interest and defendant's motion for summary judgment—all of which have been opposed by the respective nonmoving parties. Having carefully listened to the evidence presented by the fourteen witnesses who testified at the trial,<sup>2</sup> and

<sup>1</sup> Court docket entries 17 (amended complaint), 323 (order granting motion to add three more plaintiffs), 329 (order granting motion to add five more plaintiffs) and 330 (order granting motion to add one more plaintiff), the Court orally denied plaintiffs' request for class certification at the

post-trial conference on June 25, 1985, and that ruling is memorialized here.

<sup>2</sup> Kirby Snow, Demora Bennett, John Flynn, John Robert Richards, Marcus Bennett, Tofica Saint-Louis, Pierre

having studied the depositions of fourteen plaintiffs who did not testify (and of four others who did so only briefly—see conclusion of In. 2) and the various other documentary exhibits admitted into evidence and the various briefs and memoranda submitted, the Court hereby issues its findings of fact and conclusions of law, not always specifically so delineated, pursuant to Fed. R. Civ. P. 52(a). The pending motions will be resolved in the course of this opinion at appropriate points in the discussion.

## A

*[Preliminary Motions]*

Initially, the Court notes that plaintiffs' proposed findings of fact and conclusions of law might unfairly prejudice the defendant were the Court to take them into consideration in the absence of a counterproposal. While plaintiffs' suggestion that defendant be encouraged to submit such a paper is one solution, the hour is much too late for further delay; indeed, the Court never intended as much time to elapse prior to the issuance of this opinion as has already expired. Accordingly, defendant's motion to strike plaintiffs' proposed findings and conclusions (Docket Entry #38) is granted. The paper will not be given any weight in deciding this dispute.

Secondly, defendant filed a motion for summary judgment on March 10, 1987, seeking summary disposition of the claims of twenty-one of the plaintiffs on the ground that they were Haitian nationals and not "U.S. workers" permanently residing in this country, and hence not plaintiffs properly able to claim protection under the statutes involved in this action. Plaintiffs opposed the motion, arguing that the defendant's stipulation to the propriety of the status of all of these plaintiffs in the Pretrial Order (Docket Entry #22, p. 10, § 6.A.), and its failure to ever raise this defense, directly or indirectly, until some twenty months following the trial, effectively bars defendant from relying upon it now on a theory either of waiver or estoppel, or on the ground that the motion is unavailable at this juncture. The Court, on the strength of the record herein and on the logic of *Guglielmo v. Scott & Sons, Inc.*, 58 F.R.D. 413 (W.D. Pa. 1973), deems the defense waived. Defendant's motion for summary judgment (Docket Entry #50) is accordingly denied.

As a final preliminary matter, defendant has moved for the dismissal of all claims made by nine plaintiffs who neither presented themselves for deposition nor appeared at the trial of this matter. The plaintiffs have objected, citing the Court to stipulations by the parties that the

nine affected plaintiffs applied for work with the defendant during the same seasons and under the same conditions herein complained of as the other twenty-six plaintiffs (Pretrial Order, p. 12, § 6.L and 6.M). The nine affected plaintiffs concede the unavailability of any award of actual damages in their favor. Based on the Court's findings and conclusions set out below, this compromise position is sustainable by them. Accordingly, defendant's motion, first made orally at trial, then in writing following trial (Docket Entry #31), and again in writing shortly thereafter (Docket Entry #43), is denied.

## B

*[Facts]*

At issue in this case is whether an allegedly pre-employment ladder test utilized by the defendant to disqualify the plaintiffs from employability at defendant's orchards in 1983 and 1984 was conducted fairly and legitimately under the circumstances here at play.

The defendant is a family-owned business which cultivates and harvests peaches and apples, predominantly, in Western Maryland for the commercial fresh fruit market. Its produce is assured marketability when its fruits are picked just prior to full ripeness, and are shipped to arrive with a minimum of bruising. The emphasis on cosmetics requires careful pruning for sun exposure, frequent sprayings for insect control, and gentle handling at harvest to minimize bruising and subsequent marketplace rejection. The defendant employs approximately thirty people year-round, and supplements them with several hundred migrant and seasonal workers during the peach and apple harvesting months, typically July through October. These supplemental employees, if hired early in the season, harvest both peaches and apples, and perform pruning and other orchard maintenance tasks as well.

For nine of the ten years preceding trial of the instant dispute, the defendant has applied to the U. S. Department of Labor ("DOL") and the U. S. Immigration and Naturalization Service ("INS") for permission to temporarily employ foreign workers during its peak labor months. Such use of foreign labor is permitted by 8 U.S.C. § 1101(a)(15)(II)(ii) when a U.S. employer asserts and DOL certifies that qualified U.S. workers are unavailable to perform the jobs for which foreign workers, known colloquially as "H-2's" are sought.

The system involved in procuring H-2's is complex. An employer first applies for foreign workers by submitting a "criteria job order" to

(Footnote Continued)

Palinac, Nelson Fells, Doree Jean-Louis, Merlin Williams, Soule Lee Thomas, Jean Etienne, Joseph Beard and Terry

Keyburn; and cameo appearances by Pierre Benjamin, Meane Deslites, Luckner Delmas and Dennis Souver.

DOL. In defendant's case, each criteria job order contained two documents: an Agricultural and Food Processing Clearance Order ("clearance order") and a Job Offer (or Alien Employment, Form MA-7-5011 ("7-5011"). Clearance orders and 7-5011's must contain identical terms and conditions of employment for a criteria job order to be approved. Upon approval, a clearance order is circulated through these portions of the national job clearance system most likely to produce qualified domestic applicants; in this case, the clearance orders were circulated in the Maryland region and along the East Coast. A clearance order is considered by the courts to be "essentially an offer for a contract of employment." *Western Colorado Fruit Growers Assn v. Marshall*, 473 F.Supp. 693, 696 (D.Colo. 1979), which a qualified U.S. worker accepts by traveling to the worksite before the arrival of any H-2's or within the first fifty percent of their contract with an employer.

In the event that an employer's labor needs are not being filled by U.S. workers, DOL certifies the employer as eligible to employ H-2's, and an appropriate foreign labor pool, generally already on alert, is activated, resulting in the arrival in short order of a contingent of foreign workers. The H-2's and the U.S. workers must be treated equally both in the hiring process and on the job. 20 C.F.R. § 655.202(a).

Defendant applied for H-2's in both 1983 and 1984, the years in question in this case. The parties have stipulated that all 35 plaintiffs are "U.S. workers" and that the defendant is an "agricultural employer" as those terms are defined in AWPAs, and that AWPAs consequently govern this situation. In March and in June, 1983, and again in March, 1984, defendant submitted criteria job orders numbered 4072460, 4072470 and 4072492, respectively, to DOL; they were approved and the clearance order components were circulated through the job clearance system.

Ten of the plaintiffs<sup>2</sup> applied for work at Hepburn Orchards pursuant to one of the two 1983 clearance orders. The remaining 25 plaintiffs applied for similar work the following year. Each of the 35 plaintiffs was required to appear at the local job clearance system referral point, the Hagerstown, Maryland office of the state Department of Employment and Training, where the terms of the job order were or should have been explained either in English, Spanish or Haitian-Creole, a tongue spoken by the 21 Haitian plaintiffs and certain clearance system office staffers.<sup>3</sup> They were also then advised or

reminded of the defendant's ladder test, which would be administered at the worksite. Plaintiffs were then escorted to the worksite<sup>4</sup> where Terry Hepburn, then defendant's vice-president, reviewed the plaintiffs' applications and administered a ladder test to them. It is this ladder test, which all the plaintiffs failed, and defendant's subsequent refusal to employ plaintiffs for a three-day, twenty-four workhour probationary period, which lies at the heart of this dispute.

## C

## [Ladder Test]

The ladder test has been administered by Terry Hepburn, only, at Hepburn Orchards to every new employee, whether H-2 or domestic, since the late 1970's. Evidence adduced at trial satisfies the Court that the test was administered generally in the following manner: An initiate would be directed to go to a 24-foot long wooden ladder, weighing approximately 45 pounds when dry, which would be lying on the ground in an area of the orchard. The initiate was directed to raise the ladder to a vertical position without bracing it against anything or anybody, to carry the ladder in a vertical position several dozen feet, and to turn around and return the ladder to its original position. These directions were given either by Terry Hepburn or by his delegate, typically, the polylingual employment office escort, usually in English or in the initiate's native language.

The ladder test was not given in a scientific fashion, however. Some initiates were able to brace the foot of the ladder in a hole in the ground when raising it, but none were expressly permitted to do so. Some initiates were given only one chance (e.g., Nelson Felix), while others were given two (e.g., Demora Bernett), or more. Apparently due to the test ladder being stored on the ground in an exposed area, it was sometimes wet and thus much heavier than when it was dry. Finally, on some occasions, initiates were told to lean the ladder into a treetop without knocking off any apples, while others were told not to let the ladder hit a tree.

Defendant, by Terry Hepburn, justifies the ladder test as culling out unqualified employees on the theory that the skills tested (unaided raising of the ladder and vertical portage) are job-related. Defendant concedes that it tests a worst-case scenario: ability to raise a possibly wet ladder, of the type generally used for apple harvesting in the defendant's orchard, without any assistance at all, and to carry it vertically

<sup>2</sup> Demora Bernett, Domingo Diaz, John Flynn, Craig Merbi, Terry Miller, John Robert Richards, Meriko Senat, Ricky Snow, Olvert Ulyase and Pedro Wilson.

<sup>3</sup> Several of the plaintiffs testified in Court with the assistance of an English-Haitian-Creole interpreter.

<sup>4</sup> The evidence indicates that one plaintiff, Craig Merbi, appeared at the worksite without having followed the aforementioned procedure, the effects of which independence will be discussed *infra*.

under control for some distance. However, Terry Hepburn conceded, and other evidence proved to the Court, that workers generally braced the bottoms of their ladders in holes, against tree trunks or with a fellow worker's help when raising them in the field, and that ladders were usually dragged on the ground or carried horizontally when moving them any considerable distance, and that these field practices were acceptable to the defendant.

Defendant further defends the description of the ladder test as "work-related" due to the need, in the defendant's fresh fruit marketing business, to minimize bruising fruit with carelessly handled ladders. However, this purpose is better served by a maximum allowable bruise rate of five percent, which defendant enforces on a worker-by-worker basis at harvest checkpoints in the field. Failure to meet productivity standards, including maximum bruise rates, is cause for dismissal after the probationary period expires.

Defendant additionally insists that the test equally serves its concern for worker safety. This may be the case—certainly an initiate who passes the test has demonstrated some desirable qualities for the job<sup>6</sup>—but, if safety is genuinely defendant's concern, then the Court is at a loss to understand why defendant does not put points on the feet of its ladders to assist workers in raising them. Instead, defendant's ladders have flat or barely rounded feet, making the raising often more difficult, as several of the initiates found when the test ladders continued to slip away from them.<sup>7</sup> What the test does measure is Terry Hepburn's personal view of the desirability of hiring a new fieldworker for apple picking on the day that he or she applies for work, even if apple picking will not begin for several more weeks and only peaches are being harvested at that time, using much shorter and lighter ladders. Further, the test only measures these factors with regard to people who have never worked for the defendant before, regardless of prior experience. It is subjectively given and subjectively judged. This subjectivity is gravely underscored by defendant's failure to administer it to former employees on the theory that they have demonstrated their abilities to handle the ladder; they may indeed have handled the ladders in an acceptable manner in a previous season, but for defendant not to retest these past employees on the day of their return in a subsequent season assumes too much, revealing that immediate ability to flawlessly execute the test on the day of arrival at the orchard is insignificant in comparison to produc-

tive performance on the job, even in defendant's view.

In sum, the Court finds that the ladder test as administered by defendant does not reasonably and fairly test initiates for job-related skills.

Plaintiffs make much ado of the fact that no H-2 has ever failed the ladder test, while some 54 to 82 of the 239 U.S. worker applicants in 1983, and 51 of the 151 U.S. worker applicants in 1984, failed it. Defendant notes that its H-2 labor forces come from pools of experienced Jamaican sugar cane cutters, who are implicitly stronger than many domestic workers. Plaintiffs counter that many of them successfully passed similar ladder tests given under much more fieldwork-related conditions at other apple orchards after failing the test at Hepburn Orchards. Defendant properly refuses to be obliged to conform its hiring standards in every particular to those of its fellow growers. Plaintiffs suggest, however, that defendant's pass-fail rates vary more markedly depending on the pending arrival or presence of H-2 workers than on the skills of the ladder test initiates, for complex economic reasons.

Particularly, it appears that U.S. workers generally are less productive in menial fieldwork than are H-2's, causing defendant to need to pay domestic employees more money for nonproductivity in order to be compensating them at DOL-established minimum field wages. Further, growers such as the defendant are obligated to pay social security contributions, unemployment insurance premiums and worker's compensation premiums on behalf of domestic workers, but not on behalf of H-2's for their transportation between Jamaica and the worksite and back again, being more expensive than transporting U.S. workers from Florida to the worksite and back, partially offsets that edge. While the evidence on this facet of the business was less than complete, the Court is satisfied that the defendant could have had and, as it appears to be a financially successful business, probably did have such venal concerns in mind when deciding whether or not to hire any new domestic applicants.

#### [Three-Day Contracts]

Nonetheless, the defendant's principal error occurred not in the rendering of the test per se, but in the effect which was attached to it. New domestic workers who failed the test were not hired, while new H-2's, whether they passed (and all did) or not, were hired for at least three workdays by the terms of their work contracts. The H-2's, like the U.S. workers, had only to arrive at Hepburn Orchards minimally quali-

<sup>6</sup> Note that two witnesses testified that they passed their tests by bracing the ladder in holes in the ground, conducted by Terry Hepburn.

<sup>7</sup> A ladder was produced and examined by the Court in the course of the trial.

fied, that is, barely able to do the work described in the 7-50B, in order to be deemed to have accepted defendant's offer of employment. The terms of the contracts of the H-2's provided for a minimum three-quarters contract wage, which could only be denied if an H-2 was fired for cause, defined as being "unable or unwilling . . . to meet the minimum production standards . . . after [having] been afforded [a] reasonable trial and [training] period," see H-2 worker contracts at § 10, in turn defined in the criteria job orders as twenty-four workhours or three workdays.

Defendant's effort to dismiss the significance of this disparity grounds itself on three points. First, defendant argues that the H-2's did not have executory contracts, but were only hired after they arrived at Hepburn Orchards and, if they were new to Hepburn, took and passed the ladder test. However, the ladder test was not mentioned anywhere at all in the 1983 criteria job orders, although it was mentioned as a pre-employment procedure in the 1984 job order. Yet, in 1983, two groups of H-2 workers arrived at and worked for Hepburn Orchards, signing their contracts upon their arrival there, while in 1984, the year in which the pre-employment test was articulated in the job order, the H-2's executed their contracts in Jamaica, before taking any ladder test.

Defendant argues that the timing of the signing of the H-2 contracts is irrelevant, since any new H-2 who failed the ladder test would not be hired, pursuant to the H-2 contract. Yet this term, if one can claim it is one, was never revealed to the H-2 workers in 1983, and when it was known or knowable in 1984, defendant had foreclosed its option to enforce it by signing the H-2 contracts before administering the ladder test, and thus obligating Hepburn Orchards not to fire a test-failing H-2 until a trial period had elapsed.

Finally, defendant claims that plaintiffs' interpretation of the effect of the H-2 work contracts is wholly speculative, since no H-2 has ever failed a ladder test and been sent right back to Jamaica by this defendant. However, what is sauce for the goose is sauce for the gander.

The absence of a single H-2 ladder test failure in almost a decade leaves the interpretation of the effect of the test squarely in the Court's hands. The Court's earlier finding that the ladder test does not fairly and reasonably test for job-related skills eliminates it as an obstacle for any minimally qualified initiate, to the same extent that the employer has waived it for any minimally qualified former employee. Thus, any minimally qualified initiate who applied for work at Hepburn Orchards in 1983 or 1984 should have been hired for at least the first three days, and thereafter either terminated for

cause or else paid for at least three-quarters of the time which he or she could have worked. Failure to provide these identical terms to both H-2's and U.S. workers is a violation of defendant's assurance that it would do so, expressed in the job orders in conformance with 20 C.F.R. § 665.202(a).

## D

*[Plaintiffs' Qualifications]*

Were the plaintiffs minimally qualified to work at Hepburn Orchards? The evidence adduced at trial indicates that fruit harvesting is physically demanding labor, entailing frequent moving of ladders and carrying sacks of harvested fruit from the trees to rowing field checkpoints. Nonetheless, the weight required to be lifted rarely exceeded 45 to 50 pounds at once, a weight which the Court accepts can be moved with moderate effort by an ordinary healthy human being. None of the plaintiff applicants was disabled or sickly; indeed, most were experienced fieldworkers and the majority appear to have been hired for similar work in other orchards soon after their experiences at Hepburn Orchards. Accordingly, at least as to the 25 plaintiffs who testified at trial or were deposed, the Court is satisfied that they were minimally qualified and should have been hired for at least the three-day probationary period.

## E

*[Written Terms of Employment]*

AWPA and the H-2 program share a common goal of attempting to secure nonexploitative work for U.S. workers in the nation's fields and vineyards. AWPA specifically bars employers from unjustifiably violating the terms of any working arrangements made with migrant or seasonal agricultural workers, 29 U.S.C. §§ 1822(e) and 1832(c). The regulations governing the H-2 program require employers to hire domestic workers without discrimination on the basis of nonjob-related criteria, on the exact same terms offered H-2 workers, to and through the midpoint of any activated H-2 contract period, 20 C.F.R. § 655.200, et seq.

The criteria job orders submitted by defendant in its effort to procure H-2 workers constituted the working arrangements against which both domestic and H-2 employees were recruited. By its own terms, these job orders claimed to be complete documents listing all material terms involved. The reason for the DOL requirement for such assurances is clear: workers respond to the circulated announcements by travelling to the worksite at their own expense and, in keeping with the humanitarian purpose of AWPA, must be protected from unfair surprises upon arrival.

It is beyond dispute that the 1983 job orders at issue contained no reference whatsoever to any ladder test. Inasmuch as defendant then used the ladder test, found by the Court not to be legitimately job-related, to deny employment to applicants, there can be no question but that passing the ladder test was a threshold and material term of employment. Since defendant had utilized such an employment screening device for many years, its omission from the job order must be seen as deliberate.

By the same token, the Court finds that the reference to the ladder test made in the 1984 job order is misleading, as it does not advise a prospective employee of the peculiarities of defendant's test. A mere mention of a ladder test, without more, hardly describes the procedure employed at Hepburn Orchards, where the difference between the skills tested and the permitted field practices was quite significant. Given the clear reference to a probationary period in the job order, any experienced fruit picker could well have assumed that any of a variety of acceptable ladder-handling techniques would have resulted in passage of the test. Misleading, the reference may as well have been omitted in its entirety once again.

These omissions and misrepresentations regarding the ladder test, and its effect on the employment of domestic workers, together with the consequent denial of employment contracts with guarantees equivalent to those offered the H-2's, constitute violations of both AFWA and the older Wagner-Peyser Act. However, the Court will only assess damages under AFWA in light of its more specific applicability to the facts of this case.

## F

*[Intent to Violate AFWA]*

Specific intent to violate AFWA is not required for the Court to find that there has been an intentional violation of the statutory scheme. *Salazar-Callejon v. Prssidio Valley Farmers Assn.*, 765 F.2d 1334 (5th Cir. 1985). Rather, the common civil standard which holds one liable for the natural and foreseeable consequences of one's acts is employed. *DeLeon v. Ramirez*, 465 F.Supp. 698, 705 (S.D.N.Y. 1979). The Court finds the defendant's violations of AFWA to have been intentional within the context of 29 U.S.C. § 1854(c).

## G

*[Damages]*

Evidence at trial demonstrated that the period covered by the job orders in 1983 ran from July 12, 1983 to November 4, 1983. The affected period the following year extended from July 9, 1984 to October 31, 1984. The H-2 contracts called for six-day workweeks with eight-

hour workdays, and provided three-quarter contractual wage guarantees.

Plaintiffs urge the Court to award actual damages to the 25 plaintiffs who testified or were deposed on the question by assuming all 25 plaintiffs would have worked to the conclusion of the job order period if hired. The Court declines to do so, noting that if all 25 had been hired, the work period would probably have ended sooner. The Court is satisfied that applying a three-quarter contractual wage guarantee to these 25 plaintiffs is far more equitable.

Further, the Court will require at least one articulable basis for assuming that an applicant would have met productivity standards within the three-day probationary period. Should the Court be unable to make such a finding as to any plaintiff, he or she will be awarded actual damages only for that three-day period, or statutory damages, whichever is higher.

Finally, the Court will assume that no employee would have worked on the first Monday in September, Labor Day, or on the day he or she first arrived at Hepburn Orchards.

Plaintiffs further request that lost wages be determined by the applicable Adverse Effect Wage Rate ("AEWR") in each year for the peach harvest days, and by the estimated hourly rate equivalent for an estimated average 1.3-bushel workhour for the apple harvest days. Translated into dollars, plaintiffs seek the 1983 AEWR of \$4.38/hour for peaches and an estimated \$5.35/hour for apples in 1983, and the 1984 AEWR of \$4.54/hour for peaches and the same estimated \$5.35/hour for apples in 1984. Defendant objects, noting that the same sources from which plaintiffs derived the estimated apple picking wage of \$5.35/hour, the 1983 job orders (p. 1, § 9), also clearly indicate that the wage is estimated and, in one job order, expressly not guaranteed. The Court agrees that the only guaranteed wage was AEWR, it being higher than the federal minimum wage, and will apply the appropriate AEWR for three-quarters of each of the 25 plaintiffs' potential contract periods in calculating their gross lost wages.

The law is clear that these plaintiffs are also entitled to be reimbursed for any other out-of-pocket expenses for which the H-2's would have been reimbursed. However, income earned from other sources during this period must be applied in mitigation. *Dialist Co. v. Pulford*, 42 Md. App. 173, 399 A.2d 1374 (1979).

Accordingly, the Court's calculations of actual damage awards are set out below as to each of the 25 plaintiffs who testified or were deposed, in alphabetical order. [Chart omitted.—CCH.]

In lieu of actual damages, AFWA permits the Court to award statutory damages up to \$500 for each nonduplicative violation. 29 U.S.C.

Defendant principally objects on the theory that none of these plaintiffs proved that they are entitled to actual damages. Defendant supplements its position by arguing that the awarding of prejudgment interest to these plaintiffs would be more in the line of adding insult to injury rather than fairly compensating these plaintiffs for injuries suffered at its hand.

The Court finds the reasoning of *Montenegro* to be sound, and the defendant's objections without merit or supportive authority. The Court notes that the defendant exposed itself to this potential consequence when it elected to reject generally qualified applicants on the basis of their having failed to perform like ideal employees within minutes of their arrival at its orchard while indulging in the biased notion that all Jamaicans already are ideal employees. Indeed, the defendant exposed itself to even greater damages than those awarded here, for defendant could have had no idea at the time its laxer tests were being given that any of the rejected applicants would mitigate any of their damages suffered by obtaining other gainful employment. Far from being penal, prejudgment interest serves to reciprocate plaintiffs for

defendant's possession and use of their wrongfully withheld benefits.

In striking this balance, however, the Court must acknowledge that the actual damages awarded are principally lost wages, return transportation costs and housing costs, virtually none of which would have accrued as of the dates of defendant's breaches, and not one of which awards could have been determined sooner than the last day of these plaintiffs' court-determined three-fourths time contracts of employment. Moreover, the Court takes judicial notice of the declining rates of interest which have prevailed for the last three to four years.

Accordingly, plaintiffs' motion for an award of prejudgment interest to accompany each of the seventeen awards of actual damages is granted, and prejudgment interest will be awarded at the simple (not compounded) rate of five per centum per annum from those seventeen plaintiffs' court-determined final dates of their guaranteed three-fourths time contracts of employment to this, the date of judgment.

A separate judgment order will be issued.

§ 1854(c). Here, plaintiffs have alleged two separate violations as to each applicant, regardless of the year in which he or she applied for work at Hepburn Orchards. First, plaintiffs have alleged and proven, as discussed, *supra*, that Hepburn Orchards improperly utilized a ladder test, applied and judged in a manner that renders it impermissibly nonjob-related, as a means of denying employment to domestic migrant and seasonal agricultural workers, even for the three-day probationary period, utilizing a fall apple ladder even though virtually all plaintiffs applied during the peach harvesting time period, in violation of rights secured to them by AWP/A, 29 U.S.C. §§ 1822(e) and 1832(c).

Secondly, plaintiffs have alleged and proven, as discussed, *supra*, that defendant's job orders were misleading in that they failed to mention (in 1983) or too vaguely mentioned (in 1984) the ladder test which defendant was improperly employing in the first instance. Such misleading job descriptions are prohibited by 29 U.S.C. §§ 1821(f) and 1831(e) in the interest of protecting agricultural workers, who are generally poor people, from wasting their time and resources by traveling long distances in pursuit of publicly offered employment opportunities which, as described, they would be capable of procuring and satisfactorily performing.

All plaintiffs not awarded actual damages set out above seek statutory damages in the amount of \$500 for each of the two violations. The Court concludes that each plaintiff, with the exception of Craig Merki, is entitled to an award of statutory damages for two violations, and takes issue but not umbrage with plaintiffs' suggestion that it be maximum permissible amount.

Craig Merki, according to the evidence submitted, applied for work at Hepburn Orchards without first having gone to an employment service office. He was subjected to a ladder test and failed. Defendant thereupon learned that Mr. Merki had not been properly referred in the first instance, and suggested that he go to an employment service office and reapply for work at Hepburn Orchards. Defendant thus concedes that it did not consider Mr. Merki a wholly incapable person who would never have been hired under any circumstances.

However, because Mr. Merki does not appear to have reapplied after his visit to an employment service office, if indeed he ever visited such an office, he cannot claim to have been misled by any information which he should have been given about the job via a reading of an offending job order at such office. He was, nonetheless, improperly considered by being subjected to defendant's ladder test, and so stands with his statutory rights violated in one instance, but not both.

Labor Law Reports

#### [Statutory Damages]

Regarding the amount of statutory damages to be imposed, the Court considers it necessary to refrain from imposing the maximum where overt maliciousness is not evident, in order that the imposition of the maximum penalty might retain extra meaning. Yet defendant's conduct in subjecting unproven applicants in a ladder test rooted in fantasy rather than reality was certainly conscious and deliberate, with obvious results: generally qualified applicants were denied defendant's three-day probationary period and the opportunity for season-long employment, right from the start.

The Court is mindful of the extra burdens which the cosmetic-conscious market brings to bear on agricultural growers who sell their fruits fresh rather than for processing or juicing, but the Court is equally satisfied that such growers are partly responsible for these pressures. The Court, in its considerable years, has never seen an imperfect fruit used in advertisement, regardless of how inconsequential the blemish. Accordingly, the Court sees no basis for reducing a grower's obligations to its would-be employees in order to better enable it to meet self-generated market expectations without passing such costs along to the consumer.

The Court will award statutory damages of \$400 to each of the eighteen plaintiffs not awarded actual damages for the violation of the rights secured them by 29 U.S.C. §§ 1822(e) or 1832(c). The Court will also award statutory damages of \$400 to each of the five plaintiff whose rights secured them by 29 U.S.C. §§ 1821(f) or 1831(e) were violated in 1983, when the job clearance orders made no reference whatsoever to defendant's ladder test, notwithstanding the significance which the defendant had placed upon it as a matter of practice for many years in succession. Finally, in recognition of defendant's efforts to provide more accurate job descriptions in 1984, the Court will award statutory damages of \$350 to each of the twelve plaintiffs whose rights under §§ 1821(f) or 1831(e) were violated by the defendant that year.

#### H

#### [Prejudgment Interest]

Lastly, plaintiffs have moved for an award of prejudgment interest on the awards of actual damages stemming from the dates upon which the seventeen plaintiffs who have been awarded actual damages applied for work at Hepburn Orchards. Defendants oppose the motion.

Plaintiffs cite *Montezuma v. Meese*, 803 F.2d 1341, 1354 (5th Cir. 1986) for the proposition that prejudgment interest from the date of breach is appropriate when actual damages, not statutory damages, are sought and awarded.

¶ 34,913

[§ 35,042] *James Caugills et al., Plaintiffs v. Hepburn Orchards, Inc., Defendant.*  
United States District Court, District of Maryland. No. JH-84-989. June 5, 1987.

**Migrant and Seasonal Agricultural Worker Protection Act**

**Discharges—Migrant Workers—Misconduct v. Low Productivity.**—Evidence established that an operator of a fruit orchard unlawfully violated the terms of a working agreement by summarily discharging six migrant workers for low productivity rather than for "serious misconduct" within the meaning of the agreement. The employer unsuccessfully argued that when persons do nothing more than pick green fruit, stand around and do nothing, and pick undersized fruit they are guilty of serious acts of misconduct. However, a preponderance of evidence showed that the alleged conduct was far less extreme and the workers' lapses far more sporadic, and even partially justified by the relative absence of harvestable fruit. In view of a supervisor's failure to testify, a charge of fighting leveled against a seventh employee also was rejected. APWA, Section 302(c).

Back reference: ¶ 22,335.

**Discharges—Migrant Workers—Notice to Employment Service.**—A meeting did not amount to effective notice of termination to a local employment service, since no names were given and no final decision regarding termination was announced at the time. Accordingly, the summary

(Footnote Continued)

1.C. [11,890] 615 F.2d 728, 731 (6th Cir. 1980); *Pacific Advertisers Co. v. NLRB*, [84 LC ¶ 10,757] 577 F.2d 1172, 1183 (5th Cir. 1978); *Committee on Manner Hours of R. W. Grand Lodge v. NLRB*, [81 LC ¶ 13,220] 356 F.2d 214, 221 (3d Cir. 1977). Commercial interest weighs against disclosure. See *Minich*, 737 F.2d at 787; *Wine Hobby*, 502 F.2d at 137. Courts hesitate to require disclosure if it will cause stigma or embarrassment. See *Air Force v. Kam*, 425 U.S. 352, 381 (1975) (files of disciplined cadets released if deletion of identifying references sufficient to protect cadets' privacy interests); *Hawth v. Department of State*, 616 F.2d 772, 775-76 (5th Cir. 1980) (non-disclosure of names and addresses of United States citizens imprisoned abroad), cert. denied, 449 U.S. 856 (1980). Cf. *Care v. United States Postal Serv.*, 730 F.2d 946, 948-49 (4th Cir. 1984) (disclosure of information about successful, but not

unsuccessful, applicants); *Karson v. Department of Health and Human Servs.*, 649 F.2d 65, 68 (1st Cir. 1981) (no threat of stigma to disclose names and addresses of applicants rejected for National Cancer Institute research grants).

<sup>2</sup> FOIA's legislative history indicates that Congress thought that fees should not be awarded when the government had "a colorable basis" for withholding information. *Church of Scientology*, 700 F.2d at 491 n.6 (quoting S. Rep. No. 93-454, 93rd Cong., 2nd Sess. 19 (1974)). See also *Miller v. United States Dep't of State*, 779 F.2d 1378, 1390 (9th Cir. 1985) (colorable reasonable legal basis); *Aviation Data Serv.*, 667 F.2d at 1323 (reasonable or colorable basis); *LaSalle Extrusion Univ. v. F.T.C.*, 627 F.2d 481, 484, 486 (D.C. Cir. 1980) (reasonable or colorable basis).

45,528

Wage-Hour Cases  
*Caugills v. Hepburn Orchards, Inc.*

66 4-8-88

termination of seven employees in violation of the terms of a working agreement were unlawful. APWA, Section 502(c).

Back reference: ¶ 22,335.

**Farm Labor Contractors—Intentional Violations—Foreseeable Consequences.**—An agricultural employer did not have to have specific intent to violate the statute for there to be a finding of an intentional violation in the summary discharge of seven migrant workers. It was sufficient to hold the employer liable for the natural and foreseeable consequences of one's acts. APWA, Section 504(c).

Back reference: ¶ 22,343.

**Farm Labor Contractors—Damages—Summary Termination.**—For purposes of computing damages awarded seven unlawfully discharged migrant workers, a three-quarter contractual wage guarantee was utilized rather than an award until the end of the job order period. The work period probably would have ended sooner had all seven continued working. The relevant backpay rate was the Average Effect Wage Rate, plus reimbursement for out-of-pocket expenses for which the employees would have been reimbursed. Four of the employees were awarded actual damages for the three-quarter period, while the other three were awarded statutory damages of \$450 in light of work at other orchards and an absence of "overt maliciousness." APWA, Section 504(c).

Back reference: ¶ 22,343.

**Farm Labor Contractor—Damages—Prejudgment Interest.**—Discharged employees awarded actual damages also were awarded prejudgment interest at five percent per annum, simple, as of the last day of their guaranteed three-fourths time contracts. APWA, Section 504(c).

Back reference: ¶ 22,343.

Keith G. Talbot, Gregory S. Schell, Susan Compennelle, Legal Aid Bureau, Inc., Salisbury, Maryland, Edward J. Tuddenham, Migrant Legal Action Program, Inc., Washington, D.C., for Plaintiff. Thomas E. Wilson (Seyfarth, Shaw, Fairweather & Geraldson), S. Stephen Karalekas (Karalekas & McChill), Washington, D.C., for Defendant.

#### [ Statement of Case ]

The instant amended complaint, filed on behalf of eleven migrant and seasonal agricultural workers, alleges violations of rights secured to them by the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §§ 1801 *et seq.*, the Wagner-Peyser Act, 29 U.S.C. §§ 49 *et seq.*, and the common law of contracts.

In the course of preparing this case for trial, the Court granted plaintiffs' motion to compel discovery on February 26, 1986, holding *sub curia* the question of an award of costs, *i.e.*, attorney's fees. The matter was tried to the bench on March 17-19, 1986, during the course of which the Court reserved ruling on the admissibility of two types of documentary evidence, which are subsequently briefed by the parties at the Court's direction.

Further, in the course of trial, the defendant challenged the propriety of plaintiffs' answers to interrogatories in particular and their good-faith compliance with the discovery process in general by moving for a judgment in its favor at the end of the plaintiffs' case-in-chief on March 17, 1986. The motion was argued and held *sub curia*, but its basis was resurrected at the start of proceedings the following day in defendant's motion for mistrial, argued and denied before

proceedings resumed. Finally, this issue returned as the basis of defendant's motion for dismissal or for judgment by default, filed post-trial, and fully briefed by both sides.

Additionally, defendant moved for dismissal of the claims of four of the plaintiffs at the end of their case-in-chief on the basis of their lack of prosecution of them. None of the four plaintiffs involved—Juan Agramonte, Jean-Jacques Hughes Ancio, Dieudonne Casimir and Samuel Halston—had presented himself for deposition, answered interrogatories or appeared at trial. After initially reserving on the motion following its argument, the Court granted it orally at the end of proceedings on March 18, 1986. This ruling will be reflected in the final judgment order issued in conjunction with this opinion.

Following trial, the parties submitted post-trial briefs and replies thereto at the direction of the Court. The remaining seven plaintiffs also filed a motion to strike portions of defendant's post-trial brief, to which defendant filed a response. Recently, on March 30, 1987, over a year after the trial had concluded, defendant filed a motion for summary judgment as to the claims of the four Haitian and the two Cuban complainants. Plaintiffs have opposed this motion. Lastly, plaintiffs filed a motion for award of prejudgment interest on May 11, 1987.

¶ 35,042

©1988, Commerce Clearing House, Inc.

Having carefully listened to the testimony of the nine witnesses who appeared at the trial,<sup>1</sup> and having studied two other plaintiffs' depositions,<sup>2</sup> admitted at trial, and the various other documentary exhibits received in that process, and the various briefs and motions submitted and the responses and replies thereto, the Court hereby issues its findings of fact and conclusions of law, not always specifically so denominated, pursuant to Fed. R. Civ. P. 52(a). The pending motions will be resolved in the course of this opinion at appropriate points in the discussion.

## A

Initially, the Court notes that plaintiffs voluntarily filed a document titled "Plaintiffs' Proposed Findings of Fact and Conclusions of Law." While not the subject of a motion *ne recipiatur*, the Court considers it possible that, in the absence of a counterproposal from the defendant, the filing may unfairly prejudice that party. Accordingly, the Court declines to review that filing and it will not be given any consideration in the Court's evaluation and decision of this action.

## [Discovery Irregularities]

Secondly, defendant's oral mid-trial motion for judgment in its favor based on alleged irregularities in the discovery phase of the case (resurrected after trial as a motion for dismissal or judgment by default), derives from two plaintiffs' admitted unfamiliarity with the typed English interrogatories which were propounded to and answered by them with the assistance of their counsel. Defendant escalated the confusion of the plaintiffs, neither of whom were fluent in English,<sup>3</sup> with allegations of fraud allegedly resulting from the plaintiffs' derogation of Rule 33 of the Federal Rules of Civil Procedure, and the Code of Professional Responsibility. Defendant makes much ado of the fact that two of the signature pages attached to the seven remaining plaintiffs' answers to interrogatories<sup>4</sup> are singularly creased as though signed and mailed separate from plaintiffs' answers, and that plaintiff Shackleton's signature on the Farmworker Referral Sheet dated July 15, 1983 is printed, whereas his signature on his answers to interrogatories dated June 28, 1985 is in cursive script. Plaintiffs oppose the motion, taking strong exception to the allegations of fraud, and asserting the accuracy and veracity of the responses provided. Plaintiffs concede that, at most, they failed to include certificates of translation in their responses to defendant's interrogatories, but otherwise insist that their counsel were entitled

to assist them in the preparation of their responses, and discount the significance of the two creased signature pages and Mr. Shackleton's evolved signature. Plaintiffs further charge that the motions are untimely, and failed to be preceded by efforts to reconcile the parties' differences as required by Local Rule 34 of this Court.

Defendant concedes that dismissal is a harsh sanction not employed in ordinary circumstances. However, defendant's ultimate reliance on *McDougall v. Dunn*, 468 F.2d 468 (4th Cir. 1972), is misplaced. Unlike these plaintiffs, the offending party in *McDougall* failed to sign the answers, did not produce key documents, and did not correct the problems when they were noted in pretrial motions to compel discovery. The Court is not persuaded that the instant problems rise above ordinary discrepancies, if to that level at all. The plaintiffs' testimony did not differ radically from any responses given in their signed, detailed answers to interrogatories, provided some eight months before trial. The Court fails to discern any serious prejudice to the defendant, not to mention fraud upon the Court, in plaintiffs' conferring and cooperating with their counsel in providing the answers at issue, even if they are somewhat delayed in arriving in defendant's hands.

Nonetheless, the Court considers the absence of translator's certificates to be important enough to warrant some penalty in order to emphasize the Court's view that English language answers provided by parties not fluent in English should indicate clearly that they are fully understood and adopted by such persons as true and correct, even where the proponent of such questions fails to specifically inquire about English language comprehension. In the Court's view, the equitable solution lies in summarily denying plaintiffs' motion for an award of \$1,500 in attorney's fees, made in conjunction with their own successful motion to compel discovery granted on February 26, 1986, but, in all other respects, denying defendant's oral and written motions for dismissal or judgment by default. It is so ordered, and will only be impliedly reflected in the Judgment Order attached hereto.

Thirdly, defendant filed a motion for summary judgment on March 30, 1987, seeking summary disposition of the claims of five of the seven remaining plaintiffs on the ground that they were, in four instances, Haitian nationals and, in the fifth case, Cuban, and in defendant's view, not "U.S. workers" permanently residing

<sup>1</sup> Jose Manuel Camacho, Osmare Paul, James Cougills, Felix Nelson Capas, Celeste Cajuste, Terry W. Hepburn, Drew Hesse, Lawrence Worthington and Robert O. Bilner.

<sup>2</sup> Plaintiffs' Exhibits 5 and 6; depositions of Alberto Jose and Wilson Shackleton, respectively.

<sup>3</sup> Indeed, four of the five plaintiffs who testified at trial did so with the aid of either an English-Haitian-Creole or an English-Spanish translator.

<sup>4</sup> Defendant's Mid-Trial Motion Exhibit 1—answers of Messrs. Camacho and Capas, in particular.

in this country able to claim the protections of the statutes here at issue. Plaintiffs opposed the motion both on the facts and the law.

The Court need note only that the parties stipulated to plaintiffs' description as "migrant agricultural workers within the meaning of AWPA" in the Pretrial Order (docket entry 22, p. 6, §6A), and that defendant utterly failed to raise this question until more than a year had elapsed following trial on the merits, in order to deem the defense waived. *Guglielmo v. Scott & Sons, Inc.*, 58 F.R.D. 413 (W.D. Pa. 1973). Defendant's motion is accordingly denied.

## B

## [ Post-Trial Briefs ]

Turning to the three pending questions impacting on what this Court will rely upon in deciding this matter on the merits, the Court initially will resolve plaintiffs' motion to strike portions of defendant's post-trial brief, based upon a trial ruling denying admissibility of a proffered exhibit, before resolving the two evidentiary rulings held under advisement.

On March 19, 1986, the Court denied admission of defendant's Exhibit 15, a series of documents produced by the Equal Employment Opportunity Commission in the course of an informal investigation of an allegation made by one of the seven remaining plaintiffs, Mr. Caugilla, that he had been discriminated against on the basis of his nationality (U.S. American). Because of the incompleteness of the investigation and the lack of plaintiffs' input into it beyond filing the initial charge, and other defects in process relative to the trial, the exhibit was excluded.

Nonetheless, defendant related the substance of the exhibit in its post-trial brief and attached two key portions of the exhibit to that filing as Exhibits B and C. Plaintiffs moved to strike on the basis of the Court's prior ruling. Rather than concede an error, defendant defended its unorthodox behavior in its response to the motion. Plaintiffs replied, suggesting sanctions were appropriate.

The Court has not been subjected to unruly behavior of this particular nature before, and on finding itself satisfied that plaintiffs' motion is meritorious, is sorely tempted to impose some penalty. However, the Court elects to exercise restraint on this occasion. Plaintiffs' motion to strike is granted.

<sup>2</sup> Interestingly, several months prior to this trial, defendant's agent, the Washington County Fruit Growers Association ("WCFGA") argued that the entire job service system was unconstitutional, partly due to a claim of inadequate process in the investigation of complaints and partly due to allegedly *ultra vires* decisionmaking by the State Monitor Advocate, Mr. Worthington. See Transcript of Magistrate Smallman's ruling of August 1, 1985, WCFGA v. Donovan, et

Defendant's proffered Exhibit 70; a letter from Lawrence Worthington, State Monitor Advocate with the Maryland Department of Human Resources Employment Security Administration, to plaintiff Casmacho, dated September 19, 1983, was reserved, pending briefing upon plaintiffs' hearsay objection to it at trial.

Clearly, the document is based upon defendant's records and statements, in large part, and Mr. Worthington's generic observations of related field work conditions on July 29, 1983. It is a virtual twin of a letter of the same date from Mr. Worthington to former plaintiff Agramonte, never offered into evidence, which defendant attached to its post-trial brief as Exhibit D. In neither instance did Mr. Worthington conduct a hearing or otherwise delve particularly deeply into the controversy surrounding plaintiffs' terminations. Moreover, Mr. Worthington was called as a witness and was subject to cross-examination and the scrutiny of the Court, a far more reliable source of information than his preliminary all-but-*ex parte* evaluations of these two plaintiffs' complaints.

Finding the proffered document, Defense Exhibit 70, to be untrustworthy in its conclusions, the Court denies its admissibility and will not rely upon it in deciding the merits of this case. Defendant's post-trial brief Exhibit D is also ordered stricken, *sua sponte*, for the same reasons and for the additional reason that, due to the Court's dismissal of Mr. Agramonte's claim for want of prosecution almost three weeks before the defendant's post-trial brief was filed, the letter from Mr. Worthington to Mr. Agramonte is of no relevance to this matter whatsoever.<sup>3</sup> The objection to admissibility is sustained.

## [ Computerized Records ]

Finally, plaintiffs objected at trial to defendant's offer into evidence of the computerized "employee master record" printouts of the eleven original plaintiffs, produced at various dates in 1984, as defendant's trial Exhibits 26-36, inclusive. Plaintiffs contend that the computer records, maintained only by Terry Hepburn, then defendant's vice-president, reflect Mr. Hepburn's subjective reasons for plaintiffs' terminations, allegedly recorded contemporaneously but potentially altered anytime prior to printout, and lack any substantiating

al, Civil No. HAR-85-910 (D.Md.) (Docket Entry 25). That case was dismissed "with prejudice" almost ten weeks before the instant case was tried, except that the dismissal expressly permitted WCFGA members to again raise the allegations of constitutional infirmities surrounding Mr. Worthington's two letters and other matters in other administrative and judicial proceedings. *Id.* (Docket Entry 27).

evidence, such as field supervisor notes, etc. In support of their position, plaintiffs point to a telegram sent by Mr. Hepburn to the U.S. Department of Labor ("DOL") only a few days following plaintiffs' dismissals which is arguably at odds with the computer records. Plaintiffs cite several authorities in support of their position that an adequate foundation for admission of the records is lacking. The Court disagrees.

Admissibility is one question, credibility and weight to be accorded any particular document is another. The Court will admit the computerized records and will accept them as accurate as of the days on which they were produced in hard copy. Judicial discretion will be exercised in determining how much weight to give the otherwise unsupported records, noting particularly that the defendant's sole computer terminal operator (a high ranking officer in defendant's corporation, with a putative motive for amending the record) was also its corporate representative at trial. The objection is therefore qualifiedly overruled.

## C

## [ Terminations ]

At issue in this case is whether the seven remaining plaintiffs had their employment at Hepburn Orchards, Inc. in 1983 terminated for just cause.

The defendant is a family-owned business which cultivates and harvests peaches and apples, predominantly in Western Maryland for the commercial fresh fruit market. Its produce is assured marketability when its fruits are picked just prior to full ripeness, and are shipped to arrive with a minimum of bruising. The emphasis on cosmetics requires careful pruning for sun exposure, frequent sprayings for insect control, and gentle handling at harvest to minimize bruising and subsequent marketplace rejection. The defendant employs approximately thirty people year-round, and supplements them with several hundred migrant and seasonal workers during the peach and apple harvesting months, typically July through October. These supplemental employees, if hired early in the season, harvest both peaches and apples, and perform pruning and other orchard maintenance tasks as well.

For most of the eleven years preceding trial of the instant dispute, the defendant has applied to the DOL and the U.S. Immigration and Naturalization Service for permission to temporarily employ foreign workers during its peak labor months. Such use of foreign labor is permitted by 8 U.S.C. § 1101(a) (15) (H) (ii) when a U.S. employer asserts and DOL certifies that qualified U.S. workers are unavailable to perform the jobs for which foreign workers, known colloquially as "H-2's," are sought.

## Labor Law Reports

The system involved in procuring H-2's is complex. An employer first applies for foreign workers by submitting a "criteria job order" to DOL. In defendant's case, each criteria job order contained two documents: an Agricultural and Food Processing Clearance Order ("clearance order") and a Job Offer for Alien Employment, Form MA-7-50B ("7-50B"). Clearance orders and 7-50B's must contain identical terms and conditions of employment for a criteria job order to be approved. Upon approval, a clearance order is circulated through those portions of the national job clearance system most likely to produce qualified domestic applicants; in this case, the clearance orders were circulated in the Maryland region and along the East Coast. A clearance order is considered by the courts to be "essentially an offer for a contract of employment." *Western Colorado Fruit Growers Ass'n v. Marshall* 473 F.Supp. 693, 696 (D.Colo. 1979), which a qualified U.S. worker accepts by travelling to the worksite before the arrival of any H-2's or within the first fifty percent of their contract with an employer.

In the event that an employer's labor needs are not being filled by U.S. workers, DOL certifies the employer as eligible to employ H-2's, and an appropriate foreign labor pool, generally already on alert, is activated, resulting in the arrival in short order of a contingent of foreign workers. The H-2's and the U.S. workers must be treated equally both in the hiring process and on the job. 20 C.F.R. § 655.202(a).

In March, 1983, defendant submitted criteria job order No. 4072460 to DOL, seeking 78 H-2 workers from July 12 to November 4, 1983. The criteria job order was approved and the clearance order component was circulated through the job clearance system. Each of the seven remaining plaintiffs responded to the job offer in mid-to late July, 1983, travelled to Western Maryland, was processed through the local employment service office, went out to the defendant's orchard in Hancock, Maryland, was subjected to and passed a ladder test (see *Bernett v. Hepburn Orchards, Inc.*, Civil No. JH-84-991 (D.Md.)), and was hired. The parties have stipulated that the plaintiffs are "migrant agricultural workers" and that the defendant is an "agricultural employer" as those terms are defined in AWPFA, and that AWPFA consequently has applicability to this situation. Each plaintiff was terminated between two and seventeen days after hire for reasons the legitimacy and legality of which are at issue in this case.

Plaintiffs initially complained that they were fired for failing to meet defendant's productivity requirement in peach harvesting, a standard of six units per hour expressly articulated in the clearance order which plaintiffs maintain was impossible to achieve at that early point in the season, and which the evidence showed was not

45,532

Wage-Hour Cases  
*Caugilla v. Hepburn Orchards, Inc.*

66 4-8-88

being achieved by any other employees at that time. Defendant answered that plaintiffs were not terminated for lack of productivity but for misconduct. Plaintiffs amended their complaint with leave of the Court to further plead that, if they were terminated for misconduct, their behavior did not amount to "serious acts of misconduct" within the purview of that ground for dismissal as articulated in the clearance order (Plaintiffs' Exhibit 1, p. 3). Defendant disagrees.

[ *Misconduct Claim* ]

The evidence adduced at trial satisfies the Court that Mr. Hepburn, defendant's general manager as well as its then vice-president, was dissatisfied with the performance of most if not all of his employees in July, 1983. Acutely conscious of the defendant's need to harvest its fruit in a timely manner, he made frequent if not daily calls to the local employment service office in search of experienced or productive workers, complaining frequently that his contemporary employees were inefficient and unmotivated with resultant low productivity. Mr. Hepburn testified that he directly voiced his concerns to virtually anyone who would listen, with the exception of the employees themselves.

On July 29, 1983, at the peak of his frustration, he toured the orchard with Messrs. Worthington (the state monitor advocate), Bitner (a retired missionary pastor fluent in Haitian-Creole and actively assisting Haitian migrant workers in Western Maryland) and Hesse (then employed with the local employment service office, fluent in Spanish, and in frequent contact with Mr. Hepburn during the period in question). The foursome testified that they observed various unidentified field workers harvesting peaches in a less than ideal fashion, plucking both ripe and unripe peaches as well as some leaves and twigs from trees, and standing around in the afternoon as though, to paraphrase Mr. Worthington's testimony, finished for the day.

Mr. Hepburn complained about this behavior without identifying any particular transgressors, and advised his three guests that he intended to let some unnamed workers go that day. Mr. Worthington urged his host to give the workers another two weeks, and Mr. Hepburn apparently relented briefly; he did not terminate anyone that day, but did fire five of the seven plaintiffs on the following day, July 30, 1983, and a sixth one, Alberto Jean, two days later on August 1, 1983. The seventh, Celeste Cajuste, had been terminated on July 28, 1983, for "fighting" (see Defendant's Exhibit 26), an incident that will be discussed at greater length, *infra*. None of Mr. Hepburn's three visitors on

July 29th communicated Mr. Hepburn's great distress or his proposed solution to any of the fieldworkers.

All six of the plaintiffs fired after the visit to the orchards expressed dismay and anger at the decisions to terminate them. None admitted having received any complaints about the quality or quantity of his harvest work from his field supervisors, not one of whom came forward at trial to testify in support of Mr. Hepburn's actions. Mr. Hepburn himself could only identify minor transgressions on the part of certain plaintiffs. Specifically, Mr. Hepburn testified that two plaintiffs, Messrs. Jean and Shackleton, had participated in a brief wildcat strike but had returned to work the following day after Mr. Hepburn promised full clemency for those who resumed duties. Mr. Hepburn will be held to his own words by this Court, and the incident will be given no consideration. Further, Mr. Hepburn recalled seeing plaintiff Camacho "ground-hogging" (picking only fruit reachable without resort to using a ladder) on one occasion, and observing plaintiff Capaz "standing around" on another occasion, conduct which Mr. Hepburn admitted was relatively rampant that summer, yet which was not employed as the basis for dismissal of many other of plaintiffs' offending co-workers.

Mr. Hepburn frequently complained of plaintiffs' and their co-worker's low productivity, and his concern was reflected as such in fairly contemporaneous notes taken by Messrs. Bitner and Hesse to their various dealings with him. Further, Mr. Hepburn telegraphed DOL in pursuit of his H-2 labor pool on August 5, 1983, noting that he had felt compelled to recently terminate six of these remaining plaintiffs (and three others) "due to lack of productivity." Plaintiffs' Exhibit 26.

[ *Misconduct v. Low Productivity* ]

However, Mr. Hepburn also made complaints, often simultaneous with his lamenting of his fieldworkers' productivity, regarding widespread loafing in the fields, debris in the picking sacks, and ground-hogging of the fruit trees. While defendant takes the position that these activities, not well tied to these six plaintiffs, constituted misconduct within the meaning of the clearance order, the six plaintiffs insist that such conduct at most impacted on their productivity, and in any event does not constitute "serious acts of misconduct," the contractual ground for summary termination.

Both parties rely on *A.C. Keep v. D.C. Department of Employment Services*, 461 A.2D 461, 463 (D.C. App. 1983) and Md. Code Anno. Art. 95A § 6(b), for definitions of serious or gross

¶ 35,042

© 1988, Commerce Clearing House, Inc.

misconduct in the workplace. The state statute<sup>6</sup> construes "gross misconduct" in the workplace as follows: ". . . (1) a deliberate and willful disregard of standards of behavior, which his employer has a right to expect, showing a gross indifference to the employer's interests, or (2) a series of repeated violations of employment rules proving that the employee has regularly and wantonly disregarded his obligations." Similarly, the *Keep* court held that "implicit in this court's definition of 'misconduct' is that the employee intentionally disregarded the employer's expectations for performance. Ordinary negligence in disregarding the employer's standards or rules will not suffice[.]" *Keep*, *supra*, at 463.

Defendant argues that "when individuals are hired to pick peaches for the fresh fruit market and they do nothing more than pick green fruit, stand around and do nothing, pick undersized fruit and generally do anything but pick peaches marketable on the fresh fruit market they are guilty [sic] of [serious acts of misconduct]." Defendant's Post-Trial Brief, pp. 21-22. Were this hyperbolic and accurate description of the six plaintiffs' performances, the Court would readily concur. However, in the Court's view, the six plaintiffs have proven by a preponderance of the evidence that their conduct was far less extreme and their lapses in performance far more sporadic and even partially justified by the relative absence of harvestable fruit in late July, 1983. The Court finds, in sum, that the six plaintiffs fired after July 29, 1983, may have occasionally engaged in dilatory field behavior but, if at all, certainly not to an extent where it can be classified reasonably as "serious acts of misconduct." Rather, the Court finds that any loafing, etc., on the six plaintiffs' part only exacerbated their low productivity, something which was already *sub per due* in considerable part to an immature, irregular or poor crop of peaches at that time. As no other employee appears to have been picking his quota, the six plaintiffs' dismissals for low productivity contravened fairness and the law.

## D

## [ Fighting ]

A seventh plaintiff, Cereste Cajuste, was fired on July 28, 1983, for "fighting." Defendant's Exhibit 26. The evidence adduced at trial shows that on Mr. Cajuste's second day at the orchard, a fellow worker took this plaintiff's ladder after the lunch break. Mr. Cajuste brought his co-worker's original ladder back to him in an effort to retrieve his own and some words were

exchanged. Plaintiff's field supervisor told Mr. Cajuste to stop working, and he was later told he had been terminated. Mr. Hepburn testified that he had been told plaintiff had started a fight over the ladder.

The obvious witness to the exchange, the field supervisor, was not present at trial. The Court, faced with plaintiff's account on the one hand, buttressed by testimony from another plaintiff, Oszone Paul, and defendant's hearsay account of an altercation initiated by Mr. Cajuste on the other, is forced to conclude that the field supervisor would not have testified favorably to the defendant. *Blow v. Compagnie Maritime Belge (Lloyd Royal) S.A.*, 395 F.2d 74, 79 (4th Cir. 1968).

In conclusion, the Court finds Mr. Cajuste to have proven by a preponderance of the evidence that he was unjustly terminated for a serious act of misconduct.

## E

## [ Notice to Employment Service ]

A further provision of the clearance order required defendant to notify the local employment service office prior to or when it was firing someone. Mr. Hepburn testified that he considered the July 29th meeting at the orchard to have effectively notified the service that plaintiffs were going to be terminated. The weight of the evidence does not support his contention. No plaintiffs' names were given to the visitors, and no final decision regarding terminations was announced at that time. In sum, defendant violated this term of the clearance order through noncompliance with it.

## F

## [ Unequal Treatment ]

Plaintiffs, in Count I of their amended complaint, charge defendant with unequal treatment of domestic and H-2 workers, and with failing to adhere to the contractual conditions of dismissal. The Court notes that there were no H-2 workers at Hepburn Orchards when these plaintiffs were present and so dispenses with the allegation of unequal treatment. However, the Court finds defendant to have violated the terms of the clearance order relating to terminations without justification.

Because AWPA provides plaintiffs more comprehensive protections than the Wagner-Peyser Act, or the common law of contracts, the Court will award damages pursuant only to 29 U.S.C. § 1854(c).

<sup>6</sup> Erroneously cited by defendant in its post-trial brief at p. 22 as a quotation from the *Keep* decision.

<sup>7</sup> Defined in terms nearly identical to those in the Maryland Statute in *Hichonbatens v. D.C. Unemployment Compensation Board*, 273 A.2d 475, 477-478 (D.C. App. 1971).

## G

[ *Intentional Violation* ]

Specific intent to violate AWPA is not required for the Court to find that there has been an intentional violation of the statutory scheme. *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, [103 LC ¶ 34,713] 765 F.2d 1334 (5th Cir. 1985). Rather, the common civil standard which holds one liable for the natural and foreseeable consequences of one's acts is employed. *DeLeon v. Ramirez*, [86 LC ¶ 33,788] 465 F.Supp. 698, 705 (S.D.N.Y. 1979). The Court finds the defendant's violations of AWPA to have been intentional within the context of 29 U.S.C. § 1854(c).

## H

[ *Damages* ]

Evidence at trial demonstrated that the period covered by the job order involved here ran from July 12, 1983 to November 4, 1983. The clearance order called for six-day workweeks with eight-hour workdays. Further, the clearance order expressed an employer's guarantee of three-quarters employment. Plaintiffs' Exhibit 1, clearance order Item 9(d).

Plaintiffs urge the Court to award them actual damages rather than statutory damages, calculated by assuming all seven plaintiffs would have worked to the conclusion of the job order period if allowed. The Court declines to do so, nothing that if all seven had done so, the work period would probably have ended sooner. The Court is satisfied that applying a three-quarter contractual wage guarantee to these seven plaintiffs is far more equitable.

Further, the Court will assume that no employee would have worked on the first Monday in September, Labor Day.

Plaintiffs further request that lost wages be determined by the 1983 Adverse Effect Wage Rate ("AEWR") for the peach harvest days, and by the estimated hourly rate equivalent for an estimated average 13-bushel workhour for the apple harvest days. Translated into dollars, plaintiffs seek the 1983 AEWR of \$4.38/hour for peaches and an estimated \$5.35/hour for apples. Defendant objects, noting that the same source from which plaintiffs derived the estimated apple picking wage of \$5.35/hour, the clearance order (p. 1, § 9), also clearly indicates that the wage is estimated ("est."). The Court agrees that the only guaranteed wage was AEWR, it being higher than the federal minimum wage, and will apply the appropriate AEWR for three-quarters of each of the seven plaintiffs' potential contract periods in calculating their gross lost wages.

The law is clear that these plaintiffs are also entitled to be reimbursed for any other out-of-

pocket expenses for which H-2's would have been reimbursed. However, income earned from other sources during this period must be applied in mitigation. *Dialist Co. v. Fulford*, 42 Md. App. 173, 399 A.2d 1374 (1979).

[ *Calculations* ]

Accordingly, the Court's calculations of actual damage awards are set out below as to each of the seven plaintiffs who testified or were deposed, in alphabetical order.

1. *Cereste Cajuste*

Arrived by bus from Florida, hired July 26, 1983; worked two days; paid \$89.00 for bus to Hepburn Orchards; fired for "fighting" over a ladder.

At trial, Mr. Cajuste testified that he remained in defendant's laborers' camp for 13 days, sure that he would be recalled. When he was not, he went and obtained employment at another orchard. A review of this plaintiff's deposition, identified but not offered into evidence as plaintiffs' Exhibit 3, is more specific on the question of subsequent employment. As this greater detail was not brought out in trial by either side, and in recognition of the high risk this places on the Court of unjustly enriching the plaintiff, the Court will award him statutory damages of \$450.00 in lieu of actual damages.

2. *Jose Manuel Camacho*

Hired July 26, 1983; worked four days; fired for low productivity; unemployed until January 9, 1984.

July 26-Nov. 4, 1983	87	workdays
3/4 contract, thru 10/10/83	65	
less days at Hepburn	-4	
Total lost days	61	
	x 8	hours
Total lost hours	488	
x AEWR	4.38	
Gross lost wage	\$2,137.44	

No discernible adjustment; gross lost wages equal actual damages.

3. *Felix Capaz*

Took bus from Florida (\$75.00); hired July 26, 1983; worked four days; fired for low productivity; unemployed through rest of season.

July 26-Nov. 4, 1983	87	workdays
(see above calculations)		
Gross lost wages	\$2,137.44	
Adjustments: add \$75	75.00	
bus fare	4.38	
Actual damages	\$2,212.44	

4. *James Caugillo*

† 35,042

Took bus from West Virginia (\$17.00); hired July 26, 1983; worked four days; fired for low productivity.

At trial, plaintiff made no testimonial reference to other employment during the rest of the season. However, plaintiff's answers to interrogatories, admitted and reviewed by the Court in connection with defendant's mid-trial motion to dismiss or for mistrial, indicates that plaintiff was self-employed as a television repairman during the remainder of the season. Again, the Court reviewed plaintiff's deposition, identified but not offered into evidence as plaintiff's Exhibit 2, and found it more specific on this point. Unable to make greater use of the inconclusive information therein, and in order to avoid an obvious problem in unjustly enriching plaintiff, the Court will award plaintiff \$450 in statutory damages in lieu of actual damages.

#### 5. Alberto Jean

Testified solely by deposition, plaintiffs' Exhibit 5.

Hired July 15, 1983; fired Aug. 1, 1983 for low productivity; incurred rental expenses upon his return to Florida, but earned enough to cover them, and to buy cigarettes. The Court will assume plaintiff Jean earned an extra dollar per day during the three months which elapsed before he found regular gainful employment; plaintiff's rental expenses having been offset by occasional earnings, neither factor will be used to adjust damages.

#### 6. Ozonne Paul

July 15-Nov 4, 1983	95	workdays
¼ contract, thru 10/12/83	71	
less days at Hepburn	-14	
Total lost days	37	
	× 8	hours
Total lost hours	456	
× AEW R	4.38	
Total lost wages	\$1,997.28	
Adjustments:		
less \$57		
cigarettes	57.00	
Actual damages	\$1,940.28	

Drove to jobsite for \$70; hired July 14, 1983; fired for low productivity after working 14 days.

At trial, Mr. Paul testified that he procured another job within a few weeks, harvesting fruit at other orchards in the area. Again, plaintiffs' unadmitted deposition, identified as plaintiffs' Exhibit 4, provides more detail upon which the Court cannot place its reliance. Again, to avoid the likelihood of unjustly enriching the plaintiff, the Court will

award him \$450 in statutory damages in lieu of actual damages.

#### 7. Wilson Shackleton

Testified solely by deposition, admitted as plaintiffs' Exhibit 6.

Hired July 15, 1983, worked 13 days, fired July 30, 1983; returned to unemployment in Florida until November; rental shelter for \$25/week.

July 15-Nov 4, 1983	95	workdays
¼ contract, thru 10/12/83	71	
Less 13 days at Hepburn	-13	
Total lost workdays	58	
	× 8	hours
Total lost workhours	464	
× AEW R	4.38	
	\$2,032.32	
Adjustments: add 10 wks.		
rent × \$25/wk.	25.00	
Actual damages	\$2,282.32	

Title 29 U.S.C. § 1854 permits the Court to award either actual damages if proven or statutory damages up to \$500 per violation of AFWA. In this case, although the plaintiffs have sued under two substantive sections of AFWA, the Court is awarding statutory damages only on the claim which was proven to the Court's satisfaction, § 1822(c), violation of terms of working agreement. Moreover, the Court is not awarding the maximum amount in order that the maximum available penalty be preserved for use in those cases where overt maliciousness is satisfactorily proven. That is not quite the case here, but the Court is satisfied that defendant's conduct merits a relatively stiff penalty. Plaintiffs had already overcome one of defendant's hurdles, its ladder test (see *Bernett v. Hepburn Orchards, Inc., supra*). Having been hired, they were then deprived of the opportunity of a full seasons' employment without just cause.

#### I

#### {Prejudgment Interest}

Lastly, plaintiffs moved on May 11, 1987, for an award of prejudgment interest on the actual damage awards running from the dates upon which the seven plaintiffs were wrongfully fired. Defendant is quite likely going to oppose the motion on the same or similar grounds to those articulated in *Bernett v. Hepburn Orchards, Inc., supra*.

For the same reasons explicated by the Court in the *Bernett* opinion issued on April 14, 1987, the Court grants plaintiffs' motion and awards prejudgment interest to plaintiffs receiving

45,536

Wage-Hour Cases  
*Brock v. Mechanicsville Concrete, Inc.*

66 4-8-88

actual damage awards at five percent per annum, simple, as of the last day of the Court- determined final dates of their guaranteed three-fourths time contracts.

---

1 35,043

©1964, Commerce Clearing House, Inc.

complaint along with copies of consent forms signed by each new plaintiff, the second amended complaint is hereby deemed to have been filed and served by mail as of this date.

[¶ 35,070] *Dean Clarke et al., Plaintiffs v. Gardenhour Orchards, Inc., Defendant.*

United States District Court, District of Maryland. No. J11-84-4419. July 23, 1987.

**Migrant and Seasonal Agricultural Worker Protection Act**

**Farm Labor Contractors—Private Suits—Failure to Appear.**—The claims of four migrant workers were not dismissed, even though the workers did not appear and testify, since they were among thirteen plaintiffs who had applied as a group for work, and three of the plaintiffs did testify at trial. The entire group had applied for the same work and were told that housing was not available for them. They were subjected to a uniform condition, and the individual claims were not unique so as to require individual testimony. Additional duplicative testimony from the remaining plaintiffs would have been of nominal value, and its absence was not prejudicial to the employer. Further, the additional plaintiffs would have been exposed to significant practical hardship if their presence at trial were required. AFWA, Section 504(c).

Back reference: ¶ 22,343.

**Farm Labor Contractors—Housing—Lack of Control.**—A farm labor contractor, who had offered "no cost housing" as part of its working arrangement to potential alien workers, was obligated to provide similar housing to U.S. migrant workers despite the fact that the existing housing was temporarily unavailable through no fault of the employer. The employer's housing was rented from a neighboring employer and had been damaged by vandals, requiring extensive repairs that would not be completed until after the employees were to begin work. There was no offer of alternative housing which would have been made had the employees been alien workers. It was no excuse that the condition of the existing housing was out of the employer's control. AFWA, Section 202.

Back reference: ¶ 22,332.

**Farm Labor Contractors—Damages—Intent.**—An employer's repeated refusal to provide housing to U.S. workers, as required by an existing working arrangement applicable to both U.S. and alien migrant workers, was sufficient to show that the violations were intentional for the purpose of damages. The employer provided free housing to alien workers upon their arrival but continued to deny the U.S. workers the same benefit on three different occasions. AFWA, Section 504(c).

Back reference: 22,343.

Keith G. Talbot, Gregory S. Schell and Susan Compernelle, Legal Aid Bureau, Salisbury, Maryland, for Plaintiffs. Thomas E. Wilson (Seyfarth, Shaw, Fairweather & Geraldson), S. Steven Karalekas (Karalekas & McCahill), Washington, D.C., for Defendant.

*[Statement of Case]*

HOWARD, D.J.: This complaint, filed by thirteen migrant agricultural workers, alleges violations of their right to labor camp housing at defendant employer's orchard as accrued by the Migrant and Seasonal Agricultural Worker Protection Act ("AWAP"), 29 U.S.C. §§ 1801, et seq., the Wagner-Peyser Act, 29 U.S.C. §§ 49 et seq., and the common law of contracts. Trial on the merits was held without a jury on July 18, 1985, and the parties subsequently filed post-trial briefs and responses thereto at the request of the Court.

The parties also filed a number of mid-trial and post-trial motions which have been held *sub curia*. Specifically, defendant moved at trial to dismiss the claims of four plaintiffs for failure to prosecute, and to dismiss allegations made on

behalf of a fifth plaintiff for failure to state a claim. Both motions were made orally and in writing, and the motion to dismiss the claims of four plaintiffs for want of prosecution was renewed in writing eleven months later. Defendant also filed a motion to strike plaintiffs' proposed findings of fact and conclusions of law, a paper which plaintiffs volunteered as an aid to the Court. Finally, on March 31, 1987, defendant moved for summary judgment as to all claims filed by plaintiffs who were Haitian citizens. The plaintiffs have opposed every aspect of all of these motions, and the parties have filed replies and supplemental briefs in many instances.

Having carefully listened to the evidence presented by the nine testificants at trial, and having studied the various depositions and other documents received into evidence on July 18,

<sup>1</sup> *Dea Roy Clarke, Mary Ellen Beaver, Carol Jackson Moreau, Archange Phillisín, Yolanda Milan, Joseph Beard,*

*George W. Gardenhour, Jr., John Rinehart and Merlin Williams.*

1985, and the arguments of the parties in their post-trial briefs, the court hereby issues its findings of fact and conclusions of law, not always specifically denominated as such, pursuant to Fed. R. Civ. P. 52(a). Additionally, having reviewed the various memoranda and their attachments in support of and in opposition to the pending motions, the Court will issue its rulings on them, without resort to a hearing, Local Rule 4(G), at the outset of this opinion.

## A

## [ Failure to Appear ]

Initially, the Court notes that plaintiffs' proposed findings of fact and conclusions of law might unfairly prejudice the defendant were the Court to take them into consideration in the absence of a counterproposal. While such papers are frequently of great assistance to the decision-making process, the hour is much too late to seek a counterproposal from the defendant; indeed, the Court never intended its final decision to have been this long in the offing, and sees no cause for further delay. Accordingly, with undiminished respect for plaintiffs' enthusiasm for filing papers, and with equal regard for defendant's commensurate propensity, the motion to strike plaintiffs' proposed findings and conclusions is granted. The paper will not be given any weight in resolving this dispute.

Secondly, defendant raised a defense for the first time in its motion for summary judgment, filed over twenty months after the conclusion of the trial. Specifically, defendant asks the Court to bar claims by nine of the thirteen plaintiffs on the ground that each of them is a Haitian national and not a "U.S. worker" as that term is defined in AWPA. Plaintiffs oppose the motion, asserting the defense has been waived by the lapse of time, by defendant's stipulation to plaintiffs' status as "migrant agricultural workers within the meaning of the AWPA" in the Pre-trial Order jointly submitted and approved by the Court on July 17, 1985 (Paper No. 10, § 6.A, p.5), and by its constant reference to plaintiffs as "migrant workers" or U.S. workers from the inception of this matter until the filing of the motion for summary judgment. See, e.g., defendant's post-trial brief.

On the strength of the record, and relying on *Guglielmo v. Scatti & Son, Inc.*, 58 F.R.D. 413 (W.D. Pa. 1973), the Court deems the defense waived. It follows that defendant's motion for summary judgment is denied.

Defendant moved for dismissal of the claims of four plaintiffs (Adrien Drino by Delia Pierre, personal representative of his estate, Thomas Jackson, Seguerre Placide and Curtis Thornton) for their failure to present themselves either for deposition or at trial; in sum, for want of prosecution. Plaintiffs oppose the motion on the theory that each plaintiff's case was proven at trial by the testimony of co-plaintiffs and the physical evidence received. Accordingly, further testimony by these plaintiffs, it is suggested, would only have been repetitive, cumulative and unnecessary.

The evidence adduced at trial satisfies the Court that on September 15, 1983, a group of agricultural workers, including eleven of the plaintiffs, applied en masse for work at defendant's Western Maryland orchard and were advised that housing could not be provided for them. Of that group of eleven plaintiffs, three (Dean Clarke, Carol Morcau and Archange Philistin) testified at trial. Three others (Messrs. Drino, Placide and Thornton) did not, nor were they deposed; they are three of the four subjects of this motion.

Defendant renewed its motion in June of 1986 on the further basis that this Court had dismissed claims of certain plaintiffs in another migrant worker lawsuit (*Caugills, et al. v. Hophorn Orchards, Inc.*, [108 LC ¶ 35,042] Civil No. JH-84-991) for failure to prosecute, setting a precedent which should be followed and applied in this case. The defendant fails to appreciate, however, that the *Caugills* claims involved individual situations pertaining to dismissals rather than a mass application and subjection to a uniform condition, as is alleged here. The Court views the need for testimony from Messrs. Drino, Placide and Thornton to have been nominal at best, and the absence of it nonprejudicial to the defendant. The Court declines to draw an adverse inference from their silence in view of the practical hardships which requiring their presence at trial could have wrought, given the nature of their occupations. See *Beliz v. W.H. McLeod & Sons Packing Co.*, [103 LC ¶ 34,726] 765 F.2d 1317, 1331 (5th Cir. 1985) (AWPA case); *Donovan v. New Floridian Hotel, Inc.*, [94 LC ¶ 34,194] 676 F.2d 468, 471-472 (11th Cir. 1982) (FLSA case); *Alzalde v. Oranas*, 580 F.Supp. 1394, 1396 (D. Colo. 1984) (FLCRA case). The motions to dismiss the claims of Messrs. Drino, Placide and Thornton for these reasons are denied.<sup>2</sup>

<sup>2</sup> On July 1, 1985, the Court permitted Delia Pierre to prosecute the claims of Adrien Drino as the personal representative of his estate, on the express condition that she file "an affidavit ... confirming that her husband, Adrien Drino, is deceased and that there is no other legal personal representative to plead [his] interests, as soon as practical."

No such affidavit has been filed to date. Accordingly, unless such an affidavit is produced and filed within thirty (30) days from the date of this decision, the Court will entertain a motion to vacate any award made to that plaintiff for the default.

On the other hand, the evidence regarding plaintiff Jackson showed that he applied for work, presumably alone, on September 29, 1983, or two weeks after the large group discussed *supra*. Mr. Jackson did not appear at trial, either live or by deposition. However, plaintiffs' introduction of an administrative complaint filed by Mr. Jackson several weeks later, and the testimony of the woman who processed the complaint, satisfy the Court that the quality of the proof is compatible with the burden of carrying it within the context of the circumstances here at play. The motions to dismiss his claims for failure to prosecute will also be denied.

Finally, defendant moved for dismissal of the claims of plaintiff Austin Halmey for failure to state a claim in the complaint. The Court is not persuaded that the general allegations in the complaint are exclusive of this plaintiff any more than they are inapplicable to any other unidentified plaintiff. Sufficient allegations have been made, and adequate proof offered by the testimony of co-plaintiff Clarke, to overcome this technical and otherwise insubstantial motion.

#### B

##### { Free Housing }

The parties have stipulated and the Court finds the thirteen plaintiffs to be migrant agricultural workers and the defendant to be an agricultural grower within the purview of the context of AWP/A. The plaintiffs travelled from Chambersburg, Pennsylvania in pursuit of work in the defendant's apple orchard in the late summer and fall of 1983. Defendant had filed a "criteria job order," No. 4072475, pursuant to 8 U.S.C. § 1101(a)(15)(X)(ii) in an effort to procure permission from the U.S. Department of Labor and the Immigration and Naturalization Service to import and hire twelve temporary foreign workers, so-called "H-2's to do orchard harvest work from September 6 to November 4, 1983.

The H-2 procurement system is complicated. If an application is initially approved, one of its two components, an Agricultural and Food Processing Clearance Order ("clearance order") is first circulated in the domestic labor market; in this case, in the mid-Atlantic area (including Pennsylvania) and along the East Coast. In an effort to find U.S. workers to meet the grower's needs. Only if an employer subsequently certifies that its labor needs are going unmet will the second component, a Job Offer for Alien Employment, be issued authorizing the entry and temporary employment of the requested H-2's. However, prior to the H-2's arrival, and within the first fifty percent of their contract, a grower is obliged to hire any qualified U.S. worker who responds to the clearance order.

The goal behind the rule is clear—to provide work for qualified domestic laborers. The terms and conditions of employment of domestic workers must be identical to those offered and provided to H-2's. The material terms are spelled out in the clearance order, and that clearance order, as circulated, is deemed by the courts to be "essentially an offer for a contract of employment." *Western Colorado Fruit Growers Ass'n v. Marshall*, 473 F.Supp. 693, 696 (D Colo. 1979), which a qualified U.S. worker accepts by traveling to the identified worksite within the time frame mentioned in the preceding paragraph.

In this case, the defendant expressly offered "no cost housing" to his foreign labor force. Defendant did not own his own housing but leased it from neighboring Rinehart Orchards. On August 30, 1983, Rinehart's camp housing was severely damaged by vandals, requiring extensive repairs. The evidence adduced at trial tended to show that the defendant did not become aware of the problem with its rented housing until the lessor contacted Mr. Gardenhour, Jr., the defendant's president, on September 14 or 15, 1983, to let him know that the housing was damaged and would not be repaired and ready to occupy until the following week.

On September 15, 1983, the aforementioned group of applicants, including eleven of the plaintiffs, arrived at defendant's worksite. Mr. Gardenhour testified that they were escorted by a farmworker service person from Chambersburg, Pennsylvania, and that he could tell they were foreign nationals because he could not communicate with them. The group had not been properly screened and processed by the local job service office, so Mr. Gardenhour called for the assistance of Merlin Williams, a local job service office employee. The group was processed at Hagerstown and returned to defendant's orchard. The eleven plaintiffs were interviewed, tested and offered work.

The controversy crystallized when defendant then advised plaintiffs that it had no housing for them at that time but that it would be available a week later. The Court is satisfied that no offer of alternative housing arrangements or reimbursement of rental housing and commuter expenses was communicated to these plaintiffs, notwithstanding Mr. Gardenhour's testimony to the contrary. The preponderance of the evidence indicates that Mr. Gardenhour was anticipating the arrival of his requested H-2's, but the Court is satisfied that the proffered housing was not ready for occupancy by anyone, U.S. worker or H-2, on September 15, 1983. While some plaintiffs testified that Mr. Gardenhour had told them that the housing was being reserved for the H-2's, it would not have been ready had they arrived that day. However, the Court is convinced that the defendant would have made

45,650

Labor Relations Cases  
*Clarke v. Gardenhour Orchard, Inc.*

74 6-3-88

alternative arrangements for housing the H-2's had it been they who arrived on September 15, 1983, rather than the plaintiffs.

In any event, after defendant offered work to those eleven plaintiffs, without housing until the following week and without any surrogate housing agreement, plaintiffs accepted the work and Mr. Gardenhour telephonically cancelled his request for H-2 workers. Mr. Gardenhour argued at trial and post-trial that a state commuter distance policy relieved him from any obligation to provide plaintiffs with housing as they had come from Chambersburg, Pennsylvania, less than twenty-five miles away from defendant's Western Maryland orchard. However, Mr. Gardenhour testified at trial that on September 15, 1983, he was unaware of the distance between his orchard and Chambersburg, unaware of the commuter distance policy, and quite aware that the eleven plaintiffs were foreign nationals.

If he had any doubts, the background information obtained from each plaintiff during that day's processing in Hagerstown and provided to Mr. Gardenhour should have satisfied him that the plaintiffs were indeed migrant farmworkers, most if not all of them based in Florida. Accordingly, the commuter distance policy would have no relevance as it applied only to area residents, and his obligation to furnish no-cost housing should have been clear.

Defendant seeks to be excused from his obligation to house the plaintiffs because the state of the Rinehart camp was out of his control. However, in the Court's view, defendant, having offered housing to H-2's as of September 6, 1983, the starting date in the criteria job order, should have ascertained via contact with Rinehart Orchards that the housing would actually be ready by September 6. While defendant did not bother to do so, it was still made aware of the problem with the camp prior to the plaintiffs' arrival and should have realized that alternative arrangements would have to be made. None were. This dereliction of duty rendered the terms of the clearance order inaccurate or misleading in violation of 29 U.S.C. § 1821(a)(5) and (f), and consequently violated the terms of the parties' working arrangement in violation of 29 U.S.C. § 1822(c).

Virtually the same circumstances occurred when plaintiff Austin Halmey applied for work at the defendant's orchard after being processed in Hagerstown on the morning of September 19, 1983. If anything, defendant's failure to make an offer of camp housing or an acceptable temporary substitute to plaintiff Halmey is more egregious in that several days had elapsed within which the error should have been realized and corrected. The labor camp housing was not ready for occupancy until September 20, 1983,

by which time virtually all of the eleven plaintiffs who were hired on September 15th, and Mr. Halmey, had realized that they would be hard pressed to pay unreimbursed rent in Chambersburg and an unreimbursed daily commuting fee to a driver in their contemporary financial circumstances, particularly as the defendant's crop did not appear to be overly bounteous at that time. Unfortunately for all involved, plaintiffs felt compelled to seek work elsewhere before defendant could advise them that the camp was ready for their occupancy.

Faced with high employee attrition on or about September 21st, defendant requested reactivation of its request for H-2's. The request was authorized and seven H-2 workers arrived from Jamaica on September 27, 1983. That same day, plaintiff Jackson applied for work with the defendant, prior to the actual arrival of the Jamaicans, but was not offered employment, let alone housing. Mr. Jackson went off to find work elsewhere and could not be located when defendant, in a change of mind a few hours later, sought to offer him a job. Regrettably, by then, the error had been committed and the damage done.

## C

## [ Damages ]

Each plaintiff seeks statutory damages of \$500 for each of the two violations of AFWA, pursuant to 29 U.S.C. § 1854(c). Additionally, plaintiffs seek actual damages either as an alternative to statutory damages under AFWA or pursuant to the Wagner-Peyser Act and contract claims.

In order to be awarded damages under AFWA, plaintiffs must show that the violation(s) of the statutory scheme were intentional. Specific intent to violate is not required. *Salazar-Calderson v. Presidio Valley Farmers Ass'n.*, [103 LC ¶ 34,713] 765 F.2d 1334 (5th Cir. 1985). Rather, the common civil standard of holding one liable for the natural and foreseeable consequences of one's acts is employed. *DeLeon v. Ramirez*, [86 LC ¶ 33,788] 465 F.Supp. 698, 705 (S.D.N.Y. 1979). The Court finds this standard to have been met in this case.

## D

## [ Intent ]

The recurrence of the same violation on September 15, 19, and 27, 1983, satisfies the Court that the defendant did not intend to provide housing to U.S. workers with a willingness equal to its inclination to shelter H-2 workers when they arrived. The evidence was clear that the H-2 workers were housed upon their arrival and otherwise received treatment in accord with the terms of the criteria job order. Accordingly, the

¶ 35,070

©1988, Commerce Clearing House, Inc.

Court finds that plaintiffs have clearly established both a violation of § 1821(f) and a violation of § 1822(c) and finds no reason to merge the two violations for purposes of penalty assessment.

However, the Court does not consider the defendant's actions to have been overtly malicious. In order that an imposition of the maximum penalty might carry added impact, the Court will award statutory damages to each plaintiff in the amounts of \$250.00 for the § 1821(f) violation, pertaining to the effectively misleading clearance order, and \$400.00 for the § 1822(c) violation, the substantive breach of

the offered terms of employment, for a total award of \$650.00 per plaintiff.

Finally, regarding plaintiff's request for additional awards of actual damages, the Court finds the record created at trial to be insufficient in detail to permit a fair and proper evaluation of actual losses suffered by each plaintiff. Accordingly, no further actual damages will be awarded for the Wagner-Peyser act and common-law claims.

The attention of the parties is redirected in footnote 2, supra.

[§ 35,071] Michael Facchiano, Jr. et al., Plaintiffs v. The United States Department of Labor et al., Defendants.

United States District Court, Western District of Pennsylvania. No. 86-2711. December 16, 1987.

#### Davis-Bacon Act

**Ineligible Litigants—Wage and Recordkeeping Violations—Collateral Estoppel.**—The Department of Labor was not bound by the Department of Housing and Urban Development's prior debarment action since the two actions were sufficiently dissimilar. The DOL action, unlike the HUD debarment that affected only HUD contracts, would affect all government contracts. Moreover, while the HUD action was based on a criminal conviction arising out of Davis-Bacon Act violations, the DOL action was based on the violations of the Act themselves. Therefore, the employer's attempt to enjoin the DOL debarment action through a defense of collateral estoppel was rejected. DBA, Section 276a-2(a).

Back reference: § 26,904.

Thomas A. Berret (Meyer, Unkovic & Scott), Pittsburgh, Pennsylvania, for Plaintiffs. George R. Salem, Solicitor of Labor, Marshall Harris, Regional Solicitor, Alfred J. Fisher Jr., Albert W. Schollaert, for Defendants.

#### [ Statement of Case ]

##### I. Recommendation

MITCHELL, M: It is respectfully recommended that the defendants' motion for summary judgment be granted.

##### II. Report

Presently before the Court for disposition is the defendants' motion to dismiss for lack of jurisdiction and cross motions for summary judgment.

The facts are basically uncontested and are set forth in the parties joint stipulation filed on June 30, 1987. Facchiano Construction Company ("the Company") is a corporation engaged in the operation of a concrete constructing business. Michael Facchiano and John Facchiano are officers of the company. During the period between 1982 and 1984, the company was engaged in construction projects which were partially funded by the Department of Housing and Urban Development ("HUD"). During the summer of 1984 the Department of Labor ("Labor") conducted an investigation of the company's performance on certain construction

projects, and determined that the company had been paying its employees less than the prevailing wages applicable under the Davis-Bacon Act, 40 U.S.C. § 267a, et seq.; that the company had not properly paid the amount of overtime compensation required under the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327 et seq. and that the company had falsified its payroll records to reflect compliance with these Acts. Thereafter, a criminal information was filed in this Court and on February 22, 1985, Michael Facchiano, Jr. and the company pled guilty to two counts of mail fraud. Michael Facchiano, Jr. was sentenced to six months incarceration on February 22, 1985 and fines were levied against both him and the Company. In addition, back wages were paid to company employees.

Subsequently, HUD filed an administrative complaint against Michael Facchiano and the Company seeking to debar them from participating in HUD funded programs and by Order dated March 15, 1986, it was directed that they be debarred from participating in any HUD funded project until November 15, 1986. Since

U.S. Department of Labor

Office of Administrative Law Judges  
1111 20th Street, N.W.  
Washington, D.C. 20036

..... :  
 In the Matter of :  
 :  
 Terry Millar and Damora Bennett :  
 v. Hephburn Orchards, Inc. :  
 (J.S. Case No. 4630-83-37); :  
 :  
 Ricky Snow : Case No. 85-JSA-2  
 v. Hephburn Orchards, Inc. :  
 (J.S. Case No. 4630-83-64); :  
 :  
 Domingo Diaz :  
 v. Hephburn Orchards, Inc. :  
 (J.S. Case No. 4630-83-51); :  
 :  
 Merilus Senat and Oldvert Ulyssa :  
 v. Hephburn Orchards, Inc. :  
 (J.S. Case No. 4630-83-63). :  
 .....

#### DECISION AND ORDER

This matter arises under the provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 et seq (the Act), which regulates the admission of aliens into the United States, and regulation governing the administration of the Act, 20 CFR Part 655.

#### Statement of Facts

Hephburn Orchards, Incorporated is a fruit grower located in Maryland, which qualified under 20 CFR Part 655 to hire temporary foreign workers under a temporary labor certification issued by the Secretary of Labor. In 1983, it hired Jamaican workers for the harvest season beginning in July and running through November.

After obtaining the appropriate clearance order for the recruitment of foreign workers, Hephburn placed its request for workers with the Washington County Fruit Growers Association (Washington) which assisted member-growers in filling job orders. This association employed an agent, Florida Fruit and Vegetable Association (Florida) acting in cooperation with the West Indies Labor Pool, and, in this case, the government of Jamaica, entered into contracts of employment on behalf of Hephburn which included as parties Hephburn, the worker, and the government of Jamaica.

- 2 -

Florida is a labor broker for employers from farm labor throughout the United States. It sends or has an on-site agents for recruitment of temporary workers in the West Indies. It selects workers based on their ability to harvest sugar cane. When the worker is hired, Florida enters into a contract as agent for the employer, and it arranges transportation to the place of employment. For these services, it is paid a fee out of the wages earned by the employee.

The contract of employment is a lengthy, formal agreement which covers wages, and living conditions, which must be provided by the employer. It incorporates governmental regulations which govern all phases of the employer-employee relation. When the worker is hired, the contract is executed in Jamaica by the worker, representatives of the employer, and the government.

The period of employment of the worker begins when he arrives at the place of employment, and it terminates on the date of his departure from that place. The term of employment is fixed, but it may be shortened provided the employer pays a guaranteed minimum to the employee for the season. The employer may terminate the worker's employment for cause; deportation, or failure to meet minimum production standards. The contract contains a brief description of the work, and states that the worker must be able to use wood or aluminum ladders up to 24 feet, climb, and carry bags of fruit weighing from forty to fifty pounds. Other conditions of employment provide: "The employer will provide three (3) days of training or allow three (3) days of work from the commencement of employment, at the conclusion of which workers must have reached production standards".

In its hiring for the fall of 1963, Hepburn entered into contracts with about eighty Jamaican workers for the season. In preparation for that harvest season, Hepburn also received applications for employment from U.S. workers. More than half of these applicants were denied employment on their failure of Hepburn's "ladder test". Among the rejected employees were the complainants in this action.

The practice of employing alien workers cannot be used to exclude qualified U.S. workers. The laws and regulations require domestic and foreign workers to be treated equally. At the time Hepburn took on the aliens, the complainants in this case applied for work at Hepburn, but were refused employment. They complain that they were required to demonstrate skills not required of the aliens as a condition of employment. Moreover, they contend that they were refused employment upon failing the "ladder test" whereas the aliens were given three days of training to learn to manage the ladder.

- 3 -

The employer denies these allegations and says that all prospective employees were required to pass the "ladder test," and that the three days of training was used to increase the production of the workers after they were hired rather than to teach ladder handling.

The ladder test was administered exclusively by Mr. Terry Hepburn, vice president of Hepburn Orchards as a condition for employment for all applicants in 1983. State Transcript at 91, and 115. Unless an applicant had previously worked for Hepburn picking apples, that person would have to take and pass the ladder test id. at 92. Several U.S. workers failed the test, but no West Indian workers failed the test in 1983. id.

The ladder test is described by Mr. Hepburn:

We ask applicants to vertically ascend the ladder and be able to walk with it a reasonable distance which is, you know, like three or four trips (sic).

Transcript at 116. The length of the ladder ranges between 21 and 24 feet, but there is no uniformity in the kind or size of the ladder: "It depends, like I said again, who broke what end what was available right next door". Transcript at 116.

#### Statement of Proceedings

The complainants, who are U.S. workers filed complaints alleging that Hepburn violated 20 CFR Part 655 in requiring the ladder test of U.S. workers and not Jamaican workers, and in giving Jamaicans three days training, but not offering the same to U.S. workers.

The Job Service local office consider the complainants and found no violations. On appeal the State Office found no violations. On request of the complainants, the State Board of Appeals conducted a hearing at which both sides produced evidence. The State Board Special Examiner found violations of Section 20 CFR 656.202(a) of the regulations and ordered Hepburn's job services discontinued.

The regional administrator of U.S. Department of Labor reviewed the case, and affirmed the Special Examiner in the findings and penalty. The decision of the regional administrator is on appeal to the office of administrative law judges. The case is considered on all of the evidence presented by the parties below, and the briefs submitted on this appeal.

- 4 -

Issues

The appellant, charges that the Regional Administrator erred in his findings and decision. On appeal, Hepburn states the issues as follows:

A. The ladder test administered by Hepburn in 1983 was a necessary component of the clearance order and had been approved by DOL.

B. Hepburn's administration of the ladder test in 1983 did not violate 20 CFR 655.202(a) as it was administered to all workers as a pre-employment condition.

C. The three day training period is a post-employment period provided to all workers.

D. Hepburn did not violate the 50 percent rule in 1983.

Conclusions

A. The ladder test administered by Hepburn in 1983 was a necessary component of the clearance order and had been approved by DOL.

Hepburn argues that the ladder test was administered in accordance with the clearance order and the job offer for alien employment.

This conclusion is not supported by the evidence. While it is true that the the job description in the order and offer in 1983 contains a statement that the worker would be required to handle ladders up to 24 feet, there is no mention that the applicant would be required to demonstrate an ability to handle a ladder as a condition of hire. The inference drawn by Hepburn that the ladder test was a necessary component is not an inference that flows from the job description.

The Jamaicans were hired on the basis of their ability to cut sugar cane. They had an executory contract with Hepburn before they left Jamaica. There was nothing expressed or implied in that contract requiring the aliens to take the "ladder test" in Maryland, or that failure of a ladder test would be grounds for repatriation. The contract made in Jamaica may be reasonably interpreted to mean that the aliens were hired by Hepburn and that they would be given training on the job to meet production standards. That the Jamaican government would permit its nationals to go to Hepburn subject to a ladder test without assurances of work is inconceivable.

- 5 -

The employer argues that the ladder test was approved by the Department of Labor. This is a generalization taken out of context and it is irrelevant to the question for determination: Were the aliens and U.S. workers treated equally in the matter of the ladder test? The answer is no, and specifically it is found that the ladder test was not a component of the clearance order.

B. Hepburne administration of the ladder test in 1983 did not violate 20 CFR 655.202(a) as it was administered to all workers a preemployment condition.

Section 20 CFR 655.202(a) provides in part:

(a) so that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers.

As shown above, the foreign workers had assurance of work before they left Jamaica. Whether or not they passed a ladder test in Maryland was not a condition of their employment. Contrary to Hepburn's testimony, it is believed that the aliens were not given a ladder test after they arrived in Maryland. Indeed, if they were given any tests in Maryland, Hepburn was violating the contract made by his agent with the alien and the government of Jamaica; the alien was judged and qualified for work with Hepburn on his ability to cut sugar cane in Jamaica.

The ladder test which Hepburn represents as an objective criterion for screening applicants for work is suspect. In the context of this case, it is seen as a device for the arbitrary rejection of job applicants. The results of the test are as predictable as Hepburn wishes to make them. It is noted: that he alone gives the test; that the choice of ladders is his; that the location, duration, and course for the test is selected by Hepburn. Ladder handling ability in this instance is directly affected by the weight and length of the ladder, and the topography of the land over which it must be carried. It is seen from Hepburn's testimony that there is no standard

- 6 -

for testing; the ladder is one that was "available", and the distance was "like three or four trips". Transcript at 116. Given these variables, the test is as easy or difficult as Hepburn wishes to make it. It is not surprising, therefore, that he reported that none of the Jamaicans failed the test. Hepburn had considerable discretion in giving the test, and there is a strong inference based on the numbers, that Hepburn used it to reject U.S. workers, and, in contrast to his handling of the Jamaicans, he did not allow them a three day training period.

It is found that Hepburn violated 20 CFR 655.202(a) by imposing restrictions on U.S. workers not imposed on foreign workers, and in failing to offer training (the same benefits) to U.S. workers that it offer to foreign workers.

C. The three day training period is a post-employment period provided to all workers.

Hepburn's contract with the foreign workers contained a provision for a three day training period. Through his agent, he hired them, and then trained them. The training period was an enforceable term of that contract. Indeed, failure to provide the foreign workers with training would breach the agreement not only with the worker but the government as well. In the context of hiring process, the training period is viewed as an inducement to work for Hepburn. Conceivably, workers who could not handle the ladder in the beginning could acquire that skill with training. A foreign worker, who was in doubt about his skills for the job, could rely on his training to bring him up to production.

The employers argument that the training period only applies after hire is a truth, which does not meet the issue. The point here is that the foreign workers were hired, and as a provision of their contracts they were assured a training period. For equality of treatment, the U.S. worker should have been hired and given the same assurances.

It is found that Hepburn did not offer the benefits of training that it offered to foreign workers.

D. Hepburn did not violate the 50 percent rule.

Section 20 CFR 655.203(e) provides in part;

From the time the foreign workers depart for the employers place of employment, the employer will provide employment to any quali-

- 7 -

fied U.S. worker who applies to the employer until fifty percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed.

The facts are not in dispute, Hepburn did not hire U.S. workers as mandated by this section. The reasoning is that since the U.S. workers did not pass the ladder test, Hepburn was not obligated to hire them. This is circumlocution that presumes that the U.S. workers and the foreign workers were getting the same deal from Hepburn. Conditions were not the same for both sets of workers. The foreign workers were hired, and then trained, whereas the U.S. workers were rejected without an offer of training.

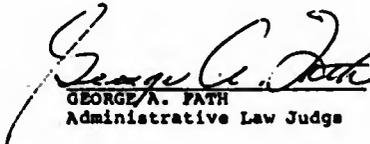
It is found that Hepburn violated 20 CFR 655.203(e).

ORDER

For the reasons stated above, it is decided that Hepburn Orchards Incorporated violated the terms of its temporary labor certification for 1983, and, accordingly, pursuant to 20 CFR 655.209(a) Hepburn Orchards, Incorporated, shall not be eligible to apply for a temporary labor certification for the coming year.

This order affirms the decisions of the Special Examiner and the Regional Administrator: "...that all Job Service services to Hepburn Orchards, Inc. be terminated within twenty (20) working days from the certified date of the receipt of this decision.

Entered: June 5, 1986

  
GEORGE A. PATH  
Administrative Law Judge

GAP:pac

-----		
ROBERT SWANGER ET AL.	)	MARYLAND
COMPLAINANTS	)	
	)	JOB SERVICE COMPLAINANTS
VS.	)	
	)	NUMBERS 4630-83-31,
FAIRVIEW ORCHARDS ASSOCIATES	)	4630-84-13, 14, 15,
RESPONDENT	)	19, 20, 21 and 24
-----		

#### Background

The respondent submitted two Agricultural and Food Processing Clearance Orders on March 22, 1983, and June 13, 1983, requesting workers to pick peaches, summer apples and fall apples. The Clearance Orders provided the required information including job specifications, wage rates and deductions, assurances, etc.

The complainants applied for the jobs offered by the respondent in the Clearance Orders. Since the circumstances involving each of the complainants is different, each situation is reviewed separately.

Robert Swanger - Complainant applied to the respondent for employment about August 18, 1983, after being referred by the Job Service. Complainant was hired by the respondent on September 19, 1983. On September 19, 1983, complainant filed a complaint with the Job Service alleging violation of the 50% rule [20 CFR 655.203(e)]. The local office decision issued on September 23, 1983, found in favor of the respondent stating that 50% of the contract period had expired. The complainant appealed the local office decision on September 30, 1983. The State office decision, issued on December 12, 1983, upheld the complainant and found the respondent in violation of Job Service Regulations. The respondent appealed the State office decision on December 21, 1983, and requested a hearing.

Ralph Scarlett et al. - The complainants were referred from the local Job Service office for employment with the respondent on July 28, 1983. The complainants were not hired by the respondent. On April 27, 1984, the complainants submitted a complaint with the local Job Service office alleging violation of 20 CFR 655.203(e), the 50% rule. The local Job Service office decision issued on May 10, 1984, upheld the complainants. The State office decision of June 6, 1984, concurred with the local office decision and informed the respondent that services were to be discontinued under provisions of 20 CFR 658.502(a)(6). On June 15, 1984, respondent appealed the State office decision and requested a hearing.

EXHIBIT "H"

-2-

Curtia Clark et al. - Complainants were referred from the Job Service local office on July 28, 1983, however, respondent did not interview complainants at that time. Complainants filed a complaint on April 27, 1984, alleging (1) Complainants were not offered at least the same benefits which employer offered temporary foreign workers [20 CFR 655.202(a)] (2) Violation of 20 CFR 655.203(e) and (3) Failure of respondent to cooperate with the Job Service in contacting workers [20 CFR 655.204(d)(3)]. The local office ruled that the respondent was in violation of 20 CFR 655.203(e). The State decision, issued on June 6, 1984, informed the respondent that services would be discontinued under 20 CFR 655.502(a)(6). On June 15, 1984, respondent appealed the State decision and requested a hearing.

Richard Spencer - Complainant was referred from the local Job Service office to respondent on July 28, 1983. Respondent contacted complainant on August 29, 1983, and informed him that he should be at respondent's workplace on August 30, 1983. Complainant voluntarily terminated employment on August 30, 1983. On April 30, 1984, complainant filed complaint with local Job Service office alleging failure of respondent to provide housing, thereby violating 20 CFR 655.202(b)(1). The local Job Service office decision on May 16, 1984, upheld complainant and found respondent in violation of 20 CFR 655.203(e) and 20 CFR 655.202(b)(1). The June 6, 1984, State office decision agreed with the local office decision and found the respondent violated 20 CFR 655.203(e). The respondent appealed the State office decision on June 15, 1984 and requested a hearing.

Robert Younger - Complainant was referred by the local Job Service office on August 11, 1983, to the respondent. Complainant was unable to attend the employment interview due to automobile problems. Complainant called respondent and respondent requested complainant to mail application with a letter of explanation as to why he was unable to come to the interview. Complainant complied with respondent's request, but was not called by the respondent until September. On May 7, 1984 complainant filed a complaint alleging violation of Federal Regulations 20 CFR 655.203(e). The local office decision issued on May 16, 1984, upheld the complainant and found the respondent in violation of 20 CFR 655.203(e). The State office decision of June 6, 1984, concurred with the local office decision. On June 15, 1984, the respondent appealed the State office decision and requested a hearing.

-3-

Leonard Conrad - Complainant was referred to the respondent on July 28, 1983, by the local Job Service office. Although complainant returned to the respondent several times to seek employment, he was not employed until approximately November 2, 1983. On May 14, 1984, complainant submitted a complaint and alleged violations of Federal Regulations 20 CFR 655.203(e). The local office decision, issued May 29, 1984, upheld the complainant and noted the respondent was in violation of 20 CFR 655.203(e). The State office decisions of June 14, 1984 and June 19, 1984, concurred with the local office decision. The respondent appealed the State office decision and requested a hearing.

Mason Rodeheaver - Complainant was referred to the respondent by the local Job Service office on July 28, 1983. The complainant was neither interviewed by respondent on July 28, nor contacted by respondent for employment purposes. On May 21, 1984, complainant filed a complaint with the local Job Service office alleging violations of Federal Regulations 20 CFR 655.202(a), 655.203(e), 655.204(d)(3) and 655.202(b)(1). The local office decision of May 29, 1984, found the respondent in violation of 20 CFR 655.203(e). The State office decision of June 14, 1984, concurred with the local office decision. The respondent appealed the State decision and requested a hearing.

Harold James - The Job Service referred the complainant to the respondent on July 28, 1983, for a job interview. Complainant was not given an interview on July 28, 1983, but instructed by the respondent to return to the local Job Service office. On May 31, 1984, complainant alleged violations of Federal Regulations 20 CFR 655.202(a), 655.203(e), 655.204(d)(3) and 655.202(b)(1). The local Job Service office decision of June 14, 1984, upheld the complainant and found the respondent in violation of 20 CFR 655.203(e). The State office decision of June 21, 1984, concurred with the local office decision. The State office decision was appealed by the respondent and a hearing was requested.

All of the above cases were joined together by the State Special Examiner, since similar issues were involved in all of the complaints. A State hearing was held on August 20, 1984, at which there was testimony offered by complainants Robert Younger, Curtis Clark, Robert Swanger and Paul Moran. All of the parties were represented by legal counsel.

## Discussion

The Maryland Special Examiner's decision issued on September 28, 1984, concludes that the respondent is in violation of the assurances in its Agriculture and Food Processing Clearance Orders and conditions set forth in letters that granted authority to utilize foreign workers. The respondent has submitted a detailed response regarding each complainant's actions related to the job openings available with the respondent. In the response the respondent alleged that some complainants were not available for employment and the Special Examiner erred in his interpretation of the 50% rule [29 CFR 655.203(e)].

The respondent maintains that the 50% rule was not violated, since regulations (29 CFR 655.203(e)) do not require the respondent to cease all operations, hire the applicant the same day nor repatriate the foreign workers to allow for U.S. workers; however, these points are not the issue in relation to the 50% rule. The 50% rule requires only that the respondent accept qualified U.S. workers for employment during 50% of the contract period. The respondent is making a simple issue into a complex one by continuously begging the regulation. It is exactly because the respondent did not hire qualified applicants (complainants) that these complaints have validity and substance. The complainants were interviewed and supposedly hired (Respondent's exhibits C, D, E and G) but never put to work, or efforts made to contact them to go to work, until weeks later. This evasive action against U.S. workers is a clear and direct violation of Federal Regulations. The simple facts are: The respondent's job order stated workers were needed July 12, 1983. The obligation of the respondent under the 50% rule was to hire U.S. workers through September 7, 1983. The complainants applied for work prior to that date but were not put to work, or offered work, until weeks later. The failure to provide work for the complainants when the respondent was seeking workers constitutes a violation of the rule.

Listed below is a summary of the pertinent facts pertaining to each complainant:

Name of Complainant	Date Applied for Work	Action by Respondent
Robert Swanger	July 28, 1983	Called complainant on September 16, 1983, to report to work

-5-

Ralph Scarlett	July 28, 1983	Called complainant on September 16, 1983, to report to work
Ronald Davis	July 28, 1983	Called complainant on September 16, 1983, to report to work
Paul Moran	July 28, 1983	Called complainant on September 16, 1983, to report to work
Curtis Clark David Cole John Lynch William Busch Larry Hutt Robert Raynor Ronney Weimer Tony Carr Steven Lease	July 28, 1983	No action taken. Respondent claims no knowledge of interviewing these complainants
Richard Spencer	July 28, 1983	Called complainant on August 29, 1983, to report to work
Robert Younger	August 1, 1983	Called complainant on September 16, 1983, to report to work
Leonard Conrad	July 28, 1983	Called complainant on November 2, 1983, to report to work
Mason Rhodeheaver	July 28, 1983	No action taken. Respondent claims no knowledge of complainant
Harold James	July 28, 1983	No action taken. Respondent claims no knowledge of complainant

-6-

The respondent raises two additional points that should be addressed. First, the respondent states that regulations must be interpreted reasonably and consistent with statutory mandate. I certainly agree. But, it is unreasonable for an employer to delay. Second, the respondent concludes that there was an unreasonable interpretation of regulations. The regulation is clear and it is difficult to see how it could be interpreted in any other manner.

Lastly, the respondent states that the State Special Examiner erred in not finding the State agency in violation of Department of Labor policy. I find this argument totally without merit. There is nothing in the record to indicate the failure to hire the workers was the fault of anyone but the respondent.

#### Decision

The State Special Examiner's decision of September 28, 1984, including imposition of the sanction of discontinuation of Job Service services to the respondent under 20 CFR 658.501, is affirmed. Also, on the basis of the information contained in the State Hearing records for this case, and under the authority of 20 CFR 655.210, I find that the respondent has not complied with the terms of its temporary labor certification.

In considering whether to apply the ineligibility sanction, I will follow the principles in the MESA CITRUS GROWERS decision by Administrative Law Judge Alfred Lindeman, September 5, 1980, (cases Nos. 80-TLC-10 through 80-TLC-13). These principles involve imposing the sanction only where there has been a demonstrated adverse effect on U.S. workers, bad faith on the part of the employers, or a pattern of violations.

It is my opinion that the principles of MESA CITRUS are met in this case.

There was a demonstrated adverse effect on 18 U.S. workers by not offering employment immediately. Such delay in offering employment to the complainants is unconscionable in light of the immediate need for employment by all the complainants.

There was bad faith on the part of the respondent. All of these complainants applied well within the 50% period open to U.S. workers (655.203(e)) for employment with the respondent. Yet, none of the complainants were told to report to work until weeks later. This action by the respondent demonstrates willful disregard for its obligation to hire U.S. workers and abide by the assurances in the Clearance Order.

-7-

This is not the only violation of labor certification regulations by Fairview Orchards Associates. In my decision of September 30, 1985, I found violations of 20 CFR 655.203(e) which affected 31 U.S. workers who were denied employment. In my decision of September 9, 1985, I noted violations of 20 CFR 653.501(d), 20 CFR 658.501(3) and 20 CFR 658.501(6) concerning a crewleader and his crew. I conclude that the violations found in this instance are part of a continuing pattern of violations of the labor certification and 20 CFR 653 and 20 CFR 658 regulations by Fairview Orchards Associates.

Therefore, it is my decision that Fairview Orchards Associates is not eligible to apply for a temporary labor certification in the coming year.

Pursuant to U.S. Department of Labor Regulations, you may request a hearing on this notice before a Department of Labor Administrative Law Judge within thirty (30) days. Your written request for a hearing should be addressed to this office.

DATE:

December 17, 1985

SIGNED:

William J. Haltigan  
WILLIAM J. HALTIGAN  
Regional Administrator

-----	)	
IN THE MATTER OF:	)	20 CFR 655.210 Investigation
	)	
THE FAILURE OF FAIRVIEW	)	Number Md. 1-85
	)	
ORCHARDS ASSOCIATES TO	)	Decision by the
	)	
HIRE THE SCRIVENS CREW	)	Regional Administrator
-----	)	

This is a case involving an allegation by a United States crew leader (William Scrivens) that he and his crew were referred to jobs with a Maryland employer (Fairview Orchards Associates) by the Maryland State Employment Service in 1983, but were denied employment by the employer in violation of the assurances made by the employer pursuant to 20 CFR 655.203(e).

A worker with this type of complaint is required to exhaust his remedies at the State level before bringing the matter to the Federal level. However, the time limits for the complainant to file a complaint under the Job Service Complaint System had long since passed when I was informed of this case. Thus, Scrivens could not use the Job Service Complaint System.

The regulations governing the labor certification process for temporary agricultural and logging employment (20 CFR 655.210) state, "If, ... the RA has probable cause to believe that an employer has not lived up to the terms of the temporary labor certification, the RA shall investigate the matter." The regulation has no requirement as to the recency of the event. The information provided by Scrivens gives me probable cause to believe that Fairview Orchards Associates did not live up to the terms of its temporary labor certification issued in 1983. Therefore, I am required to investigate this matter.

This is my decision made as the result of that investigation.

#### Background

This matter was called to my attention in a letter dated April 25, 1985, from Gregory Schell, Attorney for Scrivens. Schell asked that I "...conduct an investigation and take appropriate action...."

-2-

The letter alleged that Scrivens and his crew contacted the Easton, Maryland office of the Maryland Employment Security Administration seeking farm employment on or about August 17, 1983. The Easton office told Scrivens of the Fairview Orchards Associates Job Order. Scrivens called Fairview Orchards Associates that day speaking with Jeffrey Reed. Scrivens indicated his willingness to accept the job. Scrivens was told that Fairview Orchards Associates could not immediately hire a crew since its camps were full. Scrivens did not go to Fairview Orchards since he was informed that no family housing was available for him or his crew. Scrivens then transported his crew back to Immokalee, Florida, where the crew did not have regular work until late October 1983.

Fairview Orchards Associates received certification for the temporary employment of alien farm workers in 1983. As a condition for obtaining this certification, Fairview Orchards Associates was required to make, and did make, the following assurance:

"From the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed." 20 CFR 655.203(e)

The job offer made by Fairview Orchards Associates was required to contain, and did contain, this benefit:

"The employer will provide the worker with housing without charge to the worker." 20 CFR 655.202(b)(1)

At the time this alleged incident occurred, Fairview Orchards Associates was employing foreign workers. The job order submitted as a condition to obtain these foreign workers (Agricultural and Food Processing Clearance Order No. 4072459) showed an anticipated period of employment from July 12, 1983 to November 4, 1983. The 20 CFR 655.203(e) "50 percent rule" would require U.S. workers to be hired if they applied for work prior to September 7, 1983. Thus, if Fairview Orchards Associates refused to hire workers and provide them with housing prior to September 7, 1983, they would not have lived up to the terms of the temporary labor certification.

## Discussion

Staff from the Philadelphia Regional Office of the Employment and Training Administration were assigned to investigate this matter. They visited Hagerstown, Maryland June 18 and 19, 1985, to conduct this investigation. Many of the principals involved were no longer available for questioning. These include Robert Storer, Employment Counselor at the Hagerstown local office and Drew Hess, Rural Services Representative at the Hagerstown local office, both of whom contacted Fairview Orchards Associates on behalf of Scrivens, and Jeffrey Reed, Comptroller at Fairview Orchards, who represented Fairview Orchards in the dealings with Scrivens. Scrivens and Schell were interviewed as were John Porterfield, the present Orchards' Manager for Fairview Orchards Associates, and Merlin Williams, the present Rural Services Representative in the Hagerstown local office. Telephone notes made by Hess and Reed in 1983 were made available to the investigators and were reviewed. In addition, an August 4, 1983, memorandum from the Hagerstown local office manager to Stuart O. Douglass, Maryland Employment Service Director, was reviewed.

This material provided contemporary information about the 1983 incident so that valid conclusions can be made about what transpired, despite the long lapse of time between the incident and the investigation.

The investigation revealed the following facts:

(1) On August 4, 1983, Reed informed Storer that Fairview Orchards Associates was hiring on "...an as needed basis. When a vacancy exists in the camp they will consider hiring a non-local domestic." Storer pressed the issue, reminding Reed of the 50 percent rule. He called Reed's attention to the fact that foreign H-2 workers were employed, but Reed refused to change his position on the hiring policy. Later that day Storer called Reed to refer a crew and was told Reed would "...follow through with the formality of speaking with the crew leader but will inform the crew leader that Fairview has no openings for crews at this time." (Information and quote from August 4, 1983, Pruett to Douglass memorandum.)

(2) Scrivens and his crew were experienced farm workers and were interested in and available for employment with Fairview Orchards Associates. Crew consisted of 31 individuals, including 5 married couples.

-4-

(3) Staff of the Hagerstown local office and Scrivens spoke with Reed about employment with Fairview Orchards Associates for Scrivens. Scrivens was not offered employment.

(4) Reed's notes indicate that Scrivens was familiar with the job order; that he had Federal and State Crew Leader Registration numbers; that his crew consisted of 31 individuals, including five women; and that in the absence of family housing, the crew leader "will make arrangements."

(5) While Reed's notes are related in item (4), it was apparent from all available evidence that there was ample housing available to accommodate Scrivens and his crew.

#### Decision

I find that Fairview Orchards Associates is in violation of 29 CFR 655.203(e) since employment was not provided to qualified U.S. workers who had applied to Fairview Orchards Associates within the time period covered by the 50 percent rule.

Having found this violation, I must now decide whether to invoke the only penalty available under the regulations: Notification of the employer that it will not be eligible to apply for a temporary labor certification in the coming year.

In considering whether to apply the ineligibility sanction, I will follow the principles in the MESA CITRUS GROWERS decision by Administrative Law Judge Alfred Lindeman, September 5, 1988 (Cases Nos. 88-TLC-10 through 88-TLC-13). These principles involve imposing the sanction only where there has been a demonstrated adverse effect on U.S. workers, bad faith on the part of the employer, or a pattern of violations.

It is my opinion that the principles of MESA CITRUS are met in this case.

- There was a demonstrated adverse effect on U.S. workers in that Scrivens and his crew of 31 workers were not offered employment.
- There was bad faith on the part of the employer involved. The record shows that Reed had no intention of hiring migrant workers, if they needed housing. His statement that he would "...follow through with the formality of speaking

-5-

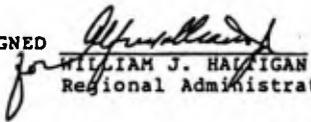
with the crew leader but will inform the crew leader that Fairview has no openings for crews at this time..." (quoted by Pruett in his August 4, 1983, memorandum in relation to another crew seeking employment) is an especially blatant disregard for his obligation to hire U.S. workers as Fairview Orchards Associates obligated itself to do when it provided the assurances required by the labor certification regulations. This violation is particularly egregious since Reed was advised and warned by Storer that his policy was not proper.

- This is not the only violation of the labor certification regulations by Fairview Orchards Associates. I have previously (August 2, 1985) found Fairview Orchards Associates to be in violation of 20 CFR 655.202(a), 20 CFR 655.203(e), and 20 CFR 655.207(c). I conclude that the violation found in this instance is part of a continuing pattern of violations of the labor certification regulations by Fairview Orchards Associates.

Therefore, it is my decision that Fairview Orchards Associates is not eligible to apply for a temporary labor certification in the coming year.

Fairview Orchards Associates may request a hearing on this matter before a United States Department of Labor Administrative Law Judge. The request for a hearing must be made within 30 days of the date of this decision. The request for a hearing must be addressed to William J. Haltigan, Regional Administrator, Employment and Training Administration, United States Department of Labor, P.O. Box 8796, Philadelphia, Pennsylvania, 19101.

DATE 9/20/85

SIGNED   
for WILLIAM J. HALTIGAN  
Regional Administrator



## DEPARTMENT OF EMPLOYMENT AND TRAINING

STATE OF MARYLAND  
HARRY HUGHES  
Governor

BOARD OF APPEALS  
1100 NORTH EUTAW STREET  
BALTIMORE, MARYLAND 21201

(301) 383-8032

THOMAS W. KEECH  
Chairman  
HAROLD A. WARRICK  
MAURICE E. DILL  
Assistant Members  
SEYMOUR S. LAUBER  
Advisory Counselor

Decesse Dejean, et al. )  
 )  
 v. ) J. S. No. 4630-8438  
 )  
 Fairview Orchards Associates )

## STATEMENT OF THE CASE

This is an appeal from a determination by Stuart O. Douglass, Director, Job Training and Placement Administration, Maryland Department of Employment and Training, dated October 8, 1984, that Fairview Orchards Associates (hereinafter Respondent) did violate Job Service regulations by offering some its temporary foreign workers the benefit of continued employment when they did not meet minimum productivity standards. A hearing on the merits of this case was held in Baltimore, Maryland on February 28, 1985. Upon Motion of Respondent, this case was consolidated with two other cases scheduled on the same day (Collins, et al. Fairview Orchards Associates, J. S. No. 4630-8447 and Lusa Versulian v. Fairview Orchards Associates, J. S. No. 4630-8338); this consolidation was for purposes of fact-finding only.

Complainants Ludes Pierre, Lerosse Wemie, Dinaus Josaph, Jean Joseph, Michal Marcalin, and Emmanuel Charles testified by telephone from Ft. Pierce, Florida, with the assistance of an interpreter in the Haitian Creole language (Tape 4, Side 2 through Tape 6, Side 2). Complainants Decesse Dejean, Italian Colony, Jacques Charles, Denis Seveur, and Frizner St. Victor did not testify at the hearing. Testifying in person for the Respondent were Joseph Beard of the Washington County Fruit Growers Association, Dixie Line, Respondent's Personnel Director, and John Berker, Respondent's General Manager. Merlin Williams, of the Hagarstown Local Office, Maryland Department of Employment and Training, also testified under subpoena. Both parties were represented by counsel. Although a consolidated evidentiary hearing was held, the Special Examiner has determined it appropriate to issue separate decisions on each case. For purposes of clarity, a description of the Exhibits admitted as to this case is attached as Appendix A.

## MOTION TO DISMISS

At the conclusion of the February 25, 1985 hearing, Respondent's counsel made an oral Motion to dismiss the complaints of Messrs. Dajeau, Celony, Charles, Saveur, and St. Victor on the grounds that these individuals did not testify at the hearing in this matter. The Special Examiner requested that Respondent submit this Motion in writing, accompanied by legal argument. Respondent's written Motion to Dismiss Complaints and Memorandum in Support thereof was filed March 12, 1985. Complainants' Memorandum in Opposition to the Motion was filed March 22, 1985.

Upon careful consideration of the arguments made by both parties, Respondent's Motion to Dismiss is denied. Section XIV of the State Plan for Appeals from Determinations of the State Job Service Office under 20 C.F.R. Section 658.417 and 418 allows for the discretionary dismissal of an appeal where the appealing party only fails to appear. The regulatory scheme does not mandate the presence of the complaining parties, and does not grant the Special Examiner the authority to dismiss the complaint of a non-appealing party. Of course, the complaining party may be necessary to establish a violation of the job service regulations, and therein lies the risk for a Complainant who does not participate at the hearing. In the instant case, the complaints of each member of the Dejan crew were consolidated, apparently without objection by Respondent, and several Complainants participated at the hearing represented by counsel. Due process was accorded Respondent, who subjected each present Complainant to grueling cross-examination. The evidence, where appropriate, adduced in this manner and given on behalf of any Complainant may be considered in connection with the case of the other Complainants - whether present or absent.

## FINDINGS OF FACT

Respondent is a 2200 acre fruit orchard located in Western Maryland. On March 19, 1984, Respondent submitted Agricultural Food Processing Clearance Order No. 4072489 (Fairview Exhibit No. 1) to the Hagerstown Office of the Maryland Department of Employment and Training. Respondent's Clearance Order requested a total of one hundred sixty-four (164) individual farmworkers to be a basic work force to pick fruit during the 1984 harvest season. On or about the same date, Respondent submitted a temporary labor certification request, along with a copy of aforementioned Job Order, seeking certification to receive temporary foreign workers (also referred to as H-2 workers) to

work the harvest in the event that an insufficient number of domestic workers were recruited for this purpose (Fairview Exhibit No. 2). Respondent's temporary labor certification was granted on June 27, 1984, with respect to the first group of sixty-four (64) foreign workers requested thereunder.

During the 1984 harvest season, Respondent had approximately 350 acres of orchard in peach production; the thirteen varieties of peaches grown by Respondent ripened at different times. At least twice each day, the fruit was carefully inspected and Respondent determined which peaches had reached the appropriate maturity to be picked. Farmworkers assigned to pick fruit were to do so according to instructions given by Respondent's foremen primarily as to the location, color and size of the fruit to be picked each day. Ripe fruit was to be picked into a metal-framed canvas-covered basket or bucket carried by the worker. Filled picking buckets were to be emptied into a sixteen bushel field bin, where the farmworker was given production credit for the fruit. Farmworkers were to avoid picking green fruit. A wagon carrying five field bins was located between two rows of trees with farmworkers assigned to pick the two or three rows of trees on either side of the bins. The counter assigned to each group of field bins would initially inspect the fruit to see whether the farmworkers were picking the desired fruit. If the counter observed green fruit being emptied into the bins, he or she would tell the worker to pick ripe, not green, fruit. When the field bins were filled, they would be transported to the packing house where the fruit was inspected again as to color and size. Here, any green fruit was discarded. When a load contained an inordinate amount of green fruit, the packing house inspector would radio the General Foreman to report that green fruit was coming into the packing house.

In addition to requiring that farmworkers pick only ripe peaches, Respondent maintains a productivity standard of eight (8) bushels of peaches per hour (Fairview Exhibit No. 1). Respondent acknowledges that on some days it is impossible for any farmworker to meet this productivity standard.

At the commencement of the 1984 harvest season, Respondent was plagued with workers, both domestic and foreign, picking green fruit. According to Respondent's General Foreman, nearly all of the workers picked some amount of green fruit at one time or another. As a disciplinary measure for picking green fruit, as well as low productivity, high bruise rates and other production

problems, Respondent employed the practice of "sitting down" temporary foreign workers; "sitting down" was accomplished by making the worker sit on the bus from one hour to an entire day. Indeed, as many as thirty H-2 workers were "set down" at a time due to problems with their work. Respondent found this disciplinary practice to be extremely effective -- after being "set down" the temporary foreign workers would pick "what was supposed to come off." During 1984 harvest season, however, this form of discipline was not used to correct the production problems of domestic workers. In 1984, no H-2 workers were discharged for low production, picking green fruit, or other production problems. During the same season, numerous domestic workers were discharged for production-related problems (Complainants' Exhibit #10).

On or about August 6, 1984, Desece Dejean, Fritzner St. Victor, Italien Celony, Jacques Charles, Denis Saveur, Ludes Pierre, Larose Wanie, Dinaus Joseph, Jean Joseph, Michel Marcelin and Emmanuel Charles (hereinafter referred to as Complainants or the Dejean crew) were referred for employment at Respondent Orchard by the Hagerstown Office of the Maryland Department of Employment and Training. Complainants are domestic workers, all of whom speak the Haitian Creole language. Complainants reported immediately to Respondent's office, passed a ladder test, and were hired. Although Tuesday, August 7, 1984, was the Complainants' first day of work, the Dejean crew did not actually begin picking peaches until Friday, August 10, 1984 (Fairview Exhibit No. 15). On that date, Complainants were assigned to pick eight hours, and achieved hourly production rates of between 4.62 and 7.25 bushels. 1/ During the week

---

1/ For the week ending August 11, 1985, Complainants worked only one day, Friday, August 10, 1984. Their individual production averages for this day were:

Dejean	(7.25)	J. Joseph	(4.88)	D. Joseph	(5.75)
Celony	(4.62)	Saveur	(4.88)	Marcelin	(5.88)
E. Charles	(5.0)	Pierre	(5.0)	Wanie	(5.88)
St. Victor	(5.63)	J. Charles	(4.63)		

ending August 11, 1984, Respondent employed sixty-three (63) temporary foreign workers to pick peaches 2/, and all of these had between two and four days in the peach orchards. Despite having more days in the orchard picking peaches, thirteen (13) temporary foreign workers achieved production averages less than the lowest production average on Dejean crew (Celony 4.62). 3/ Further, only one temporary foreign worker met the eight bushel production standard. 4/

On Monday, August 13, 1984, Complainants were assigned to pick peaches for three and one-half hours; fifty-three (53) of Respondent's H-2 workers were assigned to pick peaches for nine hours and ten more were assigned to pick peaches for five and a half hours. While the exact nature of Complainants' peach picking assignment on this day is unknown, Complainants only picked between one and four bushels in the entire three and one-half hour period, achieving an average productivity rate far lower than they had accomplished on their first day in the orchard. (Fairview Exhibit No. 15). Conversely, the temporary foreign workers were assigned longer hours and had generally high productivity rates on this day; several workers picked over 100 bushels. (Fairview Exhibit No. 16). Complainants were again assigned peach-picking duties on Wednesday, August 15, 1984. For the entire course of Complainants' two weeks of employment, they achieved average production rates of between 3.8 and 5.3 bushels per hour. Several temporary foreign workers also had average production rates within this range for this period (Reynolds, Richardson, Steele, and Murray). Forty-eight (48) of Respondent's temporary foreign workers did not meet the eight bushel per hour production standard for this time period. (Fairview Exhibits Nos. 15, 16 and 17).

---

2/ Thirty-one (31) of these were assigned to pick both summer apples and peaches during this week; their apple production was discounted in figuring average production rates.

3/ These are:

Four (4) days peach picking: Patars (4.44), Martin (4.52), and Murray (3.80)  
 Three (3) days peach picking: Reynolds (4.54), Mallis (4.39), Carter (4.24), Richardson (4.34), Pusey (3.76), and Sharrier (4.59)  
 Two (2) days peach picking: Beslay (4.0), Starling (4.52) Smellie (4.17), and Lindsay (4.0)

4/ Hubert Gordon (9.57)

On or about August 16, 1984, the entire Dejean crew was discharged for failure to meet the Respondent's productivity rate, failure to follow instructions and language problems (Fairview Exhibits Nos. 4 through 14). With respect to the alleged failure to follow directions, on or about the first day the Complainants were assigned to pick peaches, it came to the attention of Respondent's General Foreman, via the packing house, that the Dejean crew was picking green peaches. On this day, the General Foreman himself attempted to instruct the Complainants as to which peaches to pick by showing them an example of a ripe peach and describing the desired qualities of the ripe fruit in English; i.e., "pick the big red ones." Neither the General Foreman, nor any other supervisor on Respondent's staff, speaks Haitian Creole; nonetheless, the General Foreman tried to communicate as best as he could with the Dejean crew, seeking the assistance of crew members who understood him to tell the others. In addition, Respondent assigned an additional supervisor to work with the crew. None of the Complainants were warned or "set down" for picking green peaches or other production problems. On the contrary, at least three of the Complainants (Larose Wanie, Dinaus Joseph and Jean Joseph) were complimented on their work. The Complainants were not aware of complaints concerning their work performance, and none knew why he was being discharged.

Immediately upon termination, the Complainants met with legal counsel and each Complainant signed job service complaint forms. Worded in English, and prepared by their counsel, these complaints set forth substantially similar allegations that Complainants were discharged for failure to attain productivity standards while Jamaican H-2 workers who had similarly low production rates were retained by Respondent, and that Jamaican H-2 workers were permitted to "groundhog" (pick fruit from only the lower portions of the tree) and were otherwise given more favorable work assignments. These complaints were filed with the Hagerstown office, Maryland Department of Employment and Training, on August 22, 1984. Because these complaints involved alleged violations of the terms and conditions of the job to which Complainants were referred by the Maryland Job Service, the complaints were handled as job service complaints under the applicable Federal regulations.

By letter dated August 31, 1984, Samuel E. Pruett, Office Manager of the Hagerstown Job Service Office issued a post-investigation determination on these complaints pursuant to 20 C.F.R. 658.416(c). By this determination, Respondent was found in violation of 20 C.F.R. 655.202(a) by offering some of its

temporary foreign workers the benefit of continued employment when they did not meet minimum production standards. The determination found the allegations concerning "groundhogging" to be without merit. By letter dated October 8, 1984, this determination was affirmed by Stuart O. Douglass, Director of the Job Training and Placement Administration, Maryland Department of Employment and Training. 5/ Respondent requested an administrative hearing in this case by letter dated October 19, 1984.

#### CONCLUSIONS OF LAW

The primary issue in this instant case is whether the Respondent violated 20 C.F.R. 655.202(a) by offering some of its temporary foreign workers the benefit of continued employment when they did not meet minimum productivity standards, while failing to offer the benefit of continued employment to domestic workers who failed to meet the same standards. In pertinent part, 20 C.F.R. Section 655.202(a) provides:

"So that the employment aliens will not adversely affect the wages and working conditions of similarly employed U. S. workers, each employer's job offer to U. S. workers must offer the same benefits which the employer is offering, intends to offer, or will afford to temporary foreign workers. Conversely, no job offer may impose on U. S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers..."

20 C.F.R. 655.202(a).

---

5/ It should be noted that on October 5, 1984, Stuart O. Douglass notified William J. Haltigan, Regional Administrator, U. S. Department of Labor, of his office's intention to discontinue Job Services to the Respondent on the grounds that Respondent in this case violated 20 C.F.R. Sections 655.202(a) and 655.203(c) in its administration of the ladder test and for failing to hire a qualified U. S. worker without a lawful job-related reason. This letter, however, is apparently in error since neither of these issues is the subject of instant complaints or of the State Office's actual determination on these complaints.

On August 16, 1984, the entire Dejean crew was discharged for failing to meet minimum productivity standards for peach-picking set by Respondent in its job order (8 bushels per hour), for failing to follow directions with respect to picking ripe, not green, peaches, and for language problems. 6/ As set forth in detail herein, the facts in this case clearly establish that Respondent did not enforce its 8 bushel per hour production standard on temporary foreign workers. During the two weeks in question here (August 5, 1984 through August 18, 1984), Respondent employed sixty-three (63) workers; forty-eight (48) of these averaged less than 8 bushels per hour for this time period. During the week ending August 11, 1984, only one of the sixty-three (63) workers met this production standard. Yet no H-2 worker was discharged for production reasons.

Respondent acknowledges that, at times during the harvest season, it is impossible for any foreign worker to reach this minimum production standard, thereby suggesting that the standard is variable. Assuming, arguendo, the existence of a relative productivity standard, the record still supports a conclusion that Respondent treated H-2 workers differently, and more favorably, than its domestic workers. During the subject time period, members of the Dejean crew achieved average productivity levels between 3.8 and 5.3 bushels, and were discharged. Four (4) temporary foreign workers had productivity levels within this range, but were not discharged. More significantly, during the week ending August 11, 1984, the members of the Dejean crew - after one day of peach picking - reached an average production levels of between 4.62 and 7.25 bushels per hour. Thirteen (13) H-2 workers had average production levels below the lowest of the Dejean crew, after between two and four days of peach picking. The Dejean crew was discharged; the H-2 workers were not. The record could not be clearer that Respondent offered temporary foreign workers, who did not meet minimum productivity standards, the benefit of continued employment and denied this benefit to the domestic Complainants. Put another way, Respondent imposed and enforced production standards or "obligations" upon the domestic Complainants which were not imposed and enforced upon its temporary foreign workers. Either way, Respondent is in violation of 20 C.F.R. Section 655.202(e).

---

6/ The record fails to reflect what weight each of these factors was actually given in the termination decision. The terminating official, C. Marshall Ritter, did not testify at the hearing.

It is important to note here that Respondent promised, through its Job Order, to provide its workers a three-day training period, at the conclusion of which workers must have reached the required production standards. Complainants, however, did not work a full three days in the orchard before they were discharged for production reasons. The record reflects that on Monday, August 13, 1984, Complainants worked only 3.5 hours picking peaches; during that three and a half hour period, they each picked between one and four bushels only. In comparison, fifty-three of the Respondent's temporary foreign workers picked peaches for nine hours on that day and several of these picked over 100 bushels. While the exact nature of the Complainants' job assignment on this day is unknown, it clearly offered them little chance to improve their productivity levels. On the contrary, on this date, Complainants achieved an average production rate far lower than they had achieved on their first day in the orchard. Not only were the Complainants discharged prior to the completion of a full three-day picking period, but the record strongly suggests that their assignment on August 13, 1984 was far less favorable than the work assignments given to all of the H-2 workers.

With respect to Complainants' alleged failure to follow instructions concerning the picking of ripe peaches, the record reflects that Respondent had a continuing problem with its workers, both domestic and foreign, picking green fruit. On the first day in the orchard, Respondent's General Foreman personally demonstrated to the Complainants which fruit was to be picked. Thereafter, however, no further complaints on this subject were made to the Dejean crew, and the work of several Complainants was even complimented by their direct supervisor. Thus, Complainants understandably believed that there was no further problem with the fruit they were picking. If Respondent continued to find fault with the Complainants' work, this was not communicated to the Complainants; no warnings were given and no other disciplinary action was taken against them until they were discharged. This is in sharp contrast to the efforts made by Respondent to discipline dozens of temporary foreign workers for similar problems by "sitting them down" on the bus. Respondent found this technique to be extremely effective in correcting picking deficiencies, yet readily admits that this technique was never used to discipline or warn domestic workers, including Complainants, of production problems. <sup>7/</sup> In sum,

---

<sup>7/</sup> Complainants argue that such non-verbal "feedback" would have had special significance to the Creole-speaking Complainants, given the language difference and Respondent's lack of Creole-speaking supervisory personnel. The Special Examiner agrees.

-10-

Respondent offered its temporary foreign workers the benefit of clear disciplinary action for production-related problems, prior to discharge, while the same benefit was not offered to Respondent's domestic workers. By this disparate treatment, Respondent is in violation of 20 C.F.R. 655.202(a).

## DECISION

Respondent is in violation of 20 C.F.R. 655.202(a). The determination of the Director in the above-captioned case is affirmed.

Job services shall be terminated pursuant to 20 C.F.R. 658.501(a).

  
 Judith S. Singleton  
 Special Examiner

Date: October 8, 1985

## NOTICE OF RIGHT OF FURTHER APPEAL

Any interested party may file an appeal from this decision. This appeal must be taken in writing, within 20 working days from the certified date of the receipt of the decision. This appeal must be taken to the Regional Administrator, William Haltigan, U. S. Department of Labor, Employment and Training Administrator, Region III, P. O. Box 8796, Philadelphia, Pennsylvania 19101, Attn: III TGRC.

## COPIES MAILED TO:

Solicitor of Labor  
 Attn: Associate Solicitor for  
 Employment and Training  
 Legal Services  
 Department of Labor, Rm. N. 2101  
 200 Constitution Avenue, N. W.  
 Washington, D. C. 20210

William Haltigan  
 U. S. Department of Labor  
 Employment and Training Administration  
 Region 3  
 P. O. Box 8796  
 Philadelphia, Pennsylvania 19101  
 Attn: III TGRC



## DEPARTMENT OF EMPLOYMENT AND TRAINING

STATE OF MARYLAND  
HARRY HUGHES  
Governor

BOARD OF APPEALS  
1100 NORTH EUTAW STREET  
BALTIMORE, MARYLAND 21201  
(301) 283-5632

THOMAS W. REECH  
Chairman  
HAZEL A. WARMACK  
MAURICE E. DILL  
Associate Members  
BEVERLY E. LAMIER  
Advisory Staff

Antonio Santa )  
 )  
vs. ) J. S. Complaint No. 4630-83-62  
 )  
Fairview Orchards )

## STATEMENT OF THE CASE

This is an appeal by the employer from a determination of the Director, Stuart O. Douglas on April 4, 1984 that the grower Fairview Orchards Associates was in violation of the assurances contained in its application for temporary labor certification as set forth in 20 C.F.R. 655.203(c).

The employer did not appear at the hearing. The employer had agreed at a pre-hearing conference through its counsel that the case would be held on September 17 at Hagerstown, Maryland at 10:00 a.m. Subsequently however, the employer's counsel announced that it would not participate in this hearing. The complainant's attorney was given the option to move to dismiss the appeal and chose instead to present testimony.

## FINDING OF FACT

On September 29, 1983, the complainant, Antonio Santo, presented himself at Fairview Orchards seeking employment. At that time, the grower Fairview Orchards, Associates, was employing temporary foreign workers under job order no. 4072467 and 50% of the contract period under which the foreign workers were employed had not elapsed and would not elapse until October 6, 1983. When the complainant was interviewed by a supervisor for the grower, the complainant presented his paycheck stub from his prior employer, Hepburn Orchards, during the same season, 1983. The check stub showed the amount of bins picked per pay period. The complainant's production level was lower than the employees then working at Fairview Orchards Associates.

The interviewer filled out an interview summary form for the complainant's interview and showed under the heading rejected reason "work reference - Hepburn Orchards (83 season). 9/26/83 - T. Hepburn stated that Santo was fired because of low production" and after that appear the initials of J. Reed, Controller

EXHIBIT "J"

of Fairview Orchards Associates. Under a heading Comments the following appeared: "Santo gave conflicting statements regarding employment at Hepburn Orchards; application excludes Hepburn as 'work history'. Upon questioning, Santo stated that he quit Hepburn Orchards because he did not like the food served." After the grower refused to hire the complainant, he filed a complaint with the Job Service against the grower on October 20, 1983 through his attorneys. In the complaint it was alleged that Fairview Orchards Associates had violated the terms of the job order when they failed to hire the complainant.

An investigation was undertaken by the Job Service and disclosed that the complainant was interviewed, that he did exhibit his check stub and that he was picking at a production level lower than the employees working at Fairview Orchards. As a result, the Job Service at first found on November 4, 1983 that the grower was not in violation of its job order. After appropriate intervening procedures, the Director, Stuart O. Douglass, on April 4, 1984, made a determination that the grower was in violation if its job order because it was found by the Director on the basis of a letter from the Regional Administrator that "references may not be a requirement for hiring ..." The determination further found that at the time the complainant was refused employment, Fairview Orchards was employinn temporary freign workers under job order no. 4072467, and 50% of the contract period had not elapsed.

#### CONCLUSIONS OF LAW

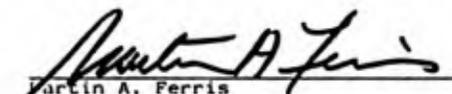
The assurance placed in the job order by the grower in conformity with 20 C.F.R. 655.203(e) stated that from the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. It also provides that, in addition, the employer will offer to provide housing, and other benefits, wages and working conditions required by 655.202 to any such worker.

In January of 1983, correspondence had taken place between the agent for the employer and the Regional Administrator concerning whether or not it was appropriate to require references for hiring. The grower had been informed by the Regional Administrator that it was not appropriate. The grower was therefore aware of the requirements at the time that it rejected the employment of Antonio Santo, the complainant, because of a work reference from another orchards.

The burden of proving that the determination of the Director is incorrect rests squarely upon the appellant. The appellant in this case is the grower, Fairview Orchards, Associates. Since they did not appear and present any testimony they can hardly be said to have met this burden and therefore, based upon testimony presented on behalf of the complainant and the failure of the employer to appear and present testimony in opposition, it is concluded that the determination of the Director, Stuart O. Douglass was correct and that the grower must be decertified from use of the Job Services under the regulations.

## DECISION

Failure of the grower, Fairview Orchards Associates, to hire the complainant, Antonio Santo on September 29, 1983 was in violation of the assurances contained in its job order no. 4072467 as required by §20 C.F.R. 655.203. It is hereby ordered that the grower, Fairview Orchards Associates, be decertified from use of the Job Service services 20 days after the certified date of receipt of this decision.

  
 Martin A. Ferris  
 State Hearing Examiner

MAF:knh

DATE MAILED: April 2, 1985

## NOTICE OF RIGHT OF FURTHER APPEAL

Any interested party may file an appeal from this decision. This appeal must be taken in writing within 20 working days from the certified date of the receipt of the decision. This appeal must be taken to the Regional Administrator, William Haltigan, U. S. Department of Labor, Employment & Training Administrator, Region 3, P. O. Box 8796, Philadelphia, PA 19101, ATTN: III, TGRC.

## COPIES MAILED TO:

Solicitor of Labor  
 ATTN: Associate Solicitor for  
 Employment & Training  
 Legal Services  
 Department of Labor, Rm. N 2101  
 200 Constitution Ave., N.W.  
 Washington, DC 20210

William Haltigan  
 U. S. Dept. of Labor  
 Employment & Training Administration  
 Region 3  
 P. O. Box 8796  
 Philadelphia, PA 19101  
 ATTN: III TGRC

U.S. Department of Labor

Office of Administrative Law Judges  
1111 20th Street, N.W.  
Washington, D.C. 20036

Date: December 14, 1987

Case No. 87-JSA-1

J.S. Case Nos. 4630-83-17  
4630-83-50

IN THE MATTER OF

LFROY AZOR, ET AL., AND  
SIDOLES PRESI, ET AL.,  
Complainant

v.

HEPBURN ORCHARDS, INC.  
RespondentBEFORE: Robert J. Shea  
Administrative Law JudgeDECISION AND ORDER

This proceeding arises under the Wagner-Peyser Act of 1933, 29 U.S.C. § 49 *et seq.*, and the regulations governing the Job Service System found at 20 C.F.R. Part 658.

STATEMENT OF THE CASE

The Complainants, migrant farm workers, were referred for fruit harvesting employment with the Respondent Hepburn Orchards through the Interstate Job Clearance System, pursuant to job order 4072460 filed by Hepburn on March 22, 1983. Complainants Leroy Azor, Evaleri Blaise and Joirilus Pierre started working at Hepburn Orchards on or about July 20, 1983. Complainants Sidoles Presi and Pauleus Blanc started work on August 7, 1983. Both the first and second groups of the Complainants were assigned housing at Hepburn's labor camp on Maryland Route 615 (camp #3). However, the complainants were informed that neither employment nor housing was available for their families. On August 12, 1983, and October 4, 1983, the Complainants filed a Job Service complaint with the Maryland Employment Security Administration alleging violations of General Administration Letter (GAL) No.46-81, Attachment 1, item 6(k) p. 7, which proposed requiring the grower to make unutilized housing available for family members of domestic workers.

The Respondent maintained that he did not have housing appropriate for family members, that the job order clearly stated his intention to offer individual housing only, that he would have to open another camp to provide family housing and

finally, that he was not required to offer family housing since it was not the prevailing practice in the community.

By letters of Samuel Pruett, (on September 1, 1983 for the first group and on October 14, 1983 for the second group) the Hagerstown Employment Service Office adopted the position of the Respondent, pointing out that the U.S. Department of Labor had withdrawn the proposal which required family housing in favor of continuing to rely on 20 C.F.R. § 655.202(b)(1).

The Complainants, on September 6, 1983 and February 7, 1984, appealed this decision to the Director, Maryland Department of Employment and Training. On October 21, 1983, and March 29, 1984, the Director affirmed the decision of the Hagerstown office. The Director decided the Respondent did not violate the terms and conditions of the job order since he found the prevailing practice was to provide individual housing only and the available housing was not suitable for family housing.

On November 3, 1983, and April 16, 1984, the Complainants appealed the Directors' decisions. Thereafter, on December 20, 1984 Special examiner Martin A. Ferris conducted a hearing at which the complaints of Leroy Azor et al. and Sidoles Presi et al. were consolidated. On March 15, 1985, the Special Examiner rendered his decision. The Special Examiner found that the area of intended employment included Washington County, Maryland; Franklin and Fulton Counties, Pennsylvania; Jefferson and Berkeley Counties, West Virginia; and Hampshire County, Frederick County and Clarke County, Virginia. The Special examiner also found that it is the prevailing practice in the area of intended employment to provide family housing. Despite these findings, the Special Examiner affirmed the decision of the Director, holding that the Respondent's good faith belief that he had acted in conformity with the Regulations rendered it "grossly unfair" to censure the Respondent for a violation of 20 C.F.R. § 655.202(b)(1).

Pursuant to 20 C.F.R. § 658.418, on April 12, 1985, the Complainants appealed the decision of the Special Examiner to the Regional Administrator, Employment and Training Administration, U.S. Department of Labor. In a decision rendered May 16, 1986, the Regional Administrator affirmed the decision of the Special Examiner. The Regional Administrator went further, however, and limited the area of intended employment to "the geographical area (Hancock, Maryland and vicinity within Maryland) of the Respondent orchard." The Regional Administrator then found that the prevailing practice within that area was to provide individual housing only.

This is an appeal of the Regional Administrator's decision. A formal hearing was held before the undersigned in Hagerstown, Maryland on March 25, 1987, at which time all parties were afforded full opportunity to present evidence and argument, pursuant to 20 C.F.R. § 658.425.

The issues on appeal are as follows:

- A. Whether the Complainants are United States workers within the meaning of 20 C.F.R. § 655.202(b)(1);
- B. Whether the Complainants' spouses and children constitute families within the meaning of 20 C.F.R. § 655.202(b)(1);
- C. Whether the "prevailing practice within the area of intended employment," as set out in 20 C.F.R. § 655.202(b)(1), is to provide family housing; and
- D. Whether, upon a finding that the Respondent violated the Regulations or failed to comply with the terms of its 1983 job order, the proper remedy is decertification under 20 C.F.R. § 655.210 or a discontinuation of the services of the United States Employment Service system under 20 C.F.R. § 658.500.

#### PINDINGS OF FACT

Hepburn Orchards, Inc. is a fruit grower located in Hancock, Maryland. Hepburn Orchards' operations are situated in the western-most portion of Washington County, Maryland at a point where the Maryland state boundaries narrow to approximately four miles wide in a north-south direction between the borders of neighboring West Virginia and Pennsylvania. Complainants' State Hearing Exhibit 2 (map of region). A portion of Hepburn's orchard extends into Pennsylvania as well. Transcript of Federal hearing, March 25, 1987 (hereafter "TR"), at 56.

Hepburn's operations are located within a four state area in the upper Shenandoah River valley which is a heavily concentrated and unified apple-growing region. Complainants' State Hearing (hereafter "SH"), Exhibit 9 (James Holt, An Assessment of Factors Affecting employment of Temporary Foreign Labor in the east Coast Apple Harvest), at 42. The counties within the four states that have the heaviest concentration of fruit producing trees include Franklin and Adams Counties in Pennsylvania; Washington County, Maryland; Hampshire, Berkeley and Jefferson Counties, West Virginia; and Frederick and Clarke Counties, Virginia. SH Exhibit 9 at 42, n. 2.

Fruit pickers routinely commute throughout the four state area seeking work on the orchards in the area. It is not uncommon for workers to commute to western Maryland Orchards from points in Pennsylvania, West Virginia and Virginia. SH at 128-130; TR at 63-67, 67-71, 155-60, 160-63, and 164-69. Farm worker employment services also refer workers to jobs throughout the four state contiguous area. TR at 237-38, 240-42 and 285.

Since about 1976, Hepburn Orchards has utilized temporary foreign workers (in the H-2 program) to assist in the harvesting of its fruit crops. TR at 44. Prior to 1973 Hepburn harvested its crops entirely with domestic labor. SH at 207. During the years that Hepburn Orchards relied on domestic labor, the orchard provided some family housing. TR at 76-77; SH at 197; SH, Complainants' exhibit 24 at 10. The family housing provided was usually for husbands and wives who both worked at the orchard. From the time that Hepburn Orchards entered the H-2 program, the orchard has moved away from hiring or housing the spouses and children of male workers. TR at 42-46..

In 1983, Hepburn Orchards had available three migrant labor camps to house it harvest workers. Two of these camps (camps #1 and #2) share a common site on Timber Ridge #1 while the third camp (camp #3 or the Marvania camp) is located on Maryland Route 615. Camp #1 has a capacity of 57 persons. There are approximately 13 rooms housing four individuals each and another room housing 5 individuals. Camp #1 has three bathrooms and a common central mess area. TR at 36-37; SH at 203-04. Camp #2 consists of two buildings. One building includes the kitchen and bathrooms while the other building includes the sleeping quarters. The building containing the sleeping quarters in camp #2 has six rooms, each accommodating 10 persons. TR at 40. Camp #3 (the Marvania camp) is a three-story structure. Kitchen and bathroom facilities are situated on the first floor. The second floor is a large dormitory room accommodating 50 individuals. The third floor includes a large dormitory room, as well as five small partitioned rooms. TR at 41; SH at 201-03. According to Maryland state health department officials, Hepburn's facilities at its Camp #1 and #3 could accommodate family members. SH, Complainants' Exhibit 23 at 9-11. TR at 291-93. From time to time after 1976, wives, who assisted in food preparation, were allowed to stay with their husbands in Camps #1 and #3. TR at 60-61, 109, 111, 140, and 144.

In 1983 Hepburn Orchards, Inc. filed agricultural and food processing clearance orders seeking harvest workers for its fruit crops. One of these clearance orders, number 4072460, sought 78 workers to perform peach and apple harvesting labor on Hepburn's operations between July 12 and November 4, 1983. Job Order No. 4072460, dated March 22, 1983. TR, Exhibit 3 at 32.

Hepburn Orchards' clearance order number 4072460 was circulated through the interstate job clearance system. As a condition of this clearance order being accepted into the interstate job clearance system, the wages and working conditions offered were required to be not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment. 20 C.F.R. § 653.501(d)(4). Clearance order 4072460 was submitted in conjunction with Hepburn Orchard's application for temporary labor certification for agricultural workers pursuant to 20 C.F.R. §§ 655.200, et seq. The clearance order contained an assurance by Hepburn that it would provide housing as required by 20 C.F.R. § 655.202. Job Order No. 4072460 at 4.

Complainants are Haitian nationals who are residents of Immokalee, Florida. Complaints were paroled into the United States and granted employment authorization by the Attorney General pursuant to 8 U.S.C. § 1182(d)(5). These aliens have been granted special parole status as Cuban-Haitian entrants. See 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure, 2-188.3. Most of the Complainants came to the United States from Barredars, Haiti, a rural community in Haiti, where they worked as farmers.

Complainants Sidoles Presi, Joirilus Pierre and Evaleri Blaise were paroled into the United States by the Immigration and Naturalization Service before October 11, 1980. Complainant Pauleus Blanc was paroled into the United States on December 19, 1980. All these Complainants were given employment authorization and documents designating them as "Cuban/Haitian entrants." TR at 135-137, 102-104; SH, Respondent's Exhibit vi. Complainant Leroy Azor entered the United States in 1981. He was issued employment authorization by the INS and a document permitting him to lawfully reside and seek employment in the United States. The employment authorization document placed no time limitation on Azor's ability to seek employment in the United States. TR at 146-47.

The Complainants were referred to Hepburn Orchards through the interstate job clearance system, pursuant to Job Order No. 4072460. All Complainants were assigned housing at Hepburn Orchards camp #3. TR at 106-07, 117, 133; stipulation before state hearing officer, Exhibit 2. Each of the Complainants was accompanied to the Hagerstown area by a woman with whom he was residing at the time. Complainants provided support for these women and, in the case of Complainant Pauleus Blanc, support for Esnel Blanc, the child of his union with Niliane Dimanche, both of whom accompanied him to Maryland. TR at 107-08, 132-133, 138-39 and 149.

The Complainants had entered into "placage" unions with these women. TR at 206-07. "Placage" is a consensual union common in rural Haiti. It is an agreement between two individuals that involves an exchange of obligations and duties, co-residence and the rearing of children. It is recognized as marriage by the public, Haitian law and the Catholic Church. "Placage" is the most common form of marriage in rural Haiti. TR at 204-06, 208.

Upon commencing work at Hepburn Orchards, Complainants requested housing for their families. Consistent with its policy of refusing to house non-working family members of fruit pickers, Hepburn Orchards denied this request. TR at 106, 110-11, 140, and 149. Since Complainants could not have their families with them at the labor camp, they were forced to locate apartments in Hagerstown, approximately 35 miles from Hancock. Complainants visited their families on weekends and occasional weekdays, making the trip by commercial bus. TR at 110, 112-13, 116, 141-144, and 150-53. Rent for the apartments was an additional expense for the Complainants. Pauleus Blanc and Sidoles Presi each spent \$300 per month in rent for the two months their families resided at one apartment in Hagerstown. TR at 114. Another apartment was shared by the families of Complainants Leroy Azor, Evaleri Blaise and Joirilus Pierre. TR at 142-43 and 151. Over the four month period their families resided at the apartment in Hagerstown, Complainants Azor, Blaise and Pierre each spent an average of \$100 per month in rent and utility expenses. TR at 143-44, 151, and 153. While the number of visits to their families varied, Complainants Azor, Blaise and Blanc travelled to and from Hagerstown at least once per week during their time at Hepburn Orchards. The one-way bus fare for this trip was \$6.80. TR at 116 and 144.

Throughout the period Complainants were employed by Hepburn Orchards, the orchard had migrant labor housing which was permitted for occupancy and was vacant. TR at 62-63.

The unavailability of housing for non-working family members has a serious detrimental effect upon the successful recruitment of domestic fruit pickers. Department of Labor General Administration Letter 46-81 (September 11, 1981), Attachment 1 at 7; TR at 154, 178-79, 245, and 286. Domestic fruit pickers who would go to Washington County, Maryland to work do not go since there is no housing available for their families.

In Frederick County, Virginia, of four permitted migrant labor camps, housing to non-working family members, including children, is normally offered at three of these camps. TR at 130, 176-77, 194; SH at 149-50; Complainants' State Hearing Exhibits 18 and 20.

In Clarke County, Virginia, there are four permitted migrant labor camps. Housing to non-working family members, including children, is normally offered at three of these four camps. TR at 128, 173-75; Complainants' Exhibit 3.

In Berkeley, Jefferson and Hampshire Counties, West Virginia, there are approximately 32 migrant labor camps. Of these camps, approximately 20 offer housing to non-working family members, with 16 housing children. TR at 243, 245; SH Complainants' Exhibit 1; SH at 142, 147. In Washington County, Maryland, there are approximately nine growers who operate permitted migrant labor camps. Of these employers, six have housed family members in the past. The prevailing practice in Washington County, Maryland is not to offer family housing. That has been the practice since the late 1970's -- about the same time Washington County growers began participating in the H-2 program.

In Adams County, Pennsylvania, there are approximately 80 migrant labor camps. Of these 80 camps, 57 have offered housing in recent years to non-working children of farm workers. TR at 226. Complainants' Exhibits 8 and 9.

In Franklin County, Pennsylvania, there are approximately 23 permitted migrant labor camps. Of these camps, at least 16 offer housing to non-working family members, including children. TR at 227, 283-84; Complainants' Exhibit 9.

Prior to 1983, there had never been a survey conducted on the prevailing practice of Maryland growers with regard to provision of housing to non-working family members. SH, Complainants' Exhibit 10. Prior to 1983 Hepburn Orchards never inquired of the United States Department of Labor, the Maryland employment service or the Maryland Department of Health and Mental Hygiene as to the prevailing practice with regard to provision of housing to non-working family members. TR at 58-59; SH at 214-15.

#### CONCLUSIONS OF LAW

##### A. THE COMPLAINANTS ARE U.S. WORKERS WITHIN THE MEANING OF 20 C.F.R. § 655.202.

###### 1. Discussion

So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S.

workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering to temporary foreign workers. 20 C.F.R. § 655.202(a).

More specifically, the Regulations provide that in order to protect U.S. workers, every employer of temporary foreign workers must provide housing without charge to every U.S. worker. "When it is the prevailing practice in the area of intended employment to provide family housing," the employer must provide housing to the families of such workers as well. 20 C.F.R. § 655.202(b)(1).

Since the purpose of the Part 655 Regulations is not intended to benefit alien workers, but to protect U.S. workers, Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 596 (1982), an initial hurdle to overcome before benefits are available under the Regulations is U.S. worker status. A U.S. worker is defined in the Regulations as including "any worker who, whether U.S. national, citizen or alien is permitted to work permanently within the United States. 20 C.F.R. § 655.200(b). Since the complaints here are neither U.S. nationals nor U.S. citizens, it is necessary to define "permanently" to see if the Complainants are U.S. workers. The Immigration and Nationality Act provides that:

(31) the term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

8 U.S.C. § 1101(a)(31). The section has been interpreted to establish that "'permanently' does not mean 'forever.'" Sudomir v. McMahon, 767 F.2d 1456, 1462 (9th Cir. 1985); Holley v. Lavine, 553 F.2d 845, 851 (2d Cir. 1977) cert. denied sub nom. Shand v. Holley, 435 U.S. 947 (1978).

Sudomir and Holley concerned aliens' eligibility for the Aid to Families with Dependent Children (AFDC) program under the requirements of 42 U.S.C. § 602(a)(33). Those cases revolved around the meaning of "permanently residing" and looked to 8 U.S.C. § 1101(a)(31) to uncover that meaning. While this case concerns permission to work rather than permission to reside, the principles are related. Permission to work implies permission to reside.

In the present case, the Haitian Complainants who arrived in the United States before October 11, 1980, are legally entitled to work indefinitely, according to Department of Labor policy. General Administrative Letter (GAL) No. 46-81 (change 1) at 3 (October 20, 1982). Haitians arriving after this time are legally bound to the time specified on their individual classification papers. Id.

A right to work indefinitely is a right to work permanently. As stated in Sudomir.

A residence may be "permanent" where the INS has permitted an alien to stay in the United States "so long as he is in a particular condition," [quoting Holley], even though circumstances may change, and the alien may later lose his right to stay. A residence is temporary when the alien's continued presence is solely dependent upon the possibility of having his application for asylum acted upon favorably. Aliens who have official authorization to remain indefinitely until their status changes reside permanently.

Sudomir, 767 P.2d 1456, 1462 (9th Cir. 1985), emphasis added.

## 2. Application

Turning to the instance case, it is clear that the Complainants are U.S. workers within the meaning of 20 C.F.R. § 655.202.

All of the Complainants are legally entitled to work indefinitely in the United States. Complainants Blaise, Pierre and Presi fit this category by virtue of arriving in the United States prior to October 11, 1980. GAL No. 46-81 (Change 1) at 3. Complainant Blanc fits this category by virtue of his designation as a "Cuban/Haitian entrant." This designation grants him a special parole status. His entrance was lawful and he may seek employment in the United States as long as he remains in that condition. Under the analysis provided by Sudomir, he is entitled to work indefinitely in the United States. The reasoning in Sudomir also mandates that Complainant Azor receive indefinite status. He is lawfully authorized to seek employment in the United States and, since there is no time limitation on the documents he received, he is also legally entitled to work indefinitely in the United States. GAL No. 46-81 (Change 1) at 3. The Complainants' presence has been legitimized by an affirmative act. They are entitled to seek employment indefinitely, and thus, permanently. Being entitled to work permanently they are U.S. workers within the meaning of 20 C.F.R. § 655.200(b).

Complainants Presi, Blaise and Pierre are also U.S. workers within the meaning of 20 C.F.R. § 655.200(b) by virtue of their entrance to the United States prior to October 11, 1980, under official Department of Labor policy. "The official DOL policy is that Cuban/Haitian parolees who entered the United States prior to October 11, 1980, are . . . 'United States workers' within the meaning of 20 C.F.R. [§ 655.200(b)]." April 7, 1983 telegram from Regional Administrator William Haltigan.

Finally, it is worthy of note that today the Complainants are eligible for permanent resident status. Congress has provided remedial legislation. While it is not controlling on this case, Congress has explicitly provided that Haitians, such as the Complainants here, who emigrated to the United States before January 1, 1982, would, upon application, have their status adjusted retroactively to establish them as permanent U.S. residents as of January, 1982. Pub. L. 99-603 § 202 (1986). Congress recognized that such Haitians have been "permanently residing in the United States under color of law" and expressed its intent to grant these Haitians formal status "consistent with the reality of their permanent residency in the United States." H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 75-76 reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5679-80.

The Respondent's argument to the contrary is not persuasive. The Respondent relies heavily upon Phillips v. Brock, 652 F. Supp. 1372, 1378 (D. MD 1987). Chief Judge Harvey in Phillips did not hold that the plaintiffs were not U.S. workers within the meaning of 20 C.F.R. § 655.200(b). In Phillips, the court concluded only that Haitian plaintiff Marcel Joseph was not an adequate class representative.

**B. THE COMPLAINANTS' SPOUSES AND CHILDREN CONSTITUTE FAMILIES WITHIN THE MEANING OF 20 C.F.R. § 655.202(b)(1).**

Complainants' spouses and children constitute families within the meaning of 20 C.F.R. § 655.202(b)(1). Hepburn argues that Complainants have no standing to challenge his failure to provide workers with family housing under 20 C.F.R. § 655.202(b)(1). Hepburn argues that the Complainants' failure to be formally married removes any categorization of their spouses and children as their "families" under 20 C.F.R. § 655.202(b)(1). The validity of a marriage ceremony is to be determined by the law of the place where it was performed. Kane v. Johnson, 13 F.2d 432 (D. Mass. 1926). While none of the Complainants were formally married according to United States' law, the Complainants were married consistent with their customs and tradition, in a placage union. Their "placage" unions would be recognized by the Haitian government and the Catholic church. Since the marriages were valid in Haiti they are valid in the United States. These unions were consensual, involved mutual obligations and in at least two instances (Complainants Blanc and Azor), included the birth and rearing of children. The Complainants' unions meet the traditional definition of a family -- a nucleus of two adults living together and cooperating in the care and rearing of their children. Finally, it is noteworthy that in 1983 Hepburn Orchards was indifferent to the Complainants' marital status. The Respondent denied them family housing not because they were unmarried but because the Respondent's policy was to deny family housing.

C. THE PREVAILING PRACTICE WITHIN THE AREA OF INTENDED EMPLOYMENT.

1. The Area of Intended Employment

The Regulations define the area of intended employment as:

[T]he area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), any place within the SMSA is deemed to be within normal commuting distance of the place of intended employment.

20 C.F.R. § 655.200(b).

The SMSA in which Hancock, Maryland is included comprises Hagerstown, Maryland and surrounding Washington County (according to the U.S. Bureau of the Census). However, the SMSA is only a minimum requirement of normal commuting distance. Under the Regulations, the test for the area of intended employment relies upon commuting distance not the SMSA. The Regulations require that the normal commuting distance for the place of intended employment at least includes any place within the SMSA. The normal commuting distance for the place of intended employment may go beyond the SMSA, However, and still be within the area of intended employment under 20 C.F.R. § 655.200(b). SMSA's can include, and, in the case of large urban areas, frequently do include, portions of several states.

The Regional Administrator's conclusion that the area of intended employment is limited by state boundaries is in error. The Regional Administrator's reliance on ET Handbook No. 385, I-102 to I-105 is misplaced. See decision of the Regional Administrator, Federal File Tab 7. The agricultural reporting areas set out in the Handbook are limited by definition to geographic divisions within a state. The definition of the "area of intended employment" set forth in 20 C.F.R. § 655.200(b) relies on commuting distances and is not limited by state boundaries.

In addition, the Regional Administrator's conclusion that 20 C.F.R. § 655.202(b)(1) must be interpreted in response to the language provided in the job order is unsound. To hold that family housing shall be provided if the grower announces in his job order that he provides it is to engage in circular reasoning. Holding that the area of intended employment is limited to that of the very grower for whose conduct complaint is being made strips the Regulations of any force. Such an unchallenged reliance on the grower's job order and a myopic view of the Regulations cannot have been the intention of the

Department of Labor. The Regional Administrator's reasoning is especially unsound in this case where the Respondent's orchard is partially in Pennsylvania. The Regional Administrator's decision would limit the area of intended employment to an area that does not even include the Respondent's whole orchard.

Turning the instant case, the testimony of fruit laborers supports a finding that 45 miles from Hepburn Orchards is a reasonable commuting distance. Testimony was received of farm workers commuting up to 60 miles each way. Additionally, it is approximately 45 miles from one end of Washington County to the other (taking official notice of the Rand McNally Cosmopolitan World Atlas). Since the SMSA in which Hancock, Maryland is located includes all of Washington County, Maryland, following the Regulations it is reasonable to conclude that commuting distances from Hancock, Maryland are at least equal to the distances between points in Washington County. Under this definition, commuting distance would be at least 45 miles. Commuting distance is defined as including, at least, all points within the SMSA. Since the SMSA includes all of Washington County, commuting distance is at least equal to the distance from one end of Washington County to the other.

The "area of intended employment" includes all counties located within a radius of 45 miles from Hepburn Orchard's location in Hancock, Maryland. These counties are as follows: Franklin and Adams Counties, Pennsylvania; Washington County, Maryland; Jefferson and Berkeley Counties, West Virginia; Hampshire County, Frederick County and Clarke County, Virginia.

## 2. The Prevailing Practice

If it is the "prevailing practice within the area of intended employment" the employer must provide family housing. 20 C.F.R. § 655.202(b)(1). "Prevailing" is defined as having superior force or influence; being most frequent or common. Webster's New Collegiate Dictionary (1979). 20 C.F.R. § 655.202(b)(1) requires the employer to provide family housing if the majority of growers in the area of intended employment provide it, i.e., if the most frequent practice is to provide family housing. Based on the evidence, including testimony from the Director of Migrant Education in Winchester, Virginia (TR at 171); Suzanne Benchoff of the Shippensburg University Migrant Child Development Program (TR at 722); an employee of Telemon which is a non-profit placement service for migrant laborers in West Virginia (TR at 238); the acting director of the Migrant Health Program, the Pennsylvania Department of Health (TR at 252 and Compliants' Exhibit 9); and an employment service officer with the Pennsylvania Department of Labor, Office of Employment

-13-

Security (TR at 263 and Complainants' Exhibit 10), the prevailing practice within the eight county area of intended employment is to offer family housing. The majority of such employers offer family housing.

### 3. Suitability

Respondent has maintained that he did not have housing appropriate for family members, a position affirmed by the Director, Maryland Department of Employment and Training. The space requirements for housing are provided for in 20 C.F.R. § 654.407. Section 654.407 requires 50 square feet per occupant for sleeping purposes, partitioned sleeping areas for the husband and wife, and separate sleeping accommodations for each family. The testimony of the Division Chief of Community Services for the Maryland Department of Health and Dental Hygiene (TR at 288) buttresses the conclusion that camps #1 and #3 could accommodate families and fit the requirements of § 654.407.

The Respondent has argued that the issue in this matter is not whether the housing was suitable for families but whether it was provided. That is not quite correct. The issue is whether family housing should have been provided. Since the provision of family housing was the prevailing practice in the area of intended employment, family housing should have been provided.

### D. SANCTIONS

The Respondent argues that the lone sanction available in this proceeding is that provided by 20 C.F.R. § 655.210(a). This position is without merit. Under 20 C.F.R. § 655.210(a), the Regional Administrator may investigate possible violations of temporary labor certifications by agricultural employers. However, this proceeding does not involve an action initiated by the Regional Administrator to deny temporary labor certification for failing to live up to the terms of past labor certifications. The remedies available to the Regional Administrator under 20 C.F.R. § 655.210(a) are wholly separate from the remedies available under the Job Service Complaint System.

20 C.F.R. § 655.210 merely curtails the application of other remedies in those situations where the Regional Administrator chooses to deny temporary labor certification in the upcoming year. MacArthur v. Beauchesne, 82-TAE-1 (December 12, 1982). Here, however, the Regional Administrator has not decided to deny temporary labor certification. He may choose to do so in the future and, if he does, he would be limited by the available remedy found in 20 C.F.R. § 655.210. In this matter, however, the complaint is a Job Service Complaint under 20 C.F.R. Part 658. Part 658 "allows for the imposition of various substantive sanctions." MacArthur, 82-TAE-1.

The authority of the Department of Labor Administrative Law Judge under the Job Service Regulations derives from § 658.425. Section 658.425(a)(4) states that the Administrative Law Judge may render such rulings as are appropriate to the issues in question. The section clearly contemplates the granting of remedial sanctions. "The Administrative Law Judge . . . possesses the authority to impose any necessary sanctions." A broad grant of authority is necessary because "an integral and vital component of any such complaint system, whether or not directly expressed, is the ability to provide redress for any actions which are adjudged to constitute a wrong under that system." MacArthur, 82-TAE-1 (December 13, 1982).

#### 1. Discontinuation of Services

20 C.F.R. § 658.500 governs discontinuation of services to employers by the Job Service System. The state agency shall initiate procedures for discontinuation of services to an employer when the employer has been found to violate the job service regulations. 20 C.F.R. § 658.501(a)(4). Here, the Respondent has violated the Job Service Regulations by failing to provide family housing as required by 20 C.F.R. § 655.202(b). In order to conform with the prevailing practice within the area of intended employment, family housing should have been provided.

Additionally, the Respondent violated the assurances made in its 1983 job clearance order by failing to offer family housing to the Complainants' non-working family members. The Respondent promised in the clearance order (under which the Complainants were hired) that it would provide U.S. workers with the benefits of 20 C.F.R. § 655.202, including the family housing benefits of 20 C.F.R. § 655.202(b)(1). Although the Respondent was required to provide family housing, it did not provide it.

Finally, in its clearance orders the Respondent misrepresented the nature of its available housing as "barracks" when the evidence shows there were numerous smaller rooms suitable for family occupancy, and the Respondent in fact used such rooms to house working husband and wife families. Characterizing available housing which is suitable for family housing as solely "barracks" style housing is a material misrepresentation. A material misrepresentation in the employer's job order triggers the discontinuation of services provisions of § 658.501. 20 C.F.R. § 653.501(a).

Since Hepburn Orchards, Inc. has violated 20 C.F.R. § 655.202(b)(1) and has violated the assurances made in its job order, the state agency (in this case the Maryland Department of Employment and Training) shall initiate procedures for the discontinuation of services to the Respondent, in accordance with 20 C.F.R. §§ 658.501(a)(3) and (4).

## 2. Restitution

Restitution is also appropriate under 20 C.F.R. § 658.425(a)(4). In order to have employment services reinstated, Hepburn Orchards, Inc. must meet the requirements of 20 C.F.R. § 658.504. For purposes of reinstatement of services, appropriate restitution shall be as listed below. These figures include reimbursement for rental expenses incurred by Complaints in housing their families, plus the commuting costs of visiting their families once a week by commercial bus (\$13.60, round trip):

<u>Complainant</u>	<u>Months Worked</u>	<u>Rent</u>	<u>Commuting Expenses</u>	<u>Total</u>
Leroy Azor	4	\$ 400.00	\$ 217.60	\$ 617.60
Evaleri Blaise	4	400.00	217.60	617.60
Pauleus Blanc	2	600.00	108.80	708.80
Joirilus Pierre	4	400.00	217.60	617.60
Sidoles Presi	2	600.00	108.60	708.80

## ORDER

1. The State of Maryland shall terminate all Job Service services to Hepburn Orchards, Inc., in accordance with 20 C.F.R. § 658.501(a)(3) and (4) until reinstatement of services of deemed appropriate pursuant to § 658.504.

## 2. Hepburn Orchards, Inc. shall pay to:

Leroy Azor	--	\$ 617.60
Evaleri Blaise	--	617.60
Pauleus Blanc	--	708.80
Joirilus Pierre	--	617.60
Sidoles Presi	--	708.80

*Robert J. Shea*  
 ROBERT J. SHEA  
 Administrative Law Judge

..... )	
Charles Stewart, et al. )	Maryland
Complainant )	
vs. )	Job Service Complaint
Fairview Orchards Associates )	Number 463#-83-71
Respondent )	
..... )	

This is a complaint brought by a farm labor contractor (Charles Stewart) under the Job Service Complaint System 2# CFR 658 against a Maryland agricultural employer (Fairview Orchards Associates) alleging that the employer violated 2# CFR 655.2#3 (e) and 2# CFR 655.2#2 (b)(1) by failing to offer the farm labor contractor and his crew employment and housing.

#### Background

On August 5, 1983, farm labor contractor Charles Stewart, on behalf of his crew, hereinafter the Complainants, discussed potential for employment with Fairview Orchards Associates of Hancock, Maryland, hereinafter the Respondent. Mr. Stewart was informed by the Respondent that an offer of work was not being made to his crew. At that time, the Respondent was employing and housing temporary foreign workers and fifty percent of the contract period had not yet expired. On July 19, 1983, the Respondent was certified for 56 temporary foreign workers for the period from July 19, 1983, through November 4, 1983. The Respondent offered no reason for its refusal to hire the Complainants other than the camp was full and they had no need for additional workers.

On November 4, 1983, the Legal Aid Bureau, representing the Complainants, filed a complaint with the Maryland Employment Security Administration alleging that the Respondent was in violation of:

1. 2# CFR 655.2#3 (d)(3) by failing to comply with assurances that it would cooperate with the E.S. system in contacting farm labor contractors.
2. 2# CFR 653.5#1 (d)(4) and 2# CFR 655.2#3 (c) by failing to comply with requirements for hiring and accommodating women in the labor camp and failing to provide family housing.
3. 2# CFR 655.2#2 (b)(1) by failing to offer housing to qualified U.S. workers.
4. 2# CFR 655.2#3 (e) by refusing to offer employment to the Complainants.

— EXHIBIT "I"

On November 22, 1983, the Hagerstown Job Service Office ruled that the Respondent was not in violation of allegations 1 and 2 but was in violation of allegations 3 and 4. On December 12, 1983, the matter was elevated to the State Monitor Advocate per 29 CFR 658.416 (c) on the basis that the Complainant was not satisfied with the local office resolution. On April 9, 1984, the Director, Maryland Department of Employment and Training, issued a decision in which it was concluded that the Respondent did not comply with the terms of its job order and its temporary labor certification by refusing to offer employment to qualified U.S. workers before fifty percent of the period of the work contract, under which foreign workers were hired, had expired. On April 27, 1984, the Respondent appealed the State decision and requested a hearing. On September 25, 1984, a State Hearing was held and a decision was issued on April 2, 1985. The State Hearing Officer affirmed the decision of the Director, Maryland Department of Employment and Training, and ordered that all ES Services to the Respondent be terminated twenty days from the certified date of the receipt of the decision. The Respondent appealed to the Regional Administrator on April 9, 1985.

#### Discussion

This is an appeal by the Respondent from a determination of the State Hearing Officer dated April 2, 1985, that the Respondent violated the assurances contained in its application for temporary foreign labor certification as set forth in 29 CFR 655.293 (c) and 29 CFR 655.293 (e) by failing to employ the Complainants at a time when it was employing and housing temporary foreign workers and 59 percent of the contract period under which foreign workers were employed had not expired.

It is clear that the preponderance of evidence and the weight of the Federal Regulations and Clearance Order supports the Complainant in this issue. It was apparently the Respondent's policy to hire domestic workers who applied only when an opening occurred in the domestic work force. This is in direct violation of the assurances contained in the agricultural and food processing Clearance Order No. 4972459 and the requirements of 29 CFR 655.293. These assurances clearly stated that the Respondent would meet the requirements of 29 CFR 655.293 in that it would, from the time foreign workers departed for the place of employment of the Respondent, provide employment to any qualified U.S. worker who applies until 59 percent of the work contract period under which the foreign workers on the job were hired had elapsed. In addition, the Respondent agreed to provide housing and other benefits to these workers. In this connection, we further find that the Respondent's actions violate the assurances contained at 29 CFR 653.591 (d).

In a brief submitted subsequent to Hearing Examiner Ferris' decision, the Respondent has advanced the argument that Mr. Stewart could not be offered employment since he was not registered with the State of Maryland under the Maryland Farm Labor Contractor Registration Act. On the contrary, the Maryland Division of Licenses and Regulations has stated that crew leaders do not have to obtain a Maryland license before applying for work in Maryland. They have further stated that growers can negotiate with crew leaders and promise jobs to these crew leaders prior to the crew leaders having to apply for a Maryland crew leader registration.

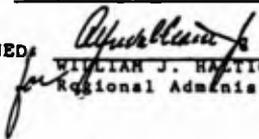
It is therefore my opinion that the Respondent has failed to offer any credible justification for its action whatsoever. Overwhelming evidence exists to support the fact that qualified U.S. workers were available for referral and that 5% percent of the contract period under which foreign workers were employed had not expired. The Respondent willfully chose to ignore its obligation to hire the Complainants despite warnings from Job Service staff that this refusal was in direct violation of the 5% percent rule. In this regard, we further find that the Respondent's actions violate 29 CFR 658.501 (3) and 29 CFR 658.501 (6) which constitutes the basis for the discontinuation of services by the Job Service System.

#### Decision

The decision of Hearing Examiner Ferris is amended to reflect the violation of Federal Regulations at 29 CFR 653.501(d), 29 CFR 658.501(3) and 29 CFR 658.501(6). This provides the basis for the discontinuation of services by the Maryland Job Service System to the Respondent.

I am offering in writing by certified mail to each party to the complaint an opportunity for a hearing before a DOL Administrative Law Judge, provided the party requests such a hearing in writing from me within 29 working days of the certified date of receipt of this decision and the offer of hearing.

DATE SEP 09 1985

SIGNED   
 WILLIAM J. HATTIGAN  
 Regional Administrator



**FRIENDS OF FARMWORKERS, INC.**

*Legal Services for Farmworkers*

3166 Kensington Avenue, 4th Floor  
Philadelphia, PA 19134-2483  
215-427-4886

19 W. High Street, 2nd Floor  
Gettysburg, PA 17326  
717-337-1544

P.O. Box 877  
104 E. State Street, 2nd Floor  
Kennett Square, PA 19348  
215-444-9331

COMMENTS BY FRIENDS OF FARMWORKERS, INC.  
ON THE TESTIMONY OF THE AMERICAN FARM BUREAU FEDERATION  
TO THE HOUSE OF REPRESENTATIVES  
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS  
WITH REGARD TO REAUTHORIZATION OF THE LEGAL SERVICES CORPORATION

Prepared by  
Arthur N. Read, General Counsel  
Friends of Farmworkers, Inc.

COMMENTS BY FRIENDS OF FARMWORKERS, INC.  
ON THE TESTIMONY OF THE AMERICAN FARM BUREAU FEDERATION  
TO THE HOUSE OF REPRESENTATIVES  
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS  
WITH REGARD TO REAUTHORIZATION OF THE LEGAL SERVICES CORPORATION

Prepared by  
Arthur N. Read, General Counsel  
Friends of Farmworkers, Inc.

On July 19, 1989 Keith Eckel, President of the Pennsylvania Farmers Association, testified before the House of Representatives Subcommittee on Administrative Law and Governmental Relations on behalf of the Pennsylvania Farmers Association and the American Farm Bureau Federation. That testimony was submitted for consideration in relationship to the reauthorization of the Legal Services Corporation Act. These comments are in response to issues raised by Mr. Eckel's testimony.

LEGAL SERVICES FOR FARMWORKERS IN PENNSYLVANIA

Friends of Farmworkers, Inc. is the only program providing legal representation to thousands of migrant and seasonal farmworkers in Pennsylvania. Friends of Farmworkers, Inc. has been primarily funded by non-LSC funds and is a "sub-recipient" of LSC funds through Community Legal Services, Inc.

The most recent U.S. Department of Commerce, Bureau of Census, Census of Agriculture for Pennsylvania indicates that in 1987 a total of 18,495 Pennsylvania farms employed hired labor at a total cost of \$292 million dollars, and that 4,202 farms spent a total of \$28.9 million dollars in contract labor. See 1987 Census of Agriculture Volume I, Part 38 County Data Table 3, p. 169. These figures represent an increase from \$224 million dollars in costs for hired farm labor in 1982 and \$12.2 million dollars in contract labor. Id.

In addition to tree, fruit, and vegetable industries employing thousands of migrant farmworkers, Pennsylvania employs additional thousands of migrant farmworkers in the production of mushrooms in southeastern Pennsylvania and continues to lead the nation in the production of mushrooms. The 1987 Census of

Agriculture shows 204 mushroom farms with total gross sales of \$225.3 million dollars.

Based upon a review of county by county data, Friends of Farmworkers, Inc. has estimated that there are a total of 17,300 migrant farmworkers in Pennsylvania and that when their dependents are included this represents approximately 50,000 migrant farmworkers and dependents. In addition, Friends of Farmworkers estimates there are an additional 32,200 seasonal non-migrant farmworkers.

Although the complaints of the Pennsylvania Farmers Association concerning farmworker legal representation might give the impression that the Legal Services Corporation has so generously funded such representation that agricultural employers in Pennsylvania are overwhelmed, the Legal Services Corporation has only allocated \$55,438 per year for farmworker representation throughout Pennsylvania.

Because of the large size of this farmworker population and the severely limited levels of funding, priorities for legal representation of farmworkers in Pennsylvania have been placed on the workplace related problems of farmworkers, including problems with unpaid minimum wages, substandard housing, and violation of federal protective laws for farmworkers including the Migrant and Seasonal Agricultural Worker Protection Act.

#### PENNSYLVANIA FARMERS ASSOCIATION COMPLAINTS

Mr. Eckel's testimony candidly acknowledges that the American Farm Bureau's principal complaint is actually with the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) which was enacted effective April 1983 as a successor to the Farm Labor Contractor Registration Act (FLCRA). The FLCRA was initially enacted in 1964 and was widely acknowledged to have failed to accomplish its principal goal of ending the long documented abuse of migrant farmworkers.

The AWPA recognized that agricultural employers as joint employers shared responsibility for abuses of migrant agricultural workers. The statute continued provisions, already

existing in FLCRA, for awards of statutory damages to migrant farmworkers abused by their employers. The AWPA has no provision for awards of attorneys fees, but such attorneys fees can be awarded by federal courts for violations of the minimum wage provision of the Fair Labor Standards Act (FLSA) or for state wage payment statutes providing for the award of attorneys fees.

The heart of the American Farm Bureau's actual dispute with legal services for farmworkers is the belief that if there were no legal services programs for farmworkers, farmworkers would be unable to pursue their Congressionally authorized claims for statutory damages under the AWPA and the FLSA.

On July 13, 1987 Congressman Bruce Morrison, a member of this Subcommittee, participated in hearings held in Biglerville, Pennsylvania before the Subcommittee on Labor Standards of the Committee on Education and Labor of the House of Representatives. At that hearing Friends of Farmworkers, Inc. General Counsel Arthur N. Read responded to many of the agricultural employer complaints about Friends of Farmworkers, Inc. representation of farmworkers. A transcript of those hearings has been prepared as Serial No. 100-50. We would particularly refer the Subcommittee to pages 48 through 114 and pages 145 through 157 thereof. In that testimony Friends of Farmworkers, Inc. responded to concerns expressed by growers that a mandatory pre-litigation dispute resolution process was required and documented our established willingness to resolve claims of farmworkers both prior to and during litigation.

As our testimony at the July 1987 Subcommittee on Labor Standards hearings indicated, we do not believe that it would be helpful to add requirements for pre-litigation dispute resolution since the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) already includes appropriate provisions encouraging parties to attempt to resolve their disputes. Prior to the July 1987 hearings before the Subcommittee on Labor Standards, Friends of Farmworkers, Inc. had voluntarily agreed to establish an experimental dispute resolution system with tomato

farmers in northeastern Pennsylvania. Only six (6) farms ever agreed to participate in this system. A tenured Dickinson law school professor agreed to serve as a mediator at greatly reduced compensation.

Unfortunately, Friends of Farmworkers, Inc. would agree with Mr. Eckel that experience with this system has not been a success, although our reasons for reaching this conclusion are very different than Mr. Eckel's. In his oral testimony in response to questioning from Rep. Harley Stagers, Mr. Eckel claimed:

There have been two attempts at mediation in excess of a two-year period where there have been, I believe, over 20 law suits filed. In both of those mediation attempts, the workers were already gone home and the mediation occurred between the attorneys for both sides.

Mr. Eckel then identified his principal interest in the mediation process as being an opportunity to try to "solve the problem while the worker was here."

Northeastern Pennsylvania's tomato harvest is a very short harvest season with workers frequently in Pennsylvania for only four to six weeks. Many of these workers are also dependent on farm labor contractors (crew leaders) for return transportation to their homes in Florida or Texas and sometimes employment in other states. As a result, many of these workers are afraid of the potential for retaliation if they raise any issues during the brief harvest season. Mr. Eckel correctly notes that the AWP provides that it is a violation of the law if any action is taken against a worker for filing a complaint, but Friends of Farmworkers is unable to assure farmworkers seeking to pursue such complaints that this provision guarantees that such retaliation or discrimination will not occur.

The agreed first step of the Pennsylvania tomato industry dispute resolution process is direct contact between the farm operator and the workers' legal representatives to attempt direct resolution of the dispute. Mr. Eckel's testimony is misleading

at best in its attempt to indicate that Friends of Farmworkers has failed to attempt to solve problems during 1987 and 1988, while workers were here.

In 1987 attempts at direct in-season resolution of disputes between one farm operator and its farm workers (principally over farm labor camp conditions) resulted in the immediate termination of the whole farm labor crew. The farmworkers' legal claims were subsequently resolved through post season mediation and litigation, but that experience gave Friends of Farmworkers little reason to encourage others to undertake in-season mediation with their employers.

In 1988 at another farm a mediator was involved in an attempt to resolve a dispute in which farm workers appeared and explained their complaints to the grower and the mediator. Not only was this in-season mediation process totally unsuccessful in resolving the dispute, it created tensions in the farm labor camp that resulted in the lead complainant being attacked and beaten in the farm labor camp within a week after a mediation session.

Contrary to Mr. Eckel's testimony, Friends of Farmworkers has undertaken other attempts at direct resolution of complaints involving farms participating in the experimental dispute resolution process while workers were present during the season in Pennsylvania, but the experience of the last two years in northeastern Pennsylvania provides little basis for advising workers that laws penalizing retaliation against complainants will be sufficient to guarantee that such retaliation will not occur.

Mr. Eckel's oral testimony is also totally incorrect in suggesting that "over 20 law suits" have been filed against the six farm operators who agreed to participate in the mediation process. In fact, to date only two lawsuits have been filed as a result of disputes arising out of the 1987 and 1988 tomato harvests in Pennsylvania, involving farms that agreed to participate in the dispute resolution process. Both of these

lawsuits have been settled with the mediation process having played at least a partial role in ultimate resolution of both lawsuits.

Mr. Keith Eckel's written testimony asserts that "litigation defense costs are driving growers out of business." There is little documentable support for this claim.

Pennsylvania agriculture continues to thrive despite the many economic forces affecting that industry. Mr. Eckel's testimony bemoans the condition of "field vegetable production, mostly tomatoes" in the north central counties of Pennsylvania. Mr. Eckel's testimony states: "There used to be almost three thousand acres under production; now there are only about two thousand."

The most recent data from the 1987 Census of Agriculture belies Mr. Eckel's complaints. Statewide a total of 7,025 acres of tomatoes were reported to the Census Bureau in 1987 as producing tomatoes for harvest, down only marginally from a total of 7,583 acres reported in 1982. In Mr. Eckel's own Lackawanna County the Census Bureau reported that 30 farms in 1987 harvested 1,419 acres of tomatoes, up from 1,136 acres of tomatoes harvested in that county in 1982, despite a decline in the number of farms engaged in such cultivation. Similarly, in neighboring Luzerne County in 1987 the Census Bureau reported that 43 farms harvested 1,381 acres of tomatoes, up from 1,122 acres of tomatoes harvested in that county in 1982, despite a similar decline in the number of farms engaged in such cultivation.

The longer term increase in production in Lackawanna County is more dramatically illustrated by a July 11, 1989 article in the Scrantonian Tribune reporting on an interview with Tom Jurachak identified as the Pennsylvania State University county extension agent for Lackawanna County. Mr. Jurachak was quoted as stating that "the local tomato crop...has grown from 200 acres to 1,500 acres in 10 years and now regularly provides \$5 million to area businesses and employees." Mr. Jurachak reported that because of excessive and persistent rainfall in May and June 1989

production would be down by 500 acres and the 500 unplanted acres would result in a reduction of \$400,000 in payrolls to local and seasonal labor. See Dan Orr, "500 Acres of Local Tomatoes Go Unplanted", Scrantonian Tribune, July 11, 1989.

The overall trend of agricultural production in Pennsylvania over the last several years has been that there have been decreases in numbers of agricultural producers, but no drastic decrease in overall volumes of agricultural production or usage of migrant farm labor. In our experience the individual decisions of farmers to cease or curtail production of labor intensive crops is primarily related to other economic and market factors (including land which is more valuable in non-agricultural production) and largely unrelated to disputes over their treatment of agricultural workers or the threat of litigation involving such treatment.

Friends of Farmworkers has always been sensitive to the economic resources of agricultural employers in seeking to resolve the complaints of individual farmworkers and groups of farmworkers. Even where class action litigation has been initiated, Friends of Farmworkers has withdrawn requests for certification of class damage claims where such certification would interfere with the economic viability of agricultural producers. In Avalos v. La Conca D'Oro, Inc., United States District Court Eastern District of Pennsylvania, Civil No. 87-4980, class wide injunctive relief was obtained against a mushroom operation, but a request for class damages was withdrawn. Similarly, in Chandler v. Apple Valley Farms, Inc., Phil Roth and Joe Lee Crews, United States District Court, Middle District of Pennsylvania, CV-84-1578, class wide injunctive relief was obtained against an apple producer together with plaintiff damages, but a request for class damages was withdrawn.

Mr. Eckel's testimony indicates that seventeen Pennsylvania growers, according to a Pennsylvania Farmers Association study, have spent almost \$800,000 in the past four years "defending themselves and settling cases brought by POP." These figures

apparently include several hundred thousand dollars in attorneys' fees paid to the growers' own attorneys with respect to claims which were ultimately resolved by payment of damages to aggrieved farmworkers. Although Mr. Eckel's written testimony indicates that these were south central Pennsylvania Fruit growers, inquiries by Friends of Farmworkers to the Pennsylvania Farmers Association and Mr. Eckel reveal that this Association study was a statewide survey, including fruit growers in south central Pennsylvania and tomato growers in northeastern and north central Pennsylvania.

We are unaware which specific growers the Pennsylvania Farmers Association is alluding to with respect to this study, but we can provide some information for the Subcommittee on several of the cases against agricultural employers in Pennsylvania which have been resolved by Friends of Farmworkers, Inc.

As a general matter, Friends of Farmworkers only pursues claims for farmworkers which it believes to have merit in that the farmworkers are entitled to statutory damages for violations of their legal rights. This is illustrated in several cases:

1. McLean v. Mickey Fought, Harold Lee Edwards and Willie James Edwards, United States District Court Middle District of Pennsylvania, Civil No. 85-0766 (Judge Muir).

The single largest payment of damages in settlement of claims brought by farmworkers against an agricultural employer in Pennsylvania occurred in this case involving a Columbia County tomato grower.

In March 1987, after twenty-one months of extensive pre-trial activity, the agricultural employer defendants settled this proceeding shortly after trial began on terms involving the payment of a total of \$90,000. This included repayment of \$12,750 in out of pocket costs expended by Friends of Farmworkers, Inc. and attorneys fees approved by the Court totalling

\$35,000 for in excess of 1,200 hours of attorney time. A total of \$43,600 (including interest earned on a special escrow account) was distributed to a total of fifty-three (53) farmworkers or their beneficiaries in the class, including twenty-one (21) persons who had been directly represented as plaintiffs by Friends of Farmworkers, Inc.

The case proceeded to trial as to two defaulting farm labor contractor defendants against whom a total of \$262,500 in damages were assessed by the Federal Court. These additional damages have been unrecoverable to date.

The proceeding was filed in June 1985 by Friends of Farmworkers, Inc. on behalf of a class of all persons employed during the years 1982, 1983, 1984 and thereafter at the Fought Farm in Columbia County, Pennsylvania and by the farm labor contractor defendants in Pennsylvania and North Carolina. The case was only filed after extensive pre-litigation attempts at resolution of the claims failed. The case was certified as a class action in February 1986.

The evidence developed by Friends of Farmworkers, Inc. in support of these claims established violations of virtually every provision of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) and violations of the minimum wage provisions of the Fair Labor Standards Act (FLSA) as well as violations of state and federal statutes. The evidence developed by Friends of Farmworkers, Inc. in support of the claims of the farmworker plaintiffs revealed:

- a. The farm labor contractor defendants (with the knowledge of the farmer) stole all funds withheld from wages for social security contributions and never reported any earnings by any farmworkers to the Social Security

## Administration.

b. Workers were housed in a very overcrowded and grossly substandard farm labor camp and had money withheld from their wages for this housing.

c. The defendants routinely falsified records of hours worked in order to establish that minimum wages were paid.

d. The defendants routinely recorded the work of husbands and wives under the name of the husband and failed to pay required minimum wages for these persons working together.

e. The defendants failed to disclose terms and conditions of employment at the time of recruitment of workers.

f. The farm labor contractors transported workers in unsafe vehicles which had not been approved by the Secretary of Labor as required by law.

2. Tillman, et al. v. Thompson Brothers United States District Court, Middle District of Pennsylvania, Civil No. CV-86-0785 (Judge Richard P. Connaboy)

The proceeding was initially filed in June 1986 by Friends of Farmworkers, Inc. on behalf of 33 plaintiffs who had been employed in 1983, 1984 and 1985. The matter was further filed as a class action on behalf of the more than 150 persons employed by the defendants in 1985 principally as to grossly substandard conditions of housing and deductions from wages for this housing and other charges. A further group of workers employed in 1986 intervened in September 1986 as to problems arising during the 1986 harvest season. The matter was only filed after pre-litigation settlement negotiations failed to achieve an agreement.

The agricultural employer defendant in this case

paid a total of \$63,000 in settlement of the individual and class claims brought in this case. This included a total of \$10,000 for payment of attorneys fees and out of pocket costs by Friends of Farmworkers, Inc. with the balance for payment of damages to plaintiffs and class members. Damages from this settlement have been distributed to in excess of 120 migrant farmworkers. The monetary terms of this settlement were agreed to in December 1986 after the Court agreed to certify the matter as a class action. Extensive injunctive relief as to future actions by the defendants was also agreed to.

Friends of Farmworkers, Inc. is unable to estimate the amount charged by the agricultural employer's attorney for his representation of his clients in this matter. Such representation included responding to a motion for preliminary injunction filed in September 1986 after a physical attack on a Friends of Farmworkers, Inc. attorney and outreach paralegal at the defendants' farm labor camp. This motion resulted in a Consent Preliminary Injunction for the 1986 season.

3. Farmworker Rights Organization, et al. v. Harold Forrester, et al. United States District Court, Middle District of Pennsylvania, Civil No. CV-86-0785 (Judge William Caldwell)

This matter was filed in August 1986 on behalf of 36 individual plaintiffs and a local farmworker organization against a fruit grower in south central Pennsylvania which had provided grossly substandard and unpermitted farm labor camp housing. The matter was filed as a class action for 1984 and 1985.

The agricultural employer defendant in this proceeding agreed in 1987 to a settlement including a total of \$71,000 in damages and attorneys' fees and

costs. This included \$10,000 to Friends of Farmworkers, Inc. for attorneys fees and costs. Damages have been distributed to 79 migrant farmworkers.

In addition to the payment of damages in settlement of farmworker claims, the agreement provided for the farm to pay "all taxes owing to the plaintiff class member farmworkers' accounts as provided by law for the years 1984, 1985 and each subsequent year." Friends of Farmworkers, Inc. is unaware if these payments are included by the Pennsylvania Farmers Association in their tally of the cost of litigation involving Friends of Farmworkers, Inc.

4. Pabon, et al. v. Emery C. Etter Jr., United States District Court Middle District of Pennsylvania, Civil No. CV-85-0954 (Judge Caldwell)

This action was filed in July 1985 by 33 named plaintiffs representing a total of 50 persons who were named as plaintiffs or were prepared to file consents to sue. The proceeding was filed as a representative action under the Fair Labor Standards Act (FLSA) and as a class action under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) and Pennsylvania state statutes on behalf of a class of at least approximately 100 farmworker who were employed by the defendant farmer during the 1984 cherry harvest and had not been paid required minimum wages.

Friends of Farmworkers, Inc. successfully negotiated a comprehensive class-wide settlement agreement with the defendant farm operator, including extensive injunctive relief as to the defendant's employment practices. Damages totaled \$19,775 for the 50 persons named in the settlement agreement and an additional \$100 for each class member who filed a claim. Damages for named plaintiffs ranged from \$200

to \$750 each depending upon the nature of injuries alleged.

Friends of Farmworkers has pursued numerous other claims on behalf of farmworkers and successfully resolved these claims of workers by obtaining for them unpaid wages and statutory damages.

Friends of Farmworkers, Inc. has also co-sponsored seminars for farmers with the Dickinson School of Law and the Pennsylvania Farmers Association and others so as to help educate the farmers as to their legal responsibilities toward their employees. Although abuses of farmworkers in Pennsylvania have continued to occur, Friends of Farmworkers, Inc. is proud of the fact that its representation of farmworkers has helped create an atmosphere in which the farming community has come to recognize the importance of respecting the legal rights of farmworkers in their employment.

COMMENTS BY THE MIGRANT LEGAL ACTION PROGRAM  
ON THE TESTIMONY OF THE AMERICAN FARM  
BUREAU FEDERATION TO THE SUBCOMMITTEE  
ON ADMINISTRATIVE LAW AND GOVERNMENTAL  
RELATIONS OF THE COMMITTEE ON THE JUDICIARY  
OF THE U.S. HOUSE OF REPRESENTATIVES

Prepared by  
Roger C. Rosenthal, Executive Director  
Migrant Legal Action Program

In his July 19, 1989 testimony, Keith Eckel, President of the Pennsylvania Farmers Association and member of the American Farm Bureau Federation Board of Directors, made four specific claims with regard to the Migrant Legal Action Program. Each of those claims is either incorrect or misleading or both. Because these claims, taken as a whole, leave the impression that the Migrant Legal Action Program (MLAP) is misusing resources or not complying with the law and that, therefore, changes are necessary in the Legal Services Corporation Act, we feel compelled to correct the facts and clear the record before the subcommittee.

The Migrant Legal Action Program is a national legal services support center which provides assistance to legal services field programs representing migrant and seasonal farmworkers. We also directly represent farmworkers with respect to their legal claims in a variety of areas.

Mr. Eckel states that eight years ago in 1981 MLAP sponsored a series of one day mini-conferences "to provide training and discussion intended to improve networking and coalition building in support of farmworkers." Mr. Eckel criticizes these meetings as not the best use of MLAP

resources. It is apparent that Mr. Eckel does not know the source of funds used for those meetings. In fact, the money for the meetings came from a special grant initiated and awarded by the Legal Services Corporation. The grant award specifically directed MLAP and a number of other LSC grantees to hold these meetings, "to build or strengthen coalitions" and "to strengthen the existing network of organizations."

Mr. Eckel also states that both MLAP and legal services field programs engage in legislative advocacy. That is true. It is also legal under federal law, although many programs do not use LSC funds for this activity. But to say we do so "frequently" is simply incorrect. A very minimal percentage of MLAP's resources is expended on legislative advocacy. Furthermore, grower organizations such as those Mr. Eckel represents have consistently lobbied on Capitol Hill on behalf of their interests. The tiny amount of legislative advocacy engaged in by migrant advocates is certainly vastly overshadowed by the extent of grower lobbying on a wide variety of issues. It is only on occasion that the small voice of our clients is heard in the legislative forum.

As to the third point, Mr. Eckel alleges that MLAP was investigated for financial irregularities in 1985. It is true that in 1985 the MLAP Board of Directors discovered financial irregularities on the part of the former Executive Director. This was reported by the MLAP Board to the Legal Services Corporation. But in a full, trial-type administrative hearing,

a federal administrative law judge, appointed by the Legal Services Corporation, found that MLAP had committed no serious wrongdoing and that the program Board of Directors had acted swiftly and decisively to remedy the situation, including the disciplining and removal of the former director and recovery of all the funds determined by an outside auditor to be owed the program.

Finally, Mr. Eckel charges that MLAP represents organizations such as the NAACP and AFL-CIO. This is simply incorrect. We do not represent those organizations. We have on occasion participated in litigation in which those organizations are represented by other, private counsel, but we have not represented these organizations. In those isolated pieces of litigation, we have represented indigent farmworkers who are legal services eligible clients. We have found that expertise in farmworker law is not common among attorneys and that our participation in these cases on behalf of eligible farmworker clients often means the difference between a case going forward or not.

In sum, Mr. Eckel's charges are groundless. We suspect they may be based more on his disagreement with the laws Congress has passed to protect farmworkers and which we help to enforce on behalf of our farmworker clients, rather than with our activities themselves. These accusations certainly cannot provide the basis for significant changes in the Legal Services Corporation Act.

COMMENTS OF THE WV LEGAL SERVICES PLAN  
 IN RESPONSE TO TESTIMONY PRESENTED TO THE  
 SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL  
 RELATIONS OF THE HOUSE COMMITTEE ON THE JUDICIARY

Prepared by Garry G. Geffert  
 Staff Attorney for the WV Legal Services Plan, Inc.  
 Martinaburg, WV

Agricultural employera, including one from West Virginia, appeared before this Committee in August 1989 with a series of complaints about Legal Services. They asserted that legal services lawyers make no attempt to negotiate settlements before filing suit, legal services lawyers demand huge attorney's fees as part of any settlement and will not settle without the fees, and that litigation initiated by legal services programs is the sole source of the growers' legal expenses. There was an implicit assertion that lawsuits in which legal services lawyers represent farm workers were frivolous. The facts are otherwise.

The general policy of the WV Legal Services Plan, Inc. (WVLSP) is to attempt to resolve issues through negotiation prior to litigation. A settlement promptly and informally negotiated and adequately compensates clients for their injuries is always preferable to formal, expensive and time-consuming litigation.

Even if it were not our policy to attempt resolution of cases through negotiation prior to litigation, the major law protecting farm workers requires it. The Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801, et seq., allows workers to recover actual damages or statutory damages of up to \$500 per violation. The actual amount of the recovery is determined by the court. 29 U.S.C. § 1854(c)(1). "In determining

the amount of damage to be awarded [under ANPA], the court is authorized to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation." 29 U.S.C. § 1854(c)(2).

There are no cases in the nation where the damage awarded to a worker under ANPA have been reduced because the workers' legal services attorney failed to engage in a good faith attempt to settle the case before litigation. Not one. Legal Services attorneys do attempt to negotiate first.

In the experience of the WV Legal Services Plan, the growers' association whose representative appeared before the Committee has forced litigation by refusing to undertake reasonable settlement offers--often refusing to make any negotiation before litigation. It has refused to respond to worker settlement offers. It has refused to offer any settlement proposals itself. The result has been that suits have been filed, with judgments or settlements before trial in which the growers have paid out substantially more than the prelitigation settlement offers. Some examples are useful:

1. Jones v. Tri-County Growers, Inc. Prior to instituting this lawsuit, The WVLSA attorney sent to Tri-County Growers demand letters on behalf of each of the six clients involved. The letters set out the violations claimed, and made a concrete settlement proposal. Two of the letters are submitted with this statement. (Attachment A). The letters for the other clients were substantially the same. Each of

the letters offered to settle the clients' claim for approximately \$700, which included \$100 to recover expenses incurred in investigating the claims. Some of the letters demanded payment of wages which the defendants did not deny were owed to the worker, but which the growers nevertheless refused to pay. Jones v. Tri-County Growers, Inc., C A. No. 84-C-392 (Cir.Ct., Berkeley Co., WV Order of April 20, 1987) at pp. 4-5, ¶¶3-6 (Attachment B). Each letter also contained an offer to discuss the matter with the grower or his counsel.

The growers made no counteroffer. The case was litigated, and the WVLSF clients prevailed on all claims. Jones v. Tri-County Growers, Inc., 366 S.E.2d 726 (WV 1988). The total amount awarded to the clients after four years of litigation was over \$20,000. The WVLSF was also awarded \$9,000 in statutory attorney's fees. Jones v. Tri-County Growers, Inc., C.A. No. 84-C-392 (Cir.Ct., Berkeley Co., WV Orders of April 12, 1988 and May 23, 1988) (Attachments D and E). All of these claims could have been settled before litigation for a total of less than \$4,500. That they were not was the growers' choice, not the clients' or WVLSF's.

2. Ostine v. Tri-County Growers, Inc. Prior to beginning litigation, a demand letter was sent to the two growers whom investigation indicated were joint employers of the four clients. The settlement offer was under \$6,000. No demand for attorney's fees was made. (Attachment E). The

responses from the growers was that neither had employed my clients, so that no settlement offer would be made.

(Attachment F). After three years of litigation, and an agency decision finding that the growers had violated both the laws and written agreements made with the Court and the U.S. Department of Labor, Ostine v. Tri-County Growers, Inc., Case No. 87-JSA-8 (DOL ALJ 1988) (Attachment G), the case was settled for over \$28,500.

3. Compere v. Tri-County, Inc. and Cheri v. Tri-County Growers, Inc. These are two class actions which arose out of the 1982 apple harvest season. The basic allegation in these cases is that in 1982, the growers promised workers in writing they would pay them additional wages as soon as the Department of Labor determined the proper wage rate. The growers later refused to honor their written promises, even though they admitted having made the promises. The WVLSF was assisted a private law firm located in Washington, DC. Prior to instituting the litigation, counsel sent a letter demanding payment of the back wages, plus interest, so that litigation could be avoided. No demand was made for attorney's fees. (Attachment I). No response was ever received.

At the end of August, not long after this Committee's hearing, after five years of litigation and on the eve of trial, a settlement was reached. The settlement has received the preliminary approval of the court. Under that

settlement, in addition to the back wages and interest initially demanded, the growers will pay each of the approximately 700 class members \$500 as liquidated damages. They will also pay \$23,000 in deposition fees and other expenses incurred to prosecute the workers' claims. In order to facilitate settlement, it was agreed that the court would decide the amount of attorney's fees to be paid by the growers to counsel for the workers. The growers have agreed that under the law both NVLSP and the private attorneys are entitled to fees as counsel for the prevailing parties.

The growers have not made attempts to negotiate with workers before filing suit. In 1985, two West Virginia growers decided they did not want to comply with U.S. Department of Labor (DOL) regulations governing piece wage rates. They made no attempt to negotiate with workers, or any representative of workers, before filing suit. After litigation, they were ordered to pay the wages required by the regulations. Feller v. Brock, 802 F.2d 702 (4th Cir. 1986). In 1983, when the West Virginia apple growers who use H-2 workers decided to renege on their written promises to pay back wages, no attempt to negotiate a settlement with any worker or representative of workers was made. Instead, the growers just filed suit. The Compre and Cheri cases discussed above had to be filed to force payment.

In fact, two of the largest recoveries for back wages in the past five years have been in suits filed not by workers, but by growers who now complain to this committee about the

litigiousness of legal services attorneys. In one case, Frederick County Fruit Growers, Inc. v. McLaughlin, 703 F.Supp. 1021 (D.D.C. 1989), over 300 H-2 apple growers in New York, New England, Maryland, Virginia and West Virginia, promised to pay the piece wage rate required by law in 1985, but actually paid wages that were 15% to 20% lower. The growers then sued the DOL, claiming they should not have to comply with the regulations. Workers, represented by legal services programs, intervened in the lawsuit to protect their interests and counterclaimed for back wages. The U.S. District Court found the growers had acted in a "duplicitous manner," Id. at 1031. Back wages, plus prejudgment interest, were awarded to all workers in the 1985 and 1983 apple harvests. While the total award has yet to be calculated, it is estimated that approximately \$4 million in back wages are owed as a result of this lawsuit filed by the growers.

In another case which resulted in the payment of over \$300,000 in back wages and interest, two West Virginia H-2 apple growers filed a similar lawsuit. Feller v. Brock, 802 F.2d 702 (4th Cir. 1986).

The vice president of the West Virginia growers' association who testified before this committee complained of the legal fees his association had paid in the past several years. Specifically, he complained that those fees were caused by Legal Services' representation of farm workers. What he neglected to tell this committee is that this association has filed five federal lawsuits of its own--including two against migrant

workers filed without any effort to negotiate a settlement first-attempting to justify its conduct concerning employment practices in 1982, 1983, 1984, 1985 and 1986.<sup>1</sup> Each of those cases was dismissed with prejudice by the growers after settlements which resulted in substantial payments to workers. One can only speculate about how much those ill-fated lawsuits cost the growers.

The fact is that the WV growers' association whose vice president testified before this committee has "manifested a pattern . . . of subvert[ing] the regulations." Clayton v. Tri-County Growers, Inc., Case No. 87-JSA-5 (DOL ALJ 1987) (Attachment H). Courts and administrative agencies have found, after hearings, that the association has: refused to pay workers wages which it admitted were owed to the workers from 1980 and 1981, Jones v. Tri-County Growers, Inc., Civil Action No. 84-C-392 (Cir.Ct. Berk.Co. WV 1987) (Attachments B and C); illegally withheld over 25% of workers wages in 1980 and 1981, Jones v. Tri-County Growers, Inc., 366 S.E.2d 726 (WV 1988); given workers credit for fewer hours than they actually worked and paid them less than the minimum wage in 1982, Williams v. Tri-County Growers, Inc., 747 F.2d 121 (3rd Cir. 1984); illegally refused to hire U.S. workers in 1980 and 1983, Donaldson v. Tri-County

---

<sup>1</sup> Tri-County Growers, Inc. v. Donovan, C.A. No. 83-31-M (N.D.W.Va.); Tri-County Growers, Inc. v. Donovan, C.A. No. 84-47-M (N.D.W.Va.); Tri-County Growers, Inc. v. Brock, C.A. No. 85-38-M (N.D.W.Va.); Tri-County Growers, Inc. v. Clayton, C.A. No. 87-39-M (N.D.W.Va.); Tri-County Growers, Inc. v. Ostine, C.A. No. 88-9-M (N.D.W.Va.).

Growers, Inc., Case No. 82-TAE-3 (DOL ALJ 1983), Sejour v. Tri-County Growers, Inc., Case No. 83-WPA-1 (DOL ALJ 1985); Cleyton v. Tri-County Growers, Inc., Case No. 87-JSA-5 (DOL ALJ 1987) (Attachment H); denied benefits to U.S. workers in violation of the regulations and agreements made with the court and the DOL, Oetine v. Tri-County Growers, Inc., 87-JSA-8 (DOL ALJ 1988) (Attachment G); and paid piece rates that were approximately 10% lower than required by law in 1985 and 1986, Feller v. Brock, 802 F.2d 722 (4th Cir. 1986). And, in 1988, DOL determined that Tri-County again violated the law by failing to provide benefits to workers as it had promised. Assessment of Civil Money Penalty, April 1, 1988 (Attachment J).

Growers could eliminate many of their legal problems by a simple step: they could comply with the law. Instead, they have chosen to violate the law, and then come to this committee to complain that because of legal services they have had to pay for their illegal acts.

The apple industry is a competitive one. But the growers' assertion that all their problems are caused by legal services representation of workers is not accurate. Newspaper accounts reflect a decline in the industry due to a failure of growers to adapt to changing market conditions. See, Heedlee, "A Fallen Industry," The Herald Mail (July 30, 1989) (Attachment K). One example of this is how some growers continue to focus on growing fruit for processing rather than for fresh market sale. Weather conditions for the past three years have been significantly

responsible for reduced harvests. Headlee, "Apple Production Predicted Off by 40%," The Herald Mail (July 30, 1989) (Attachment K). The figures cited by the WV grower purporting to show a decline in the number of growers are misleading. His figures reflect only the decline in numbers of growers which use his association's services. Several growers have stopped using the association, yet continue in business; one large grower has stated he stopped using the association because he felt it was just getting him into legal trouble. Most growers in West Virginia's Eastern Panhandle have never used this association. There are currently over 60 apple growers in the Eastern Panhandle of WV, according to a report in the Martinsburg Journal of October 2, 1989.

The rapid development of the Eastern Panhandle of WV sometimes makes land much more valuable for housing or other development than continued use in agriculture. One grower is now subdividing his orchard and offering 2 acre lots for \$25,000. Those economics are unrelated to legal services activity.

#### Conclusion

The record, based on case decisions and other facts, is clear. If the growers have problems with legal services' representation of agricultural workers, it is because they have refused to obey laws governing wages and employment conditions. They appear to seek a return to a past when agricultural workers had no meaningful rights under state or federal law. Unable to turn the clock back, they now seek to abolish one of the ways by

which the rights granted in state and federal statutes have been made meaningful: legal services' representation of farm workers. That attempt should be rejected.

LIST OF ATTACHMENTS  
COMMENTS OF THE WV LEGAL SERVICES PLAN

- A Letters dated April 27, 1984, to Tri-County Growers, Inc. from WV Legal Services Plan, Inc.
- B Jones v. Tri-County Growers, Inc., C.A. No. 84-C-392 (Cir.Ct., Berkeley Co., WV Order of April 20, 1987)
- C Jones v. Tri-County Growers, Inc., C.A. No. 84-C-392 (Cir.Ct., Berkeley Co., WV Order of April 12, 1988)
- D Jones v. Tri-County Growers, Inc., C.A. No. 84-C-392 (Cir.Ct., Berkeley Co., WV Order of May 23, 1988)
- E Letter to Tri-County Growers, Inc. and Lewis Brothers Orchards dated April 5, 1985
- F Letters to WVLSPP from attorney for Lewis Brothers Orchard dated May 10, 1985, and from attorney for Tri-County Growers, Inc. dated May 20, 1985
- G Ostine v. Tri-County Growers, Inc., Case No. 87-JSA-8 (DOL ALJ 1988)
- H Clyton v. Tri-County Growers, Inc., Case No. 87-JSA-5 (DOL ALJ 1987)
- I Letter to Tri-County Growers, Inc. and Officers from Wald, Harkrader & Ross dated July 30, 1984
- J Letter to Tri-County Growers, Inc. from U.S. Department of Labor dated April 1, 1988, assessing civil money penalties
- K Hesdlee, "A Fallen Industry," The Herald Mail (July 30, 1989)

## *West Virginia Legal Services Plan, Inc.*

Managing Attorney: William T. Workman, Jr., Esq.  
 Staff Attorney: Gerry G. Collett  
 Paralegal: Elena C. Williams  
 Personnel: Linda K. Rein

Post Office Box 1888  
 618 West Marble Street  
 Martinsburg, WV 26001  
 WV - 303-8971  
 U. S. 800 762-8910

State Director: James P. Martin, Esq.  
 1831 Quarrier Street  
 Charleston, WV 25301

April 27, 1984

Tri-County Growers, Inc.  
 P. O. Box 1053  
 Martinsburg, WV 25401

Re: Ransford Jones

Gentlepersons:

Ransford Jones worked for you during the 1980 harvest season. At that time, Mr. Jones was a temporary foreign agricultural worker. He was then known as Clifton Jones. His employee number was 000020.

While Mr. Jones worked for you, sums were deducted from his pay as "savings." On March 23, 1983, I wrote to you on behalf of Mr. Jones and requested return of the savings. You did not reply to that request. Instead, you referred the matter to the British West Indies Central Labour Organisation (BWICLO). While BWICLO did respond, they refused to return Mr. Jones' money to him.

Subsequent research and investigation have revealed that the "savings" deduction is not actually a deduction, but is instead an assignment of wages. That assignment was made without the formalities required by the West Virginia Wage Payment and Collection Act, §21-5-3. Additionally, my research and investigation have revealed that additional assignments of wages earned by Mr. Jones were made in violation of that Act. Violation of the Act can render an employer liable for the amount of the unpaid wages, plus liquidated damages equal to 30 days' wages, plus costs and attorney fees. W.Va. Code §§21-5-4(e) and 21-5-12(b). According to the records furnished to me by BWICLO, Mr. Jones earned \$4.72 per hour. Since the clearance order you submitted for the 1980 season stated that the normal workday was eight hours, 30 days' wages would be \$1138.80.

Additionally, my investigation leads me to believe that Tri-County violated the Farm Labor Contractor Registration Act (FLCRA) in 1980 because it did not furnish complete payroll information to the persons to whom Tri-County furnished workers

E — E  
 ATTACHMENT A

Tri-County Growers, Inc.  
April 27, 1984  
Page Two

like Mr. Jones. See 7 U.S.C. §2045(e) (1982 pocket part). Each violation of FLCRA can result in an award of \$500.00 in statutory damages, plus court costs. 7 U.S.C. §2050(s). Because of the decision in Williams v. Tri-County Growers, Inc., I believe Tri-County is collaterally estopped from denying the violation.

Mr. Jones is willing to settle this matter without resort to litigation. He will accept in settlement of his claims payment of \$700.00. This amount represents his "savings" of approximately \$150.00, plus another \$150.00 to compensate him for the denial of use of that money, plus \$300.00 to compensate him for other unlawful assignments of wages, plus \$100.00 to cover the costs of investigation and case development to date.

If you wish to settle this matter without resort to litigation, I must be in receipt of written acceptance of this offer prior to the close of business on Friday, May 11, 1984. To be effective, the written acceptance must be accompanied by a check for the amount set out above. The check must be made payable to WV Legal Services Plan, Inc.--Trust Account for Ransford Jones. If written acceptance is not received prior to the close of business on May 11, 1984, the offer will be withdrawn.

If you have records which you believe show that all assignments of wages were made in conformance with West Virginia law, I am willing to review them with you or with your attorney.

I look forward to settlement of this matter without resort to litigation.

Sincerely,

Garry G. Geffert  
Staff Attorney

GCG/ldt

cc: Ransford Jones  
Clarence E. Martin, III



attorney's fees or costs were due was to be decided at a later date. These issues were not addressed in the Court's March 4, 1987, Order, and are the subject of the plaintiffs' motion for partial reconsideration.

2. Plaintiff Oral Reid was employed by defendant in 1981. He did not receive his last paycheck from that employment.

3. Defendant contends the reason it did not deliver the check to Mr. Reid was that Mr. Reid left the job without providing a forwarding address and defendant did not know where to send the check.

4. Mr. Reid requested payment of his last wages, and other sums, in a letter from his counsel to defendant dated September 23, 1983. Defendant did not pay the wages owed in response to that request, and plaintiff filed suit in 1984. Plaintiff did not receive the wages owed until after the Court entered judgment for the unpaid wages on May 19, 1986.

5. Plaintiff Ranford Jonea worked for defendant in 1980. He worked under the name of Clifton Jonea. Jones did not make a demand for a last check either before this suit was filed or in the original complaint. However, in discovery of this case he learned that he was owed a final pay check. The amended complaint filed September 30, 1985, included a claim for the last pay check owed to Jonea.

6. Plaintiff Delroy Hunter worked for defendant in 1980 and 1981. He worked under the name of Alfred Hunter. Hunter did not make a demand for a last check either before this suit was filed or

in the original complaint.. However, in discovery of this case he learned that he was owed a final pay check from 1981. By letter dated March 4, 1985, his counsel requested payment of these wages. Payment was not made, and the amended complaint filed September 30, 1985, included a claim for the last pay check owed to Hunter.

7. Defendant contends it did not deliver the checks to Mr. Hunter and Mr. Jones when the wages were due to be paid for the same reason it had not given Mr. Reid his check: the workers left the defendant's employ and defendant did not know where to send the check. Additionally, defendant contends it did not know that Delroy Hunter was the same person as Alfred Hunter or that Ransford Jones was the same person as Clifton Jones.

8. On May 6, 1985, the depositions of plaintiffs Reid, Hunter and Jones were taken at the instance of defendant. At those depositions, plaintiffs Hunter and Jones testified that they were the same individuals who had worked for defendant, and explained the difference in first names. At this time, defendant knew that Alfred Hunter and Delroy Hunter were the same person, and that Clifton Jones and Ransford Jones were the same person.

9. Defendant did not tender the final pay checks due to Reid, Hunter and Jones until after this Court's Order of May 19, 1986. Defendant did pay the last wages owed to the three plaintiffs after the Court's Order of May 19, 1986.

10. The average daily wages for the three plaintiffs were:

Orel Reid:	\$34.40 per day
Ransford Jones:	\$37.752 per day

Delroy Hunter: \$55.144 per day.  
 Defendant does not dispute these calculations.

CONCLUSIONS OF LAW

1. The West Virginia Wage Payment and Collection Act places strict requirements on the payment of wages. If wages are not paid within the times set by the Act, W.Ve. Code §21-5-4(c), then the employer is liable to the worker for liquidated damages in the amount of one day's wages for each day the employer is in default, up to 30 days. W.Ve. Code §21-5-4(e).

2. Defendant did not pay plaintiffs Reid, Hunter and Jones the wages owed within the time required by the statute, or within 30 days of the time the wages were due, and therefore is liable to each of these plaintiffs for 30 times the average daily wage of that plaintiff.

3. When defendant received the letter requesting payment of the wages from Reid's counsel, defendant knew where Reid's check could be sent: to his counsel's office. Payment should have been at that time.

4. The situations presented by Hunter and Jones are somewhat different. There was no pre-litigation demand on behalf of either Jones or Hunter. Further, there was a question of identity caused by each plaintiff's use of a different first name at the time each worked for defendant. However, the identity question was resolved when the depositions of the two plaintiffs were taken. Since Hunter and Jones were at that time parties to

the litigation, defendant knew payment could be made through the office of their attorney. Defendant's reason for not delivering the final checks were no longer valid after this time.

5. Defendant contends that it decided not to concede the issue of payment of the final wages as a matter of litigation strategy, fearing it could compromise other issues in the litigation. That may have been an appropriate tactic, but defendant is liable for having taken it. The Wage Payment and Collection Act is strict about when wages are to be paid, and has no exception for litigation tactics.

6. Defendant is also liable to plaintiffs for attorney's fees and costs for that portion of this case related to the unpaid wages and liquidated damages. W.Va. Code §21-5-12; Ferley v. Zapata Coal Corp., 281 S.E.2d 238 (W.Va. 1981). The Court does not believe any exceptional circumstances exist which would make the award of fees unjust. Plaintiffs requested an award of fees for seven hours of attorney time spent in connection with these issues. In view of the uncomplicated nature of the unpaid wage issue and the billing practices in the community, the Court finds that plaintiffs are entitled to an award of \$400.00 in attorney's fees.

7. Plaintiffs are also entitled to an award of costs related to the unpaid wage issues of this litigation. W.Va. Code §25-5-12. The Court finds that plaintiffs are entitled to recover for the costs of the depositions of plaintiffs Reid, Hunter and Jones. That amount is \$75.00.

8. In summary, judgment is granted to the plaintiffs and against defendant as follows:

- a. to plaintiff Orel Reid in the amount of \$1032.04;
- b. to plaintiff Raneford Jones in the amount of \$1132.56;

and

- c. to plaintiff Delroy Hunter in the amount of \$1654.32.
- d. Defendant is also liable to plaintiffs for \$400.00 in attorney's fees and \$75.00 in costs.

The Clerk is directed to enter judgment in these amounts.

9. The Court notes that defendant objects and excepts to this Order.

The Clerk shall enter the above as of the day and date first above written and shall place this matter among causes ended.

/s/ PATRICK G. HENRY III

JUDGE OF THE CIRCUIT COURT OF  
BERKELEY COUNTY, WEST VIRGINIA

Reviewed by:

Garry G. Geffert  
Attorney for plaintiffs

Clarence E. Martin, III  
Attorney for defendant

A TRUE COPY  
ATTEST

Robert L. Burkhart  
Clerk Circuit Court

By: [Signature]  
Deputy Clerk

IN THE CIRCUIT COURT FOR BERKELEY COUNTY, WEST VIRGINIA

RANSFORD JONES, BAZIL BAILEY,	)	
ANTHONY WILLIAMS, ORAL REID,	)	
DELOEY HUNTER and ERIC C.	)	
CAMPBELL,	)	
	)	
Plaintiffs,	)	Civil Action No. 84-C-392
	)	
v.	)	
	)	
TRI-COUNTY GROWERS, INC.,	)	
	)	
Defendant.	)	

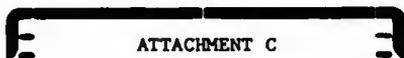
---

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on April 12, 1988, for hearing on plaintiffs' motion for summary judgment on remand from the Supreme Court of Appeals. The parties appeared by counsel. The Court finds that there are no material facts in dispute. The Supreme Court has held that the sums withheld by defendant from plaintiffs' pay were assignments of wages which were not made in compliance with the Wage Payment and Collection Act. Jones v. Tri-County Growers, Inc., Case No. 18140 (W.Va. 1988). Plaintiffs are therefore entitled to judgment as a matter of law. Wilkinson v. Searis, 155 W.Va. 475, 184 S.E.2d 735 (1971), Syl.Pt. 5; Wayne County Bank v. Hodges, 338 S.E.2d 202 (1985), Syl.Pt. 1.

FINDINGS OF FACT

1. The total amounts of wages taken from plaintiffs' gross earnings under the various assignments are set out in the


  
 ATTACHMENT C

following chart.

		<u>"Savings"</u>	<u>"Insurance"</u>	<u>Beard</u>	<u>Transportation</u>	<u>Total Assigned</u>
Jones	(1980)	\$151.96	\$13.19	\$138.95	\$152.00	\$456.10
Bailey	(1980)	\$491.57	\$42.72	\$261.29	\$152.00	\$947.58
	(1981)	\$454.15	\$39.50	\$250.00	\$226.50	\$970.15
Williams	(1980)	\$188.69	\$16.39	\$186.29	\$152.00	\$543.37
Reid	(1981)	\$107.80	\$ 9.38	\$140.00	\$226.50	\$483.68
Hunter	(1980)	\$319.26	\$27.75	\$197.00	\$152.00	\$696.01
	(1981)	\$312.33	\$27.16	\$197.00	\$226.50	\$762.99
Campbell	(1980)	\$375.97	\$32.67	\$295.15	\$152.00	\$855.79

[Admissions of Fact, ¶¶108, 109, 110, 111, 112; Defendant's Answers to Plaintiffs' First Request for Production of Documents (served November 9, 1984); Defendant's Answers to Plaintiffs' Second Request for Production of Documents, Exhibits 1 and 2, (served April 1, 1986)]. Defendant does not dispute these calculations.

2. The average daily wages of the plaintiffs, based upon an 8 hour work day, were as follows:

- a. Ransford Jones: \$37.76;
- b. Anthony Williams: \$33.66;
- c. Bazil Bailey:
  - i. in 1980: \$55.16;
  - ii. in 1981: \$57.03; and
- d. Oral Reid: \$34.40;
- e. Alfred Hunter:
  - i. in 1980: \$53.13;
  - ii. in 1981: \$55.14; and

f. Eric C. Campbell: \$40.32.

[Defendent's Anewers to Plaintiffa' Firat Requeat for Production of Documents, Exhibits A and B (served November 9, 1984); Defendant's Anewers to Pleintiffe' Second Request for Production of Documente, Exhibit 1 (eerved April 1, 1986); Affidavit of Garry G. Geffert, Attachments I and II (eerved May 12, 1986); Chert, etteched to Pleintiffe' Proposed Findinge of Fect and Conclusions of Law (eerved May 12, 1986)]. Defendant does not dispute these calculations.

#### CONCLUSIONS OF LAW

1. Unlewful aassignmente of wegee ere unpaid wages. Western v. Buffalo Mining Co., 251 S.E.2d 501, 503 (W.Ve. 1979); Milla v. Hollia-Lowmen Salee Service, Inc., 101 Lab.Cas. (CCH) ¶34,556, p. 46,273 (Cir.Ct., Berkeley Co., W.Va. 1984).

2. The traneportation reimbursement conetitutee e eeparate peyment of wegee which was never made to any pleintiff.

3. The withholdinge mede from pleintiffe' wegee were assignmente of wegee and were made in violation of the WV Wage Peyment and Collection Act. Jonea v. Tri-County Growers, Inc., Ceee No. 18140 (W.Va. 1988).

4. The violation of the statute, and therefore the wrong committed, occurred when the money wae withheld by defendant and not delivered to the pleintiffe. What happene to the money after that point is of little coneequence for purposee of determining damagee due under the Wege Peyment and Collection Act.

5. In its opinion in this case, the West Virginia Supreme Court of Appeals has ruled that strict compliance with the Wage Payment and Collection Act is required. Its decision shows that where there is a risk that enforcement of the statute will result in double payment, the risk is placed upon the employer, not on the employee. This allocation is based on the notion that the employer is in a better position to recover any sums assigned in violation of the Wage Payment and Collection Act from the recipient of those sums than is the employee.

6. As shown by the chart set out in the Findings of Fact, the amounts unlawfully withheld from plaintiffs' wages are:

- a. Ransford Jones: \$456.10;
- b. Bazil Bailey: \$1,917.73;
- c. Anthony Williams: \$543.37
- d. Oral Reid: \$483.68.
- e. Delroy Hunter: \$1459.00; and
- f. Eric C. Campbell: \$855.79.

7. The wages have remained unpaid more than 30 days since they were due to plaintiffs. Therefore, plaintiffs are entitled to recover, in addition to the amounts set out above, liquidated damages of 30 days' wages for the unlawful assignments. W.Va. Code §21-5-4(e); Willis v. Tri-County Growers, Inc., 747 P.2d 121, 135 (3rd Cir. 1984); Farley v. Zapata Coal Corp., 281 S.E.2d 238, 244 (W.Va. 1981).

8. The liquidated damages provision is in the nature of a contractual remedy and is part of the agreement between every

employer and employee in West Virginia. Lucas v. Moore, 303 S.E.2d 739, 741 (W.Ve. 1983); Milla v. Hollia-Lowman Salea Service, Inc., supra; Domer v. Beallair Orchard, Inc., 100 Lsb.Caa. (CCH) ¶34,513 (Cir.Ct., Berkeley Co., W.Va. 1984).

9. Two plaintiffs, Delroy Hunter and Basil Bailey, worked under two seperate contracts in two seperate years. Each was entitled to have all wages due to him under each contract paid within the time limits set by W.Va.Code §21-5-4 after the expiration of each contract. But unlawful assignments of wages, resulting in nonpayment of certain wages, were made in each year. Therefore, Hunter and Bailey are entitled to recover liquidated damages for each of the two years. Since Hunter has already been awarded liquidated damages for 1981, he here seeks liquidated damages only for 1980.

10. Defendant is liable to plaintiffs for 30 days' liquidated damages under W.Va.Code §21-5-4(e) in the following amounts:

- e. Basil Bailey: \$3365.70 (\$1654.80 for 1980 and \$1710.90 for 1981);
- b. Anthony Williams: \$1009.77;
- c. Delroy Hunter: \$1593.90 (for 1980); and
- d. Eric C. Campbell: \$1209.60.

---

1. Three plaintiffs, Ransford Jones, Oral Reid and Delroy Hunter, were granted partial summary judgment and awarded liquidated damages in the Order of April 20, 1987, because defendant had refused to pay them the last wages owed them for their final pay period as required by the Act. These plaintiffs are not entitled to additional liquidated damages for the years for which they have already been awarded liquidated damages by the court. The amounts awarded here are in addition to those awarded in the Court's Order of April 20, 1987.

11. In addition, defendant is liable for attorney's fees and costs of this action. W.Ve. Code §21-5-12(b); Ferley v. Zapata Coal Corp., 281 S.E.2d 238, 244 (W.Ve. 1981); Dowd v. Beeleir Orchards, Inc., 100 Lab. Cas. (CCH) ¶34,513 (Cir. Ct., Berkeley Co., W.Va. 1984).

12. Plaintiffs are directed to file an application for fees, and any costs not recorded by the clerk, within 25 days of the entry of this Order.

13. In summary, plaintiffs are awarded judgment in the following amounts, which amounts are in addition to those set out in the Court's Order of April 20, 1987:

- a. Ransford Jones: \$456.10;
- b. Basil Bailey: \$5,383.43;
- c. Anthony Williams: \$1553.14;
- d. Oral Reid: \$483.68;
- e. Delroy Hunter: \$3052.90; and
- f. Eric C. Campbell: \$2095.39;

plus costs and attorney's fees, as later determined by the Court.

14. The Court notes the objection and exception of the defendant.

15. The Clerk is directed to enter judgment for plaintiffs in the amounts set out in ¶13 of these Conclusions of Law as of the date and day first set forth above and *return this matter from the docket*

Daniel W. Henry<sup>III</sup>  
Circuit Court Judge

IN THE CIRCUIT COURT FOR BERKELEY COUNTY, WEST VIRGINIA

RANSFORD JONES, BAZIL BAILEY )  
 ANTHONY WILLIAMS, ORAL REID )  
 DELROY HUNTER, and ERIC C. )  
 CAMPBELL, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 TRI-COUNTY GROWERS, INC., )  
 )  
 Defendant. )

---

Civil Action No. 84-C-392

ORDER

This cause came before the Court on May 23, 1988, for hearing on Plaintiffs' Application for Attorney's Fees and Costs. The Court having considered the application, the materials submitted in support of the application, the opposition submitted by defendant and the arguments of counsel, and being otherwise advised, it is hereby

ORDERED AND ADJUDGED that defendant shall pay to plaintiffs attorney's fees in the amount of \$9,078.00 plus an additional \$170.95 for costs. The Clerk is directed to enter judgment for these amounts.

DONE AND ORDERED as of the date set forth above.

*JS*  
*mu*

/s/ PATRICK G. HENRY III  
 Circuit Court Judge

A TRUE COPY  
 ATTEST

CLERK OF COURT

ATTACHMENT D

By: *Patrick G. Henry III*  
 Clerk of Court

## *West Virginia Legal Services Plan, Inc.*

Managing Attorney: William T. Workman, Jr., Esq.

Staff Attorney: Gerry H. Jeffrey

Paralegal: Elena Scholten Williams

Paralegal: Linda K. Rein

Post Office Box 1888

600 West Martin Street

Martinsburg, WV 25401

304-363-8871

1-800-352-8876

State Director: James F. Martin, Esq.

1810 Quarrier Street

Charleston, WV 25301

April 5, 1985

Tri-County Growers, Inc.  
P.O. Box 1053  
Martinsburg, WV 25401

Lewis Brothers Orchards  
Route 1, Box 219  
Martinsburg, WV 25401

Re: Nikel Ostine, Meprius  
Mathurin, Julner Derisma,  
Bruno Cheri

Gentlepersons:

Nikel Ostine, Meprius Mathurin and Julner Derisma picked apples in the orchards of Lewis Brothera during the 1983 and 1984 apple harvest season. Bruno Cheri picked there during the 1983 apple harvest season. In each of those years, Tri-County Growers, Inc. furnished temporary foreign workers to Lewis Brothers Orchards to harvest apples.

From the information available to me, it appears that Tri-County Growers, Inc. and Lewis Brothers Orchards were joint employers of the temporary foreign workers. However, neither Tri-County nor Lewis Brothers Orchards identified themselves as joint employers as required by law.

Because Tri-County Growers, Inc. and Lewis Brothers Orchards were joint employers of the temporary foreign workers, all apple harvest workers at Lewis Brothers Orchards were entitled to all the benefits and protections set out in the regulations governing the temporary foreign worker program, 20 C.F.R. §655.200, et seq. Additionally, Tri-County and Mr. Charles Lewis entered into a consent order in the case of Tri-County Growers, Inc. v. Donovan, Civil Action No. 84-0047-M (N.D.W.Vs. Order filed Sept. 14, 1984), which contained the following provision:

It is therefore ORDERED,

1. That the plaintiff Tri-County Growers, Inc. assure that all its user members comply with all policies, rules and regulations of the Department of Labor for issuance of

ATTACHMENT E

Tri-County Growers, Inc.  
 Lewis Brothers Orchards  
 April 5, 1985  
 Page Two

temporary labor certifications, and all assurances contained therein, during the 1984 harvest season.

However, in neither 1983 nor 1984 were my clients reimbursed for inbound transportation and subsistence costs, as required by 20 C.F.R. §655.202(b)(5)(i); nor were they paid for transportation and subsistence costs for their return to Florida, as required by 20 C.F.R. §655.202(b)(5)(ii).

Although housing is to be provided free of charge, it appears that sums were deducted from their pay for labor camp fees. This violates 20 C.F.R. §655.202(b)(1).

The failure to pay the transportation and subsistence expenses is a failure to pay wages when they were due. This is a violation of the West Virginia Wage Payment and Collection Act, W.Va. Code §21-5-1, et seq. Under that Act, a worker is entitled to recover all wages due to him, plus liquidated damages of 30 days' wages, plus costs and attorney's fees.

In addition, it appears that my clients have claims under several federal statutes, including the Agricultural Worker Protection Act (AWPA), 29 U.S.C. §1801, et seq., and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et seq. Under AWPA, a prevailing plaintiff is entitled to receive up to \$500 per violation. Under RICO, a prevailing plaintiff can recover treble damages, costs and attorney's fees.

My clients are willing to resolve their claims for these two years without resort to litigation. They request reimbursement of their transportation and subsistence costs for 1983 and 1984, plus a sum equal to the liquidated damages they would recover under the W.Va. Wage Payment and Collection Act for one year, 1984. In addition, my clients require a written agreement from Tri-County Growers, Inc. and Lewis Brothers that neither entity, nor any shareholder or member of Tri-County, will in any way discriminate against them in any manner for bringing these claims. Each statement must explicitly say the each of my clients will be hired for agricultural work, and provided housing, if they apply for it. The statements must be made under oath and notarized. If the case is resolved prior to the initiation of litigation, any claim for attorney's fees will be waived.

My clients incurred the following transportation and subsistence expenses:

Tri-County Growers, Inc.  
 Lewis Brothers Orchards  
 April 5, 1985  
 Page Three

<u>Client</u>	<u>1983</u>	<u>1984</u>	<u>Total</u>
Nikel Ostine	\$90	\$140	\$230
Meprius Mathurin	90	140	230
Julner Derisma	90	500	590
Bruno Cheri	90	---	<u>90</u>
TOTAL EXPENSES			\$1140

According to Tri-County's clearance order, a usual work day in 1984 was 8 hours. The adverse effect rate was \$4.40 per hour in 1984. Wages for 30 of the 8 hour days at the adverse effect rate is \$1056. Each of my clients requests that amount in settlement of their claims, or a total of \$4224 in liquidated damages. Of course, should this matter go to litigation, my clients reserve the right to insist upon calculation of these damages at the actual average hourly wage rates shown on your pay records.

In sum, my clients will settle their claims without resort to litigation if Tri-County Growers, Inc. and Lewis Brothers will pay to them a total of \$5364.00.

If you wish to accept this offer, you, or your lawyer, must notify me within 15 days of the date of this letter. The letter of acceptance must either be accompanied by a check for the settlement amount, or must state a date, which can be no later than April 30, 1985, by which the payment will be delivered to this office. The check must be made payable to: W.Va. Legal Services Plan, Inc.--Trust Acct. The acceptance must be accompanied by the sworn and notarized agreements of nondiscrimination, signed by officers of each of your organizations on behalf of the organizations. The offer will not be considered accepted unless these terms are met.

If you or your lawyer wish to discuss this matter with me, please contact me within 15 days of the date of this letter. If I do not hear from you within that time, I will assume you are unwilling to resolve this matter without resort to litigation and will proceed accordingly.

Tri-County Growers, Inc.  
Lewis Brothers Orchards  
April 5, 1985  
Page Four

I look forward to an amicable resolution of this matter.

Sincerely,

Garry G. Geffert  
Staff Attorney

cc: Clarence E. Martin, III  
Nikel Ostine  
Julner Derisma  
Meprius Mathurin  
Bruno Cheri

## MARTIN &amp; SEIBERT

ATTORNEYS AT LAW

P. O. BOX 1268

118 E. COLLEGE STREET

MARTINSBURG, WEST VIRGINIA

25-401

MAY 31 1985

CLARENCE E. MARTIN 1990-1995  
 CLEVELAND M. SEIBERT 1994-1998  
 MORDECAI V. MARTIN 1997-1999  
 CLARENCE E. MARTIN, JR.  
 CHARLES B. SEAF  
 CLARENCE E. MARTIN, III - W VA & R C BAR  
 WALTER M. JONES, III

AREA CODE 304  
 TELEPHONE 327-9999

May 20, 1985

Garry G. Geffert, Esq.  
 WEST VIRGINIA LEGAL SERVICES  
 PLAN, INC.  
 P.O. Box 1898  
 Martinsburg, WV 25401

Re: Ostine, Mathurin, Derisma and Cheri

Dear Garry,

I have spoken with my clients concerning the claims of the above persons. I am informed that they were not hired by Tri-County Growers and therefore that they are not responsible for the allegations that you have made in your letter. Therefore, we reject your claim both on those grounds and also on the grounds that Tri-County Growers and Lewis Brothers were not joint employers.

Very truly yours,



Clarence E. Martin, III

CEM, III/llk

ATTACHMENT F

MAY 11 1985

LAW OFFICES OF  
**RICE, HANNIS & DOUGLAS**  
 THE OLD NATIONAL BANK BUILDING

P. O. BOX 808  
 MARTINSBURG, WEST VIRGINIA 25401  
 TEL. 304-383-0838  
 304-383-8881

OFFICES IN  
 CHARLES TOWN, W. VA. 25414  
 TEL. 304-728-1838

LACY I. RICE (1904-1974)  
 HERBERT E. HANNIS (1890-1986)  
 LACY I. RICE, JR.  
 RICHARD L. DOUGLAS  
 J. OAKLEY SEIBERT  
 MICHAEL B. KELLER  
 CHARLES F. PRINZ, JR.  
 STEPHEN C. STARKEY  
 APRIL L. DOWLER  
 ROBERT D. CLINE, JR.

May 10, 1985

Garry G. Geffert, Esquire  
 Staff Attorney  
 West Virginia Legal Services Plan, Inc.  
 P. O. Box 1898  
 Martinsburg, WV 25401

RE: Nikel Ostine, Meprius  
 Marthurin, Julner Derisma,  
 Bruno Cheri

Dear Garry:

I have discussed your letter of April 5, 1985, with representatives of Lewis Brothers Orchards. It is our feeling that Tri-County Growers, Inc. is the employer, and not Lewis Brothers Orchards. Even the order you quote from, Civil Action 84-0047-M indicates that Tri-County Growers, Inc. is the employer. As you know, I do not represent Tri-County Growers, Inc. and therefore make no representations concerning that company.

Since Lewis Brothers Orchards is not the employer in this situation I do not feel it has any legal obligation to satisfy the demands made in your letter.

Please advise if you have any questions concerning these matters.

Very truly yours,



J. Oakley Seibert

JOS/rd

CC: Lewis Brothers Orchard, Inc.  
 Clarence E. Martin, III, Esq.

U.S. Department of Labor

Office of Administrative Law Judges  
1111 20th Street, N.W.  
Washington, D.C. 20036

JAN 29 1988



In the Matter of . . . . . :

NIKEL OSTINE, MEPRIUS MATHURIN :  
and JULNER DERISMA, :  
Complainants : ..

Case No. 87-JSA-0008

v. :

TRI-COUNTY GROWERS, INC. and :  
LEWIS BROTHERS ORCHARDS, :  
Respondents :  
. . . . .

## DECISION

This proceeding arises out of claimed violations of 20 C.F.R. §655.202(b)(5) and 655.202(b)(1) and alleged breaches of the assurances of an Order entered by Judge Maxwell of the United District Court for the Northern District of West Virginia.

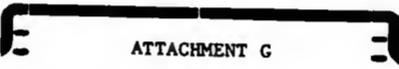
A formal evidentiary hearing was not held in this case because it is my belief that a decision can be issued on the basis of evidence submitted. These include affidavits of the Complainants, a deposition taken of Whitney Darling on November 15, 1985 and the Federal Hearing File submitted by Regional Administrator.

Based upon the evidence submitted, I make the following findings of fact and conclusions of law.

Findings of Fact and Conclusions of Law

## I

The above-named American workers who were employed as apple pickers by a user member of Tri-County Growers, Inc. had come from Florida for the harvest to work for Lewis Brothers Orchards, the grower member. They alleged that they were required to pay transportation and related food costs necessitated by their travel to the work site and return to Florida and that they were charged through payroll deductions, fees for maintenance of the labor camp where they resided.


 ATTACHMENT G


- 2 -

## II

Tri-County Growers, Inc. and the U.S. Department of Labor are involved in litigation which resulted in an order by Judge Robert Maxwell which was issued in September 1984 requiring the Department to grant certification for alien workers, but in the meanwhile provided "that the plaintiff Tri-County Growers, Inc. assure that all its user members comply with all policies, rules and regulations of the Department of Labor for the issuance of temporary labor certifications, and all assurances contained therein, during the 1984 harvest season".

## III

Based upon an investigation conducted by his office, the Regional Administrator issued a decision in which he found that the three workers were required to pay transportation and related costs from Florida to the work site and return. He found the evidence to be less clear as to whether they were actually required to pay for the maintenance of the labor camp. This was because none of the workers had mentioned this as an issue in the affidavits prepared in conjunction with the investigation. Invoking the only penalty which is possible under the Act, he held that the Employer would not be eligible to apply for temporary labor certification in the coming year. Noting that there was a pattern of violations, he found that Lewis Brothers Orchards was also not eligible to apply for a temporary labor certification. The Defendants availed themselves of the right to request a hearing.

## IV

In arriving at his decision, the Regional Administrator noted that both Tri-County Growers, Inc. and Lewis Brothers Orchards claim that they did not employ the workers. Lewis Brothers claimed that the crew leader, Whitney Darling, an independent contractor was the employer. He noted that the exact relationship between Tri-County Growers, Inc. and Lewis Brothers Orchards was the subject of litigation, but that during the pendency of this litigation, Judge Maxwell had issued a very specific order compelling both Tri-County Growers, Inc. and its user members to comply with the policies, rules and regulations of the U.S. Department of Labor.

## V

The Defendants contend that it was Whitney Darling's testimony that the three Complainants never paid him for transportation and that he and the Complainants had traveled from Florida to West Virginia to work at Lewis Brothers prior

- 3 -

to the peach season. Accordingly, the alleged violation by Mr. Darling would have occurred prior to the first payroll date of June 4, 1984. He also denied that he ever withheld transportation expenses from their wages. It also appeared that Mr. Derisma came to West Virginia prior to the 1984 peach season. Since the Complainants were transported to West Virginia prior to the peach season, it is contended that 20 C.F.R. Section 655.202 et seq. is not applicable to this case. Thus it is urged that the Regional Administrator's conclusion that a violation occurred during the apole harvest season should be reversed.

## VI

The Defendants also contend that they did not breach their assurances in the order issued by Judge Maxwell as the agreement did not contemplate actions of user members of Tri-County during the peach season since Tri-County Growers did not provide the foreign or domestic labor to its user members for the peach harvest season, but only for the apple harvest season. As the travel from Florida to West Virginia occurred prior to the peach season (June 4, 1984), any violation occurred prior to the entry of the mutual agreement on September 14, 1984, which was the date of Judge Maxwell's order.

## VII

The evidence reveals that Ostine and Mathurin were recruited in Florida to pick both peaches and apples in the Lewis Brothers Orchard in 1984. Derisma only worked in apples in 1984. Each Complainant incurred several expenses in connection with their work at Lewis Brothers. Ostine and Mathurin had to pay Darling \$40.00 each way for transportation from Florida to the job in West Virginia, and then back to Florida at the end of the apple harvest. (Ostine Dec. para. 9; Mathurin Dec. para. 9; RA Decision 3). Darling had them sign a written agreement to pay him for the transportation. Darling also put the transportation charge on the Worker Information Form which was posted at the Lewis Labor Camp. Although Derisma signed the agreement, he apparently changed his mind and drove his own vehicle from Florida to West Virginia at the end of August to arrive in time for the apple harvest. He was never offered or paid any money to compensate him for his incoming travel expenses. Although Darling claimed that none of the Complainants actually paid him any money for transportation, despite the written agreement.

- 4 -

Darling admitted that several workers did pay him. (Darling Dep. at 85). None of the Complainants were ever reimbursed for their expenses for food during the journeys between Florida and West Virginia.

## VIII

While harvesting the apple crop the Complainants resided in a farm labor camp run by Lewis Brothers Orchards. While at the labor camp, \$2.50 was deducted each week from the pay of each Complainant as a labor camp "cleaning fee." (Darling Dep. 82 and Exh. 4 (pay receipts showing \$2.50 deduction for "camp" or "cleaning" each week), Exh. 2 and Exh. 3-3 (Housing Terms and Conditions Form showing charges for "cleaning \$2.50 per week").

## IX

Although Darling was the farm labor contractor and allegedly crew leader, both he and Otho Lewis, one of the owners of the Orchard, supervised the apple pickers. Otho Lewis determined the piece wage rate which was paid to the apple pickers (Dep. 73) and the primary pay records for the apple harvest were kept by Lewis Brothers employees not by Darling. (Dep. 104-105). Darling kept no records. (Dep. 107). The equipment necessary for harvesting the apples was provided by Lewis Brothers not Darling. It was also Otho Lewis who decided where in the orchards the pickers were to work each day. (Dep. 122). Darling acknowledged that Lewis Brothers paid him for supervising work in the Lewis Orchards. Lewis also paid Darling for the employee's portion of Social Security taxes. Although the relationship between the Complainants and Lewis Brothers had many of the characteristics of an employer/employee relationship, even if Darling were technically the Employer, there was enough control over the activities of the employees, and their living conditions, to put it within the power of Mr. Lewis to comply with the order of Judge Maxwell.

## X

The investigation report, submitted pursuant to demand by Complainant's counsel, also reveals why the Regional Administrator did not find the violation concerning labor camp fees. The investigator had not inspected the pay records maintained on the Complainants. Documentary evidence proved that charges for maintenance of the housing provided to the Complainants were deducted from each Complainant's weekly pay.

- 5 -

each Complainant's weekly pay. Darling also admitted that the deductions were made. As the regulations require housing to be provided "without charge to the worker," 20 C.F.R. Section 655.202(b)(1), Respondents violated the regulations by making the deductions.

## XI

All Complainants came directly from Florida to work for the Employer and were entitled to reimbursement of inbound transportation and subsistence expenses. Contrary to the statement of the Respondents, Complainant Julner Derisma only worked in the apple harvest which followed the West Virginia peach harvest. (Dep. 53). Although he drove his own car to the apple job, he was never reimbursed for his expenses. Ostine and Mathurin worked in both the peach and the apple harvests at Lewis Orchard. (Dep. 51-52). Because two of the Complainants picked peaches for Lewis Brothers immediately before the apple harvest, the Respondents believed that the inbound transportation assurance did not apply to those two Complainants. However the regulation requires transportation and subsistence expenses incurred in traveling "... from the place, from which the worker, without intervening employment, will come to work for the employer to the place of employment ..." 20 C.F.R. 655.202(b)(5)(i)(f). As the Complainants were recruited to work in both the peach and apple harvests, and traveled directly from Florida to the place of employment without intervening employment and began work for Lewis Brothers Orchards, it is irrelevant that two of the Complainants engaged in pre-apple harvest employment with Lewis Brothers. Under the clear language of the regulations, they were entitled to reimbursement of their expenses for the trip from Florida to Lewis Brothers Orchards.

## XII

I further find that all obligations breached by Respondents arose after entry of the September 14, 1984 order. The Respondents obligation to reimburse inbound transportation expenses became final "upon the workers' completion of 50% of the workers' contract." 20 C.F.R. Section 655.202(b)(13), which here, was the apple harvest. The 50% period did not occur until well after September 14, 1984, as the harvest begins in September and runs through the end of October. The Respondents' failure to reimburse the expenses is therefore in violation of the order, the terms of certification and the regulations.

- 6 -

Accordingly, I affirm the findings and conclusions of the Regional Administrator, as supplemented, in that Tri-County Growers, Inc. and Lewis Brothers orchards violated the 1954 temporary labor certification.

ORDER

It is hereby ORDERED: that Tri-County Growers, Inc. and Lewis Brothers Orchards are not eligible to apply for a temporary labor certification in the coming year.

*Leonard N. Lawrence*  
\_\_\_\_\_  
LEONARD N. LAWRENCE  
Administrative Law Judge

Dated: 21 JAN 1959  
Washington, D.C.

LNL/mml

JUL 23 1967

U. S. Department of Labor

Office of Administrative Law Judges  
1111 20th Street, N.W.  
Washington D.C. 20036

Date Issued: JUL 22 1967

Case No. 87-JSA-5

In the Matter of

ALSON CLAYTON and  
OSCAR MARSHALL  
Complainants

v.

TRI-COUNTY GROWERS, INC.  
Respondent

and

UNITED STATES DEPARTMENT OF  
LABOR  
Party In InterestGary G. Geffert, Esq.  
For the ComplainantsClarence E. Martin III, Esq.  
For the RespondentSusan M. Jordan, Esq.  
For the United States  
Office of the Solicitor  
Department of LaborBefore: GLENN ROBERT LAWRENCE  
Administrative Law JudgeDECISION AND ORDER

This case arises under the Wagner-Peyser Act, as amended, 29 U.S.C. 49 et seq.; and the regulations at 20 C.F.R. Part 655. Complaints were filed under the Job Service Complaint system claiming violations of 20 C.F.R. 655.203(b), (c), (d) and other employment regulations. It was alleged that the respondent agricultural employer failed to provide employment and/or housing to United States workers in 1983 when it was recruiting foreign workers under an agricultural clearance order. On February 5, 1967, the Regional Administrator, U.S. Department of Labor, Employment and Training

ATTACHMENT H

Administration, Philadelphia (DOL) issued a decision that that the complaints were valid and that the respondent was not eligible to apply for a temporary labor certification in the coming year. This decision reversed decisions of West Virginia Department of Employment Security as well as a decision by a West Virginia administrative law judge, based on a oral hearing, which had dismissed as groundless the complaints. The respondent on February 12, 1987 filed a request for a hearing before this Office appealing the Administrator's Decision. On 20 February, 1987, the complainants also appealed to this Office the Administrator's decision on the grounds that the complainants were not awarded restitution or for the injuries they suffered. On 27 April 1987, this Office issued an order requiring the parties in support of their respective case to file their arguments and documentation. The last submission in that regard was received June 4, 1987. On examination of these submissions, which includes a transcript of the oral hearing, it is found that there was no need for further oral hearing. Accordingly, the record is now closed and the matter is ready for decision.

#### Findings of Fact, Conclusion of Law and Discussion

1. On June 15, 1983, the respondent applied through the West Virginia Department of Employment Security (WVDES) to hire 575 workers under Agricultural and Food Processing Clearance Order No. 0469727. DOL declined the application.

2. Respondent thereafter obtained a temporary labor certification from the United States District Court. The certification required:

"During the period for which the temporary labor certification is granted, the employer will comply with applicable Federal, State, and local employment-related laws, including health and safety laws;" 20 C.F.R. 203(b).

"The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex, or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason;" 20 C.F.R. 203(c).

"The employer will cooperate with the employment service system in the active recruitment of U.S. workers until the foreign workers have departed for the employers place of employment." 20 C.F.R. 655.203(d).

3. The respondent advised DOL firstly that the clearance order start date was to be changed to September 12, 1983 and then September 19, 1983.

4. In early September 1983, Complainant Clayton sought employment through WVDES. He was referred to the respondent and was advised the work wouldn't start until September 12, 1982. He visited the respondent on September 8, 1983 and was hired. He was told to return

September 19, 1983 when work would commence. On September 19, 1983 he again applied at the respondent's premises. However, there was a sign on the door that the respondent had closed its operations due to a creditor attachment. No information was provided as to when work would start up. Complainant could not therefore commence work with the respondent. On September 23, 1983, the complainant Clayton filed a complaint with WVDES.

5. Complainant Marshall after looking without success early in September 1983 for a position proceeded to the Martinsburg office of WVDES and learned respondent was closed. The complainant's attorney called the respondent's attorney and was advised by a letter from him that the operation was closed because of the creditor attachment. Complainant Marshall filed a complaint on September 26, 1983 with WVDES alleging a violation of 20 C.F.R. 655.203(d)(f) for failure to affirmatively recruit United States workers.

6. WVDES on September 27, 1983 denied both complaints. The complainants appealed this decision to WVDES on September 29, 1983. WVDES by separate letters on October 14, 1983 reiterated the denials. The complainants on October 18, 1983 appealed the findings to WVDES and requested a hearing. A state administrative law judge held the hearing on January 11, 1985.<sup>1</sup> By a decision dated October 30, 1985, the administrative law judge affirmed the prior denials by WVDES. This decision was appealed to the Regional Administrator DOL on January 6, 1986. DOL on February 5, 1987 reversed WVDES and the administrative law judge and held the complaints were justified. It determined that the respondent was not eligible to apply for a temporary labor clearance in the coming year.

7. The respondent failed to encourage the hiring of United States workers after September 13, 1983 and discouraged such hirings by sign postings, newspaper ads, and advice to WVDES. From the close down September 13, 1983 until the foreign workers departed for the respondent's work place on September 23, 1983, the United States workers were denied job opportunities with respondent.

8. On September 24, 1983, the respondent commenced operations using foreign workers and allegedly some United States Workers. It continued its effort to obtain foreign workers through United States Immigration and Nationalization Service (INS). Later it went to the courts for visa's when INS refused to issue them.

9. Respondent in its supporting papers to the District Court (C 10) represented that it was actively recruiting U.S. Workers. At or about the same time it advised visitors to its premises, WVDES, and the newspapers that its operation was closed. This inconsistency engenders substantial doubt that it intended to comply with 20 C.F.R. 655.203 ( d) from September 13, 1983 through September 21, 1983 or that it was actively seeking U.S. workers. Complainants argue that respondent is estopped from arguing it was seeking U.S. workers and cites Zurich Insurance Company 667 F.2d 1162, 1162, 1166 (4th Cir.

<sup>1</sup>/ T: reference to the transcript.

1982). With respect to the Zurich case there may be some merit in respondent's argument that this is not a true estoppel situation. However complainant's argument also is properly concerned with the inconsistent representations to the courts and WVEDS. These inconsistencies have not been reconciled and there is negative inference that respondent did not intend to hire U.S. workers during the period in question.

10. The intention of the respondent is also illustrated in the episode involving the execution of the judgment. The execution was advanced as the reason for the shut down on September 13, 1983. As implied in the testimony of Pitzer (T 58), respondent reopened the business not on account of the lifting of the execution, but when it received authorization from DOL and the Court to hire the foreign workers. Further, the evidence establishes that the respondent must have had operating capital in excess of the amount of the execution. Indeed it did run its business with the execution on its truck.

11. Further, it had to meet a \$12,000 payroll. This was far less than the \$2,200 execution. Accordingly, respondent's argument that it had to close on account of the execution does not appear plausible and is not entitled to credit.

12. Additionally, it is noted that there was manifested a pattern of respondent's reluctance to hire U.S. workers and subvert the regulations. See Robert Ackerman v. Mount Luels Orchards and Homer Feller, Respondents and Lewis Donaldson complainant vs. Tri-County Labor Camp Inc. and Russel Pitzer, Respondents, Edward Gagnir, Complainant v. Tri-County Labor Camp Inc. and Russel Pitzer Respondents, 82 TAE 0003 (1983); Dievnais Sejour, et ad. Complainants vs. Tri-County Labor Camp, Incorporated, and Russel Pitzer, 83 WPA, (1985).

13. The RA denied restitution to the complainants. Such a denial was only partly warranted. Complainant Marshall was not referred by the Job Service because respondent advised the Service that their operation was closed. Under 20 C.F.R. 658.401(a)(1)(i) it is clear that the referral must occur to trigger the regulation. Cited by the Complainant in support of a more liberal interpretation is NAACP, Western Region v. Brennan, 360 F. Supp. 1006, 1014 (D.C.C. 1973); 45 Fed. Reg. 3954 (June 10, 1980) and Soliz v. Plunk, 615 F.2d 272, 275 (5th Cir. 1980). These cases do not vary the clear language of 20 C.F.R. 658.40 (a)(1)(i) limiting use of the complaint system to instances where there was a referral. Accordingly, only Complainant Clayton is entitled to restitution for lost wages.

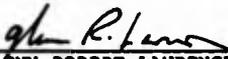
14. Respondent's Job offer guaranteed employment for 45 hours a week and 3/4 of the total work period in force (C 7). The average paid an hour (T 51-52) was \$5.89 and this is an appropriate standard inasmuch as it is not possible to calculate on a piece work basis how much respondent would have earned. Respondent occasioned this loss to complainant Clayton as it failed to provide Employment Service 10 days notice of the postponement of its need date. Accordingly, Complainant Clayton lost 45 hours as alternatively argued by the complainant (p. 39) or \$265.05. He might have lost an additional 15 hours but for illness (D 18, 25, 26) preventing him from work.

Sufficient medical proof would be necessary to support complainant's argument that failure to secure the job made him ill. That proof has not been furnished. No housing restitution is warranted inasmuch as the State paid for the housing (T 26). Perhaps the state has a claim for restitution of its housing payment.

ORDER

It is ordered that:

1. The respondent not be issued a temporary labor certification for the coming years.
2. The respondent pay to the complainant Alson Clayton \$265.05 back pay for 45 hours guaranteed work during the week of September 19, 1983.

  
\_\_\_\_\_  
GLENN ROBERT LAWRENCE  
Administrative Law Judge

GRL:crg

LAW OFFICES

## WALD, HARKRADER &amp; ROSS

CHARLES E. KSELER  
 DONI A. ALLEN  
 JAMES C. ANDERSON, JR.  
 JERRY D. ANKER  
 LORETTA COLLINS ANGRETT  
 GEORGE A. AVERY  
 HANNAH MALL  
 WILLIAM H. BARRINGER  
 JOHN ELDON BERNSTEIN  
 DAVID R. BERT  
 C. COLEMAN BIRD  
 RICHARD A. BROTH  
 THOMAS M. BRUNNER  
 DONALD T. BUCKLIN

MICHAEL J. ALBURN\*\*  
 CLYDE A. ARNOLD\*\*  
 NANCY DUFFY BECKER  
 MARRA N. BALKIN  
 SUE H. BRIGGS  
 RAYEN S. BIRNE  
 MICHAEL R. CANNON  
 JEFFREY M. CARR  
 WILLIAM JOHN CLINTON  
 CATHERINE CURTIS  
 JOHN F. DALY  
 MARY T. DROODS  
 MARY F. EDGAR  
 \*DALLAS OFFICE

JOHN S. BURKE, JR.  
 ROBERT W. EDMAN  
 MATHEA B. CONLISHAW\*  
 ROYAL DANIEL II  
 CHRISTOPHER S. DUNN  
 RICHARD A. FRANK  
 BREGA S. GOLDMAN  
 LOUIS R. GOLDMAN\*\*  
 DONALD H. GREEN  
 JOSEPH P. GRIFIN  
 RICHARD A. DROBS  
 GILBERT E. HARDY  
 NOEL KENNEDYHINGER  
 LAURENCE I. KEMES III

MICHAEL EZRA FINE  
 BRUDHAN FINE  
 MARRA A. FISCHER  
 LAURA R. FOGGAN  
 DONNA BROWN GROSSMAN  
 PAUL GUTERMAN  
 KENNETH H. HALL  
 HARRY S. HARBIN  
 KENNETH G. JAFFE  
 STONEY J. JARRE  
 MARILYN E. KEMPT  
 DANIEL L. KOFFST  
 DANIELA S. KROOP  
 \*\*NEW YORK OFFICE

JOEL E. HOFFMAN  
 STEPHEN R. FVES, JR.  
 MARRA A. JOELSON  
 MARC E. LACRITTE  
 ROBERT M. LICHTMAN  
 JEFFREY F. LISS  
 A. RICHARD METZGER, JR.  
 ANDREW M. MEYERCORD\*  
 J. BRIAN MOLLOY  
 LEWIS M. POPPER  
 M.M. MARFIELD ROSS  
 MARK SCHATZBER  
 THOMAS J. SCHWAB  
 LEE M. SIMPSON\*\*

ARTHUR J. LAPAVE, III  
 RANDALL J. LEVITT  
 DANIEL H. MACCORTY  
 JAMES A. M. EYERS  
 SHIRAZ D. MOORELL  
 LINDA M. OWEN\*\*  
 WILLIAM L. POWERS  
 MATTHEW S. PRESTON  
 LUCY F. REED  
 JANET M. ROBBIN  
 SUSAN D. SAMPTELLE  
 JANE SEIGLER  
 WILLIAM E. SIVNES\*  
 \*\*\*LONDON OFFICE

ROBERT A. SANDOL  
 STEPHEN M. TRUITT  
 THOMAS H. TRUETT  
 ROBERT L. WALD  
 KEITH S. WATSON  
 FRANK A. WEIN  
 DAVID B. WEINBERG  
 WILLIAM H. WEISSMAN  
 JOHN A. WEISSBERG\*\*\*  
 SEBALD B. WETLAUFER  
 STEVEN A. FARLOWSKI  
 JANTHONY L. YOUNG  
 CHARLES A. ZELINSKI\*\*

JOSEPH J. SIMONS  
 WALTER J. SPIG  
 STANLEY M. SPRACHEER  
 DANIEL H. SQUIRE  
 MARRA STEIN  
 BRUCE R. STEWART  
 MARRA S. WARD  
 ANN JOANNE WESSITER  
 HELEN AEM\* JAY  
 JACQUELINE E. ZINS  
 \*NOT ADMITTED IN D.C.

1300 NINETEENTH STREET, N.W.  
 WASHINGTON, D.C. 20036 1987

(202) 888-1200  
 TELEX (MCA) 248884 (WMB)  
 1101 SAN JACINTO TOWER  
 DALLAS, TEXAS 75201  
 (214) 758-0100  
 TELEX 730381 (WMBDALLAS)

345 MADISON AVENUE  
 NEW YORK, NEW YORK 10022  
 (212) 888-9300  
 TELEX 427887 (WMB)

24 UPPER BROOK STREET  
 LONDON, W1T 1PO  
 TEL 888-1076  
 TELEX (831) 888433 (WMBLON)  
 SELMA M. LEVINE (1921-1978)  
 THOMAS B. C. MATTHEWS (1931-1979)

RENOR COUNSEL  
 EABLETON A. HARKRADER  
 OF COUNSEL  
 PHILIP H. ELMAN  
 DONALD M. COSTLE  
 CHARLES H. DUSTAFORSH  
 PETER B. AELLY  
 \*COUNSEL  
 DON WALLACE, JR.

July 30, 1984

**CERTIFIED MAIL -- RETURN  
 RECEIPT REQUESTED**

TO: Tri-County Growers, Inc. and Officers,  
 Directors and Member Growers Listed  
 on the Attached Schedule  
 Post Office Box 1053  
 Martinsburg, West Virginia 25401

Gentlemen:

Together with West Virginia Legal Services Plan, Inc., this firm represents a number of agricultural workers who were employed by Tri-County Growers, Inc. ("Tri-County") and its member growers during the 1982 apple harvest season. By explicit agreement and by operation of law, Tri-County and its member growers are legally obligated to pay their 1982 workers as wages the difference between the piece rates actually paid to them in 1982 and the 1982 AER piece rates of 43 cents per bushel and 48 cents per box mandated by Judge Richey's June 28, 1983 Order in the case of NAACP, Jefferson County Branch v. Donovan, 566 F. Supp. 1202, 1210 (D.D.C. 1983). We are advised that these amounts have never been paid to the workers employed by Tri-County and its member growers.

This is to give Tri-County and its member growers formal notice that, unless all back wages are paid in full with interest of 10% per annum within two (2) weeks of the date of this letter, we intend to file, without further notice

ATTACHMENT I

WALD, HARKRADER & ROSS

Tri-County Growers, Inc. and Officers,  
Directors and Member Growers Listed  
on the Attached Schedule  
July 30, 1984  
Page Two

of any kind, a class action suit on behalf of all similarly-situated workers against Tri-County and its member growers seeking, among other things (and where applicable): (1) all back wages due; (2) statutory damages in the amount of \$500 per violation under the Farm Labor Contractor Registration Act ("FLORA"), 7 U.S.C. §§ 2041-2055, (3) statutory damages in the amount of thirty additional days' wages for each worker under the West Virginia Wage Payment and Collection Act, W.Va. Code § 21-5-1 et seq.; (4) treble damages under the Racketeer Influenced and Corrupt Organizations provisions ("RICO") of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-68; and (5) attorneys' fees and costs of suit.

This is a case of clear liability: amounts unquestionably owed to these workers have not been paid to them. Although we hope that this matter can be resolved without the expense and burdens of litigation, we intend to secure complete relief for these workers, with or without litigation.

Please have your counsel contact me or my co-counsel, Marilyn E. Kerst, at (202) 828-1200 as soon as possible if you wish to attempt an amicable resolution of this matter.

Sincerely,

  
C. Coleman Bird

CCB/bjw  
Enclosure

WALD, HARKRADER &amp; ROSS

TRI-COUNTY GROWERS, INC.  
(Officers and Directors)

Mr. John M. Porterfield  
F.R.D. #2, Box 341  
Martinsburg, West Virginia 25401

Mr. Turner Ramey  
Walnut Hill Orchard  
P.O. Box 592  
Charles Town, West Virginia 25414

Mr. Charles Leavitt  
Del Orchard  
Route 1, Box 97-0  
Martinsburg, West Virginia 25401

Mr. Russell Pitzer  
Tri-County Growers, Inc.  
P.O. Box 1053  
Martinsburg, West Virginia 25401

Mr. Richard W. Blizzard  
Clover Ridge Orchard  
F.R.D. Box 411  
Hedgesville, West Virginia 25427

Mr. Cerroll Butler  
Biallaire Orchard  
P.O. Box 1045  
Martinsburg, West Virginia 25401

Mr. Douglas Dirting  
Spring Hill Orchard  
R.F.D. 1, Box 22C  
Hedgesville, West Virginia 25427

Mr. John Cushwa  
Cushwa's Farm and Orchard  
Route 6, Box 112  
Martinsburg, West Virginia 25401

Mr. Laird Marshall  
Rockdele Farm  
Route 1, Box 118  
Sheperdstown, West Virginia 25443

Mr. Virgil Maphis  
Blue Ridge Orchard  
Route 1, Box 1B  
Shenandoeh Junction,  
West Virginia 25442

Member Growers

Mr. Devid R. Dillon  
Route 6, Box 91  
Martinsburg, West Virginia 25401

Mr. William Kilmer  
Swen Pond Orchards  
Route 3, Box 63  
Martinsburg, West Virginia 25401

Mr. Bruce E. Eyer  
Cumberland Valley Orchards  
1017 Winchester Avenue  
Martinsburg, West Virginia 25401

Mr. Richard R. Loman, Jr.  
Hollis-Lowman Sales Service, Inc.  
P.O. Box 964  
Martinsburg, West Virginia 25401

Mr. Henry Davenport  
P.O. Box 27  
Charles Town, West Virginia 25414

Mr. Lloyd Lutman  
Martinsburg Road  
Berkley Springs, West Virginia 25411

Mr. Otho Lewis  
Lewis Brothers  
Route 1, Box 219  
Martinsburg, West Virginia 25401

Mr. Jerome Hockman  
Twin Ridge Orchards, Inc.  
Route 1, Box 112  
Shenandoah Junction,  
West Virginia 25442

J.E. McDonald and Sons, Inc.  
Arden, West Virginia

U.S. Department of Labor

Employment Standards Administration  
 Wage and Hour Division  
 3535 Market Street  
 Philadelphia, PA 19104



Reply to the Attention of: **CERTIFIED MAIL**  
 #P 426 491 092

April 1, 1988

Tri-County Growers, Inc.  
 P.O. Box 1053  
 Martinsburg, WV 25401

Dear Sir:

Subject: Assessment of Civil Money Penalty

An investigation of your operation under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) in Martinsburg, WV, covering the period 9/11/87 to 10/30/87, disclosed that you failed to comply with the Act. As a result of this/these violation (s) and pursuant to section 503 (a)(1) of the Act and 29 CFR Part 500, a civil money penalty is hereby assessed. The specific violation (s) and the amount assessed for the violation (s) is set forth on the attached.

The total civil money penalty assessed as aforesaid is \$700.00. This amount is due and payable within 30 days to "Wage and Hour Division, U.S. Department of Labor". Payment by certified check or money order should be delivered or mailed to the Regional Office, Wage and Hour Division, 3535 Market Street, Gateway Building, Room 15210, Attn: MSPA, Philadelphia, PA 19104. The fact that a penalty is being assessed for the MSPA violation (s) found at this time does not preclude the taking of other enforcement action as is deemed appropriate by the Department of Labor or the additional assessment of a penalty for violations of the MSPA provisions found at some future time.

You have the right to request a hearing on the determination that any or all of the violation (s) occurred. Such request must be in writing; must contain specific reasons why you believe that the violation (s) for which you have been charged did not occur; and must be filed within 30 days from the date of this letter with the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. Procedure for filing a request for a hearing is provided in 29 CFR 500.212. If a request for a hearing is not received within the time specified, the determination of the Administrator shall become the final and unappealable Order of the Secretary.

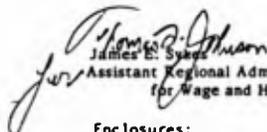
ATTACHMENT J

-2-

We would like to call to your attention that when a request for a hearing is filed with the Wage and Hour Administrator, the matter is referred to the Chief Administrative Law Judge. A formal hearing is then scheduled for a final determination with respect to the alleged violation. At such hearing you may, by yourself or through an attorney retained by you, present such witnesses, introduce such evidence and establish such facts as you believe will support your position.

Copies of the Migrant and Seasonal Agricultural Worker Protection Act and 29 CFR Part 500 are also enclosed for your reference and assistance.

Sincerely,

  
James E. Sykes  
Assistant Regional Administrator  
for Wage and Hour

Enclosures:

HSPA  
Reg. 500  
Summary of violations and amounts assessed

## ATTACHMENT

## SUMMARY OF VIOLATIONS OF THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT AND CIVIL MONEY PENALTY ASSESSMENT OF EACH VIOLATION

Item 1.	<u>Fail to disclose conditions to workers 201(a) and 301(a)</u> .....	\$ 50.00
	You failed to have the information concerning the terms and conditions of employment written down for the workers to read in a language which they could understand at the time of recruitment.	
Item 4.	<u>Breach of working arrangements with workers 202(c) and 302(c)</u> .....	\$200.00
	You violated the terms of your working arrangement with the workers by not providing travel expenses for which they were entitled to under H-2.	
Item 5.	<u>Fail to make/keep employer records 201(d)(1) and 301(c)(1)</u> .....	\$200.00
	You failed to make and keep all payroll records required by the Act.	
Item 6.	<u>Fail to provide wage statement to workers 201(d)(2) and 301(c)(2)</u> .....	\$ 50.00
	You did not furnish each worker a written statement of payroll information which included the basis on which wages were paid; the number of piecework units earned, if applicable; the number of hours worked; the total pay period earnings; the specific sums withheld and the purpose of each deduction; and the net pay for each pay period.	
Item 9.	<u>Fail to pay wages when due 202(a) and 302(a)</u> .....	\$200.00
	You did not pay wages owed to your workers when they were due.	
TOTAL AMOUNT OF ASSESSMENT .....		\$700.00

\*You are considered jointly and severally liable with Farm Labor Contractor Whitney Darling and Ager Lewis Brothers Orchards for items 1, 4, 5, 6, and 9 - for violations. Payment by either will satisfy the liability.

*Ager Lewis Brothers Paid  
items 1, 4, 5, 6 & 9*

# HERALD MAIL

Hagerstown, Md. Sunday, July 30, 1969

## A fallen industry

### Expert says apple growers were too slow to change

By TERRY HEADLEE  
Staff Writer

Orchardists who have clung to traditional methods for producing apples and have refused or been slow to switch to more modern growing techniques are primarily responsible for the decline of the apple industry in Maryland, a state fruit specialist says.

"There's a lot of blame to go around, but I think the basic reason is that many growers haven't changed with the times and now they're taking it on the chin," said Chris Walsh of the University of Maryland Cooperative Extension Service in College Park.

"The once thriving apple business has been cut by more than half in the past decade alone in Maryland, according to state and federal agricultural statistics.

As recently as 1959, the state produced 1.1 million bushels of apples, with more than half of that being harvested in Washington County.

The figure dipped to a statewide low in 1957 of 64,000 bushels, primarily because two large orchards in Washington County closed down a year earlier, killing about 2,000 acres of apple trees.

Since then, a debate has raged on as to what caused the drastic decline in apple production.

Many growers, including those at Fairview and Hepburn orchards, placed most of the blame on lawsuits and grievances heaped on

### Shrinking harvests



Graphic by E. Tom

represented by state Legal Aid Bureau attorneys.

"They said legal bills and unrealistic regulations for hiring labor prompted them to shut down.

Their views are shared by U.S. Rep. Beverly B. Ryan, D-Md., who two weeks ago submitted two congressional bills to curb lawsuits and grievances.

Other orchardists say finding good pickers had become increasingly more difficult in recent years. Still others say the market price for processed apples hasn't kept pace with rising costs.

Please turn to APPLE, A2

## Apple production predicted off by 40%

By TERRY HEADLEE  
Staff Writer

Washington County is still Maryland's leading apple producer, but the last three years haven't been kind.

From 1964 to 1967, the number of apples harvested in the county dropped by more than half. That decline was primarily because the state's two largest orchards near Hancock, Fairview and Hepburn orchards, went out of business after the 1966 harvest season.

From 1963 to 1967, the number of apple orchards in the county fell from 62 to 45 while the acreage shriveled from 4,356 acres to 2,100, according to the latest census data from the U.S. Department of Commerce.

During the same five-year period,

apples picked in the county dropped sharply from 1.3 million bushels — or 56 million pounds — to an all-time low of 64,000 bushels. A bushel holds about 43 pounds of apples.

Fruit experts say they don't expect the situation to get much better in 1969 and it's not because more orchards are going out of business.

Drought conditions in 1967 and 1968, coupled with a deadlier spring frost earlier this year, will hurt much of the apple crop this fall, they said. Growers have complained that their trees lacked bloomers in the spring, a prime indicator that apple production will be off.

Please turn to HARVEST, A2

ATTACHMENT K

A2

The Herald-Mail  
Sunday, July 26, 1988

# Apple

Continued from A1

Walsh said he believes several factors are involved in Maryland's decline in apple production. But at some point, the growers had to come to realize that they weren't going to make money if they didn't change.

Changes include replacing trees at least every 20 years and switching from the traditional apple trees to dwarf and semi-dwarf trees.

Growers can save a considerable amount of labor costs simply by switching to the dwarf and semi-dwarf trees with new plantings, Walsh said. The trees only grow to eight to 12 feet high, which make them easier to pick and press than the traditional apple trees that top out at 25 feet.

In some cases, ladders aren't even needed to pick the fruit from the trees.

"Any grower that wants to stay in business now has to modernize," Walsh said. "You can't afford to pay someone to go up and down a ladder. It can't be done. They'll be bankrupt by the year 2000."

## Labor shortage

It's also getting tougher to hire labor to older orchards, he said.

"That will be a problem some growers may face," Walsh said. "Some pickers will not go in ancient orchards and climb ladders and try to make money when they can go somewhere else and pick from the ground."

Growers in Washington state, which produces half of the nation's apples, have been using the dwarf trees for decades and have prospered because of it, he said.

In Washington County, decisions to modernize should have been made during the 1970s so that small portions of the orchards could be replanted each year with "hot varieties" demanded by consumers.

While some of the county's smaller growers have switched to more modern techniques, several of the larger orchards didn't.

"I think we contacted about with these big problems for too long," Walsh said. "And in the last couple of years, interest rates went up, prices went down and there was a wave of bankruptcies."

Walsh said that while Legal Aid workers may have hurt some growers, he doesn't share the opinion that they are solely responsible.

Attorneys for the Legal Aid Bureau in Maryland have lost only one grower case for discriminatory hiring practices against migrant workers while Legal Services attorneys in West Virginia have never lost a suit.

"I think Legal Aid has over-aggressively pursued some cases, but again, no one is above the law," Walsh said. "If the large orchards had modernized their industry rather than relying on Legal Aid, they never would have got to the point where they were blaming Legal Aid."

## The growers' side

Terry Hepburn, whose family once owned a 1,000-acre orchard near Hancock, said he was a proponent of the apple and grapevines can be quit the business.

Hepburn and Fairview orchards, which both closed in 1987, had more than 100 grower-tenants (led again then which cost \$200,000 plus in fines and settlements).

"They got us down to the point where we couldn't get to court and you have to say, 'is this really worth it?'" Hepburn said in a recent interview.

Hepburn said the courts and Legal Aid were requiring him to hire domestic workers, rather than foreign help. The result was that he couldn't find enough help and that the domestic pickers were slower and less reliable than the Jamaicans.

"They wanted us to be a private settlement program for the federal government," Hepburn said. "And it didn't matter if they could do the work or not. You just can't compete with those kinds of nations. All the odds were stacked against us."

Former Maryland Legal Aid attorney Greg Schell, who worked in many of the suits and grievances, particularly with Fairview, said the orchard was already in financial trouble before any suits were filed.

"They weren't planting any new trees and I know for a fact, because Fairview opened their files to us, that their productive stock of trees dropped 50 percent during the 1980s," Schell said. "There may have been moody big time, I mean, big time, before we ever came on the scene."

Schell said he believes an over-production of apples in the Northwest is causing financial woes in orchards stretching from Maryland in Washington.

"Apple growers are losing money all up and down the Shenandoah Valley and Washington State," Schell said. "That's not my fault. It's not the government, but their economics — that's not Legal Aid."

Another factor hurting local orchards is that the bulk of their annual crop has been sold as processed fruit, such as apple sauce and pie filling, rather than the more profitable fresh fruit market, experts say.

Richard Helebowner Jr., regional fruit specialist for the University of Maryland Cooperative Extension Service, said the Appalachian area from Virginia to Pennsylvania had tended to have their older orchards geared more toward producing processed fruit.

"A lot of our orchards are feeding the processing plants, and that hasn't allowed for much growth," Helebowner said.

Some local orchardists are planting dwarf trees which are traditionally used for the more lucrative fresh fruit market that requires larger, more durable boxes, Helebowner, however, said the changeover has been slower in Washington County, compared to Cecil and Carroll counties.

"We're in a world of change and they're in an industry that's slow to change."

## Changing with the times

One grower considered by Walsh is to be the next generation of growers. It Robert Black, who owns Catalina Mountain Orchard north of Thurmont.

Black, who took over his father's orchard which opened in the early 1960s, has only dwarf trees and sells only fresh fruit.

The grower said he is now experimenting with ultra-dwarf trees.

"Our ultimate goal is to be able to pick everything from the ground," Black said. "It's amazing how productive the ultra-dwarfs are. They cut down on costs to prune and pick them. You can make better time with less labor."

John Rinehart, a Smithsburg area grower who chairs the Maryland State Apple Commission, said he has cut down on his production acreage and has turned toward planting semi-dwarf trees to stay competitive.

Rinehart said he also has diversified his 275-acre orchard and has shifted more to the fresh fruit market.

The grower said he doesn't see the family-owned business shutting down and selling out in development, like some other growers, since his son is interested in keeping up the third-generation business.

But he admitted, the decision isn't as easy as

"With the different (development) pressures, it's a tough decision to know if you want to go out and plant a young orchard, which takes six to eight years until it starts paying for itself," Rinehart said. "It's a tough decision to make."

Fruit experts say the Shenandoah and Cumberland valleys have lost a considerable amount of orchard acreage in the past 10 years.

In the last-state area of Pennsylvania, Maryland, West Virginia and Virginia, as much as 16,000 acres of orchards, most of which produced apples, are out being used commercially, Walsh said.

The figure became more startling considering that most of that acreage lies in about 12 counties, including Franklin County, Pa.; Washington and Frederick counties in Maryland; and Berkeley and Jefferson counties in West Virginia, Walsh said.

All of this bothers fruit specialists, like the Helebowner, who says: "We're slowly losing a commodity I wish we could hang onto."

Walsh is more blunt about Maryland's apple future.

"I'm concerned the state will look like North Carolina in 10 years," Walsh said. "There's nobody putting on the brakes for all this development going on agricultural land."

"From a consumer point of view, the question isn't: 'Will there be apples on the shelves?' The question is: 'Is there going to be any gross space left?'"

# Harvest

Continued from A1

Richard Martin, a Virginia state fruit extension service agent, predicted that apple production will be off by up to 40 percent in the mid-Atlantic region that includes Maryland, Virginia, West Virginia and Pennsylvania.

"There was a bad spring frost, but I'm blaming a lot of it on the drought the last two summers," Martin said. "I think that's a big reason a lot of trees just didn't bloom this year."

Statewide, Maryland apples to have one of its worst apple crops ever in 1988, said John Rinehart, a Washington County orchardist who chairs the Maryland State Apple Commission.

The apple commission projected in June the state's harvest would hover around 700,000 bushels during 1988.

If the prediction holds true, "this will be the smallest Maryland crop in quite a few years," Rinehart said.

For most of the 1980s, Maryland averaged about 2 million bushels a year until 1987, according to the state Department of Agriculture.

Washington County, which still annually produces about half of the state's apple crop, probably will harvest only about 250,000 bushels this fall.

That's a substantial drop considering the county produced more than four times that — 1.8 million bushels — just a decade ago.

It also is a long way off from its heyday in the 1920s when the county was once labeled the nation's biggest producer of apples for a county.

A July 1, 1977 article in the Baltimore News American newspaper

insured a headline that claimed Washington County as the largest fruit growing county in the United States.

Just a year earlier, the rural county had hundreds of orchards spread over 12,254 acres — nearly six times today's acreage.

"Those days are long gone, but the demise of the apple industry in Washington County and Maryland would not be noticed much by consumers, fruit experts say."

For the most part, fruit specialists say there likely will never be a shortage of apples — whose production has increased by 25 percent worldwide in the last decade.

About half of the United States' annual apple production comes from Washington state, which is expected to pick approximately 115 million bushels this fall alone, Rinehart said.

Neighboring states also dwarf Maryland to apple production.

Pennsylvania has averaged about 15 million bushels during the past five years, according to Martin.

Since 1983, Virginia has averaged close to 11 million bushels a year and West Virginia has harvested about 4 million bushels.

Even with the 2 million bushels picked in 1988 figured in, Maryland still averaged only about 1.5 million bushels for the past five years.

By this fall, Washington County will be producing only one-tenth of 1 percent of the nation's apple crop.

"Maryland plays a very small role in the overall picture as consumers aren't going to see any difference," said Chris Walsh, extension fruit specialist for the University of Maryland at College Park.

Mr. FRANK. Let me—I am puzzled. I hope there is no suggestion that the committee is somehow going to be involved in—in fact, let me make it very clear, you are here not at the committee's particular desire, except but for the fact that Mr. Staggers, who has some very legitimate concerns here, made a point of making sure that we had a fair representation, and we invited the Farm Bureau.

If there was any suggestion that this subcommittee or any of the subcommittees have been responsible for beginning litigation for those who testify, that is preposterous. You say you have the confidence in this committee, so I think I make that clear.

Mr. ECKEL. It was not a reflection of the committee but of the grantees' history, the LSC grantees' history of pursuing those growers who have spoken out at history in the past.

Mr. FRANK. I think everyone on this full Judiciary Committee would take a very dim view of anything that smacked remotely of retaliation; and if you have any reason to believe that such an event is occurring, I urge you to be in touch with us. No one will interfere with any witness's freedom, nor will try. I think all of us would agree on that.

I want to acknowledge that Mr. Staggers was particularly concerned that we have good representation.

Mr. Flaherty.

#### STATEMENT OF PETER FLAHERTY, LEGAL SERVICES REFORM COALITION

Mr. FLAHERTY. I came to be involved in this project after learning of a particularly troublesome instance of the use of LSC funds for political purposes. You may remember the media coverage last summer of something called the "Veterans Peace Convoy," organized by a group of pro-Sandinista activists. A Nicaragua-bound caravan of 38 vehicles loaded with "humanitarian" supplies was stopped at the United States-Mexico border at Laredo, TX, by Customs officials.

Customs sought signed statements from the participants promising that the vehicles would be returned to the United States after they were unloaded in Nicaragua. The trade embargo against Nicaragua contains an exemption for humanitarian deliveries but does not allow for the export of trucks and other vehicles.

The activists, who appeared in their numerous television interviews as quite middle-class, challenged Customs' interpretation of the Nicaraguan Sanctions Regulations and proceeded to sue Secretary of State George Schultz, Treasury Secretary James Baker and several other high U.S. Government officials in Federal court in the southern district of Texas.

They were represented by attorneys affiliated with Texas Rural Legal Assistance and LSC funds were used in connection with this lawsuit. Serving as cocounsel was Margaret Ratner of the Center for Constitutional Rights, the left-wing legal institute based in New York. The lawsuit was eventually rendered moot by a Treasury decision to let the caravan proceed.

There are indications TRLA may have tried to disguise the case as just another migrant worker dispute by reporting the case to

LSC as "*Lopez v. Schultz*," with no mention of the Veterans Peace Convoy.

Whatever the truth, how could this case become a case for legal services? It is difficult to comprehend how indigent Texas citizens with legal problems benefit from a lawsuit against key American policymakers on a foreign policy issue. I know that there is a wide variety of views on the subcommittee on the controversial subject of U.S. policy toward Nicaragua. That is not the issue we are discussing today. We should not, of course, object to citizens expressing their views on such an issue or engaging in challenges to our Government's policy.

But I hope we can all agree that the use of tax moneys for these purposes in this case was inappropriate. Isn't it positively bizarre that domestic supporters of a hostile foreign regime were able to tab public funds to sue the U.S. Government? I suppose it is also somewhat ironic that I describe this case to you on this date, the 10th anniversary of the Sandinista revolution.

I think it requires a rather high degree of cynicism about assisting the poor for legal services attorneys to have gotten involved in this case. I understand that poor people with real problems and legitimate cases, for which legal remedies are available, are regularly turned away from legal services grantees because of a lack of resources. For the underprivileged in our society, day-to-day legal problems sometimes are questions of survival.

For some legal services grantees, the day-to-day problems of the poor are apparently regarded as annoyances that get in the way of working on larger ideological, political and social causes.

The Legal Services Reform Coalition has developed a number of specific recommendations that we believe will make legal services more responsive to the needs of the poor. They are contained in my written testimony. There is special emphasis at the end of my testimony on the topic already discussed at some length about the application of civil and criminal statutes pertaining to waste, fraud and abuse for LSC grantees and I, in the interest of time, I will not review it, except to say that I was quite encouraged by what I heard earlier.

Thank you.

Mr. FRANK. Thank you, Mr. Flaherty.

[The prepared statement of Mr. Flaherty follows:]

STATEMENT OF PETER T. FLAHERTY  
SPOKESMAN  
LEGAL SERVICES REFORM COALITION

Mr. Chairman and members of the Subcommittee, I appreciate this opportunity to testify on the reauthorization of Legal Services Corporation. Let me begin by identifying myself as Chairman of Conservative Campaign Fund, a political action committee. I am also a member of the Legal Services Reform Coalition, a group of trade and professional associations, membership organizations, educational foundations and individuals. Still in formation, we plan to seek reform of the federal legal services program and publicize the problems and abuses that plague the current system.

I came to be involved in this project after learning of a particularly troublesome instance of the use of LSC funds for political purposes. You may remember the media coverage last summer of something called the "Veterans Peace Convoy," organized by a group of pro-Sandinista activists. A Nicaragua-bound caravan of 38 vehicles loaded with "humanitarian" supplies was stopped at the U.S.-Mexico border at Laredo, TX by Customs officials.

Customs sought signed statements from the participants promising that the vehicles would be returned to the United States after they were unloaded in Nicaragua. The trade embargo against Nicaragua contains an exemption for humanitarian deliveries but does not allow for the export of trucks and other vehicles.

Page 2

The activists, who appeared in their numerous television interviews as quite middle-class, challenged Custom's interpretation of the Nicaraguan Sanctions Regulations and proceeded to sue Secretary of State George Shultz, Treasury Secretary James Baker and several other high U.S. Government officials in federal court in the Southern District of Texas.

They were represented by attorneys affiliated with Texas Rural Legal Assistance (TRLA) and LSC funds were used in connection with this lawsuit. Serving as co-counsel was Margaret Ratner of the Center for Constitutional Rights, the left-wing legal institute based in New York. (The lawsuit was eventually rendered moot by a Treasury decision to let the caravan proceed.)

There are indications TRLA may have tried to disguise the case as just another migrant worker dispute by reporting the case to LSC as "Lopez vs. Schultz (sic)," with no mention of the Veterans Peace Convoy.

Whatever the truth, how could this case become a case for Legal Services? It is difficult to comprehend how indigent Texas citizens with legal problems benefit from a lawsuit against key American policymakers on a foreign policy issue. I know that there is a wide variety of views on the Subcommittee on the controversial subject of U.S. policy toward Nicaragua. That is not the issue we are discussing today. We should not, of course, object to citizens expressing their views on such an issue or engaging in challenges to our government's policy.

Page 3

But I hope we can all agree that the use of tax monies for these purposes in this case was inappropriate. Isn't it positively bizarre that domestic supporters of a hostile foreign regime were able to tap public funds to sue the U.S. government? I suppose it is also somewhat ironic that I describe this case to you on this date, the tenth anniversary of the Sandinista revolution in Nicaragua.

I think it requires a rather high degree of cynicism about assisting the poor for legal services attorneys to have gotten involved in this case. I understand that poor people with real problems and legitimate cases, for which legal remedies are available, are regularly turned away from from legal services grantees because of a lack of resources. For the underprivileged in our society, day-to-day legal problems sometimes are questions of survival. For some legal services grantees, the day-to-day problems of the poor are apparently regarded as annoyances that get in the way of working on larger ideological, political and social causes.

Page 4

The Legal Services Reform Coalition has developed a number of specific recommendations that we believe will make legal services more responsive to the needs of the poor. They are: implement competitive grant-making to replace the present system of presumptive refunding of grantees, eliminate funding for national and state support centers, eliminate separate funding for specific client populations, prohibit lobbying and union organizing by grantees, implement strict controls on class action lawsuits, end client recruitment, prohibit undertaking with private monies activities otherwise illegal under the legal services statute, and require timekeeping of grantees.

Many of these reforms are embodied in H.R. 2884, introduced by Congressman Larry Combest and twenty-seven others. Although our Coalition has not endorsed specific legislation, I personally urge members of the Subcommittee to consider these reforms as the reauthorization process proceeds.

Page 5

Before closing, let me briefly comment on one area I believe deserves special emphasis. I understand current LSC grantees are currently exempt from civil and criminal statutes pertaining to fraud which apply to other federal grant recipients. I also understand that there have been several embarrassing instances where grantee employees, acting as Robin Hoods-in-reverse, have enriched themselves in a manner which would comprise criminal violations in any other federal program. In light of the hearings in which you are presently taking part with another Subcommittee, Mr. Chairman, as well as the well-publicized, incidents recently involving members of Congress, I am sure you and your colleagues are aware of the growing public disgust at this sort of thing. I implore the committee to subject LSC grantees to the same kind of civil and criminal provisions relating to waste, fraud and abuse as apply to other grant programs.

I thank the Subcommittee for its time. The Legal Services Reform Coalition will be making a more formal announcement regarding our formation in a few days. We certainly wish to maintain ongoing communications with you as reauthorization proceeds and we look forward to pursuing further the issues I have raised with you today. Thank you.

(This testimony was delivered to the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on July 19, 1989.)

Mr. FRANK. I had not previously known of the Legal Aid grantees involvement in Texas. Based on what I have just heard from you and what I have read from their own presentation, they made a grave error there. They should not have been doing that, and I will say what I have said in the past, if people in this program will do stupid things, they should not be surprised when they don't always get the kinds of results they want. This is not what this program was set up to do.

I think our job is to try to prevent those kinds of abuses without interfering with people's rights to do their job in general. It is the example of the kind of errors we have tried to stop.

There was a period in the 1970's when there were more of those abuses. We were able to diminish them. I hope that the grantees are not getting cocky out there and think that they can relapse.

I think the great majority do nuts and bolts, very important work all the time. I obviously believe in class action suits as a legitimate tool. But that was a critical case with a foreign policy issue, and these people should not have been doing it.

One of the things I will try to do in the reauthorization is to make sure that we minimize. Nothing will ever be perfect. That kind of abuse.

I apologize for having attributed to your late harvesting. We are pressed with the importance of this. I think working out the proper relationships in the agriculture area will be one of the most important things we do.

There have been some suggestions about compensation and other things. Certainly, the prospect of losing a lot of money in a lawsuit which you ultimately win or cannot prosecute your side of because you haven't got the legal fees should not be confronting people. That prospect and that possibility is not what I will look at.

I have got no further questions. I will hand this over to Mr. James, and then Mr. Stagers will continue.

Mr. JAMES. Thank you. I have had some concerns expressed to me by farmers in my area. They are most concerned because an attempt to negotiate in many cases start with extraordinary remarks. I haven't personally investigated this. Anyone who sues, of course, complains, whatever it is. So you have to take note of that.

But I have heard from people I know quite well, examples that I found quite hard to believe of potential abuses in the farming area, to such an extent that I believe there—probably we need to do some pretty serious investigations as to how to write the law so as to put it in a situation like a private attorney.

In other words, there is something to lose for the Corporation that does it like attorney's fees on the other side. I think if the farmer is sued and he wins and he spends \$50,000 on attorneys' fees, they should be paid by the Corporation or by the—since the person is indigent, it does no good to say that the indigent pays because the indigent doesn't have any money to pay. So, the indigent isn't even there when the case is over in some cases, as you said.

We tried that in the case of Florida on medical malpractice. The doctors wanted to have a statute saying that the loser pays attorneys' fees. They changed that when a doctor got an assessment for a couple million dollars for attorneys' fees.

You may have some assessment or penalty against a corporation. I say that because you don't have the normal protections that you—against a private practitioner who may invest time and not get paid.

The Corporation attorney is on a salary, so there is nothing to lose, so he is a—this is a tremendous weapon. I liken it to a prosecutor. The only thing that keeps you from having a similar problem in many cases, or similar fears in a prosecutorial sense, is that there are so many cases to prosecute that you don't often have that information.

One reason why in the criminal work you have plea bargaining is that there are 10 times as many cases as can be tried. If, however, you had an abundance of prosecutors that could try every single case, you would have more cases tried which would probably be good.

But on crimes—but in civil cases, the flip-side of it is there and if you have a motivation, not for the Corporation but for the individual attorneys to file suits, that may have a reputation building aspect to them for the individual attorney, he would be foolish not to file it if he is looking at his own best interest.

So you want to take that other than the canons of ethics for filing a frivolous lawsuit, still, it is not a balanced situation. It is too easy to go out and file a suit. There is no price to pay on the other end, is what you are saying.

On the other hand, we want—class actions have their benefit. They are simple as far as maximizing the benefit for the most people. So we don't want to throw the baby out with the bath water. We will need to look into all aspects of it to try and be balanced by it.

I question, personally, to what extent we can have bidding, if you are dealing with nonprofit corporations. I want to look into that, is bidding competitive? The nonprofit corporation, what do you do, set up another nonprofit corporation and have them bid if you are going to deal only with nonprofit corporations?

So I am not sure how the mechanics of that work. But that is basically my ignorance. I don't know how it would work for competitive bidding. I am sure we will get an explanation of that.

We have such little money to help the poor that we need to be very careful with it and make sure it is going for the purposes of writing wills, divorces, for the proper class actions. My feeling and my experience is that there are many, many people, many people that could use that type of service, and that is what we need to try to attempt to help.

Thank you all for testifying.

Mr. STAGGERS. I want to thank Chairman Frank for the record. You already mentioned it was due to my concern. There is problem with farmers in the East, and I do have questions.

Pennsylvania is a great State, but since West Virginia is my favorite State, I would like to ask the fellow on your left a few questions first.

Mr. Dirting, who is from my home district, Doug Dirting for the record, I don't know whether you have been identified, but welcome to the committee.

**STATEMENT OF DOUG DIRTING, AMERICAN FARM BUREAU  
FEDERATION**

Mr. DIRTING. Thank you.

Mr. STAGGERS. I hope you heard Mr. Raven talk about how the Legal Services Corporation is bending over backwards to negotiate. Has that been your experience in West Virginia?

Mr. DIRTING. When they do, the amounts are so astronomical that it is just—there is no compromise. They have nothing—what they throw at us is not a compromise. It is an all-win situation for the legal services attorney involved.

Mr. STAGGERS. So there is no negotiation?

Mr. DIRTING. Let's say, all right, I can give you a specific example. We get what we call a demand letter, from the local staff attorney, and he cites in the letter what he considers the violation. In the meantime, he tells us—stated in the letter precisely are my demands. If these are not met in a specified period of time, which is usually a week to 10 days, further or litigation against your organization will start.

So we get in touch with our local attorney in Martinsburg and sit down and discuss the situation, and what we have had to do to avoid the cost of litigation, which has been discussed here earlier by Mr. Eckel and other people, is pay and give in to this demand letter. If you don't, you are opening yourself up to thousands of dollars of litigation. I mean, it is either pay or litigate. This is the kind of compromise that we get. This is the compromise that we get.

Mr. STAGGERS. Mr. Raven talked about some of the issues involved. I know of one case in West Virginia where there was an agreement with the Jamaican Government to withhold some sort of savings for the workers, basically so that they would be taking some money back to Jamaica with them. There is a lawsuit over that, isn't there? Could you explain some of the details?

Mr. DIRTING. That is a very complicated issue. I am a West Virginia farmer, but I will try. It was enacted in 1884 by the West Virginia Legislature. And, of course, from talking to people throughout the State, we assume it was put on the books to protect people from the so-called company store situation back in the late 1800's. You know what I mean.

What it amounts to is that there becomes a conflict with the term deduction and assignment here. But where it comes across and hits us is in the contract with the British West Indies Labor Organization, we withhold 23 percent of the employees' gross wages. As our payroll is done weekly, it is sent to the organization, West Indies Labor Organization, and then deposited immediately in the Bank of Jamaica, in an account with the worker's name.

Mr. STAGGERS. So the worker gets the money when he returns?

Mr. DIRTING. Right, in an interest-bearing account. And when the worker returns, all he has to do is give proper identification, and that is it. I have questioned my own workers many times to see if they have any problem at all getting this money. And I have had some men with me since 1973, some of the same workers that have come back. There is no problem at all, they tell me. I don't

think the interest rate is what we would like to see here in some cases, but it is there.

The next—but anyway, the West Virginia Wage Payment and Collection Act, which you are talking about specifically, says there are no exceptions to this 25 percent deduction. In our contract we have a 23-percent amount, that is sent home and a 2-percent deduction for insurance, that is life insurance on the workers, and he is very well aware of this. It is in the contract. And a daily meal charge—you can see it puts us above the 25 percent deduction. OK?

The basis for the litigation is the contract was not signed and notarized in West Virginia. It was signed by the worker, in this case, on the island where he is from. They don't have what we call notaries or a magistrate; it is something much, much less, you know. And so this is one of the problems. It is not notarized here in the State of West Virginia, which if it was, that would have proved that they—that—you have to bear with me, you know how complicated this gets.

Then the worker and his attorney involved in the suit against us, for example, feel that it is an illegal deduction.

I don't know how much further to go with it.

Mr. STAGGERS. But that is a lawsuit that legal services brought against you to collect the excess money for the worker, even though the worker is getting the money when they go back to the islands?

Mr. DIRTING. Yes, and most of these would be workers who had illegally left the system and stayed in the United States. They would be illegally here at the time. There is a question now if a couple of these workers in the lawsuit do have their legalized status. There is a question to that. We haven't pursued it. It hasn't come on the court docket yet, but it is right around the corner.

But the amount of money involved, the worker has the opportunity to get if he goes home to get it. There is no question whatsoever. And in their settlement, they want us to pay the worker the 23 percent again, and then there is a liquidated damages in the act.

It is a question if it applies to this contract or not. But, of course, that is what they are claiming in the case, liquidated damages which would be, I think, 30 days wages. That is according to the code now of the State, West Virginia, 30 days wages at whatever the wage rate was at the time and the attorneys' fees.

And that is what is most important. The attorneys' fees. Our very overworked legal services attorney in Martinsburg who spends most of his time from what I see in the district, he wants—his attorneys' fees which are astronomical, and they are not negotiated. That is it. It is either pay it right now or go on to court.

Mr. STAGGERS. Thank you. Mr. Eckel, in your testimony you state that the Farm Bureau is developing a nationwide figure on litigation defense costs. Could you provide that to the committee?

Mr. ECKEL. We will be pleased to provide that for the record to the committee.

[The information was not available at the time of printing.]

Mr. STAGGERS. I appreciate that. You were also urged by a congressman to get involved in and establish a workers grower mediation system in your area. Could you elaborate on how that was set up?

Mr. ECKEL. Yes, sir. I am pleased for the question.

Soon after we testified before the Subcommittee of the Labor and Education Committee in Biglersville, I believe that was 3 years ago, but I would not want to be tied to the precise time period, we instituted negotiations with Mr. Arthur Reed, the director of the Friends of the Farm Workers Office in Philadelphia, which is the LSC grantee operating in Pennsylvania, to initiate a mediation program where FOF growers and farm labor contractors would be co-signers of an agreement whereby we would attempt to mediate disputes at the time that they occurred for the very reasons that I indicated I felt was advantageous both to their client and to us.

I was optimistic about that, and we signed the first agreement the following growing year. We have had that in place now 2 year. We did it in cooperation with the Dickinson School of Law, advocate of mediation as an alternate dispute mechanism and which served as a mediator first between the Farmers Association and the growers involved and FOF, and later the growers agreed to pay.

Since there was no ability for LSC to pay and no ability on the part of the workers, we agreed as growers to pay for the arbitration proceedings.

To my knowledge, there have been two attempts at mediation in excess of a 2-year period where there have been, I believe, over 20 lawsuits filed. In both of those mediation attempts, the workers were already gone home and the mediation occurred between the attorneys for both sides.

That may be legally proper. But I have to tell you that as a farmer, my concept of the mediation was an attempt to resolve the difference between the farmer and the worker. Certainly the worker probably would be represented by counsel and the farmer may or may not be. But I perceive we would try to solve that problem while the worker was here.

There are those who have indicated at the meeting here today that one of the drawbacks of that is retribution against the worker. Let me point out to you very clearly that under the Migrant Seasonal Workers Farmers Act, it is a violation of the law if any action is taken against a worker for filing a complaint.

I would indicate to you in our example, that raises questions in my mind as far as our ability without congressional direction in this matter to proceed. Mr. Read and I have known each other for a number of years. I respect his legal ability and have negotiated with him in good faith.

In November or December of last year, I received a letter from him indicating that they had had access at my camp as a result of a disagreement between my farm labor contractor's wife, not my contractor, but my farm contractor's wife and a representative of FOF.

That letter alluded to the fact that there might be need for some type of legal actions as a result of that. I met with Mr. Read this week in the context of discussing and negotiating a new mediation agreement, and he indicated to me there wasn't going to be a need probably for a legal action.

The thing that concerns me is if we are sincere and have good faith about resolving problems, a simple question on access takes only a telephone call. It is not that I can't be reached.

Mr. Read and I can probably reach each other within 10 minutes. I would suggest to you that it is a style of operation and it is a problem.

It has been indicated that the growers no longer want to continue the mediation process. Let me indicate to you firsthand, because I have been the person involved, that the growers have severe reservations that we will make any progress because for 2½ years we have not made any.

But we are realistic enough to know that we do not have the resources to take on the funds of the Federal Government, and we will continue to negotiate. And yesterday when I returned from my State board meeting to my farm, a message was waiting for me from Professor Ackerman, and we are in the process of setting a new date in early August to initiate discussions again about mediation for this year.

But if you ask me what our experience has been, our experience in the evaluation of this grower has been that we have not brought the progress that I had hoped we would bring for the growers in our State.

In my fresh market tomato industry there were 12 growers in my area 5 years ago. There are now seven. Three of those seven have left without a suit being filed against them, but convinced that it was forthcoming and knowing that they could not defend themselves and not laying themselves open to the large dollar value losses that are involved with class action suits because—and I notice this committee has no jurisdiction over the Migrant Seasonal Farm Workers Protection Act.

You, as Members of Congress, did vote on it and undoubtedly will review it. But reach of those violations of that act provides for private right of action. It includes the opportunity for the worker to recover up to \$500 per person.

In your orchard operations, in our vegetable operations, it is not unusual for a grower to have 50, 75, 100 people working for them for a very short period of time during harvest. The demand letters that Legal Service Corporation will send to you undoubtedly will list not one violation but 10 or 12.

I unfortunately 8 years ago got one of those. I know how it starts out. I don't think they have changed because the letters that I have seen in the last 2 years list everything.

The grower immediately has to, of course, begin to defend himself on each of those counts. But the threat is each of those violations at \$500 per violation times 100 workers, a settlement can be in the hundreds of thousands of dollars. So when you are asked the question why is there fear, the fear becomes very real.

So that is where the settlements are made.

Mr. STAGGERS. Let me ask you to explain for the record, on page 10 you mention that your business is very labor intensive and you are wholly dependent upon seasonal labor, harvesting and processing of your crop.

It is true in West Virginia, but I don't think people realize why the H-2 program is necessary. Could you explain a little bit for the record?

Mr. ECKEL. The H-2 program has been put into place so that, particularly in agriculture, where you have an industry that needs a large amount of labor for a short period of time, perhaps 6 or 8 weeks, in our economy and in our area today it is impossible to employ that large amount of labor for that short period of time.

And without the H-2 program, many of the growers who use that program would be out of business because they would have no ability to harvest their crop. It is not, it is not a choice of whether or not you are going to use local labor.

That local labor is not available. Now, in my operation, we are still using mostly local labor in our packing house facility, but that is becoming more and more difficult all the time.

Basically, retired people are employees. In the field, it is basically still Mexican-American families who come into my farming operation to harvest our tomatoes. But for many growers who don't have those long-term relationships or where those families now have found a different place in our society—and after all, that is what it is all about, economic progress—in those areas, the only choice is to move to the H-2 program or go out of business.

Mr. STAGGERS. In your testimony you talk about Larry Combest and his bill. My opinion would be that that probably won't pass. Let me ask you, out of the provisions in his bill, can you give us your number one priority?

Mr. ECKEL. In looking at that, and I want to answer you as honestly as I can, and staff is properly concerned that we have not taken a position on that. I don't believe I can prioritize the importance of any of the provisions. I think it needs to be a panel approach.

I recognize the concerns of those today who are expressing interest that the program not be crippled. I don't think it has to be, but I think we have to make some adjustments to make certain that the type of situation that is occurring, especially along our East Coast and in our fruit and vegetable production areas, don't continue to the point that we don't have an industry.

Mr. STAGGERS. That is an honest answer.

Mr. DIRTING, did you have a comment?

Mr. DIRTING. Yes, Congressman. I would like to give you some statistics from West Virginia. This would be using 1980 as a year compared to today. There were 2,170,000 boxes of apples—

Mr. STAGGERS. Let me interrupt you.

Is this a production data?

Mr. DIRTING. Right.

Mr. STAGGERS. Why don't you submit it for the record?

Mr. DIRTING. OK.

[The information follows:]

July 18, 1989

**PRODUCTION DATA  
TRI-COUNTY GROWERS  
WEST VIRGINIA  
1978-1989**

Following is a summary of the decline in apple production in the tri-county area of West Virginia (Jefferson, Berkeley and Morgan counties) served by the Tri-County Growers Association. Tri-County Growers is a non-profit, membership growers association which serves a number of purposes, including the recruitment and furnishing of labor to its grower members. Tri-County Growers has experienced an unprecedented amount of Legal Services Corporation-funded litigation brought against it, and its grower members, since 1980. Tri-County believes that this litigation, and the associated costs, are directly attributable to the decline in apple production and agricultural employment in the three-county area. The ten-year comparison details the economic impact of the legal costs on the area.

Production

1978	2,170,885 boxes
1988	1,096,391 boxes

Number of Growers

1978	36
1988	22
1989	18 (projected)

Gross Wages Paid to Farmworkers

1978	\$694,683
1988	\$493,375

Number of Farmworkers

1978	585
1988	442

Litigation and Related Costs

Legal fees:	1978	\$3,550
	1988	\$39,154
	1989	\$67,714 (to date)

Total amount paid in legal fees since 1978: \$405,627

Total amount paid in settlement costs since 1978: \$863,385

Nine major federal cases filed during 1978-1988 period; three yet to settle, two of which are major class action cases.

Mr. STAGGERS. Mr. James.

Mr. JAMES. Don't you think your problem is with the Migratory Workers Act it receives at \$500 a throw?

Mr. ECKEL. Yes, sir. I have testified before the subcommittee for the need for change in that. I think that is part of the problem.

Mr. JAMES. It is compounded, thought, if you have shotgun suits filed. Even though you aren't, what you are saying is we can't pay our attorneys and the technical fines. To hit us with 14 violations, it is enough to put us out of business so we better get out of business before we slip up and we have migratory workers say we are not giving proper housing.

One guy was sued under that act in my area. It was contended he was giving him inadequate housing. His contention was, look, he asked him to withhold moneys from his paycheck and send it to the owner of the house.

There was no attempt to communicate with this man or these group of men until the suit was filed. That was their contention. Now how accurate it is, I don't know, but I have heard a lot of that from the four or five different people that were used.

It seems to me you have got these Legal Services Corporations that overlap responsibilities. You can get sued from miles away. You have got a Legal Services Corporation in one place. Yet you may get sued from another State even. Have you been sued by legal services from other places?

Mr. ECKEL. Yes, I have, Florida.

Mr. JAMES. That, to me, seems inherently wrong if you are going to create a situation of interstate suits. The reason for it is specialization, I suppose, would be an argument or following the migratory worker or what? There must be some kind of reason.

It seems to me the purpose of it is—maybe we ought to have another reform. We only have a certain amount of resources and are very limited at that.

I would like to see them concentrated not on interstate law suits or intercounty law suits, but I would like to see it concentrated on helping the poor people as much as possible as opposed to that type of conduct.

Thank you so much for testifying.

You, all of you, all of the witnesses, it was valuable information. It certainly gave me more insight into a problem that I still don't thoroughly understand and I don't know the solution yet. But I hope that we look at it to maximize our Federal knowledge, the purpose of helping the poor and at the same time not annihilate or eliminate a class action tool that is beneficial in many instances, but hopefully not to drive our farmers out of business.

Thank you very much.

Mr. STAGGERS. If there are no further questions, this hearing is concluded.

[Whereupon, at 2:30 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

## APPENDIX

---

### APPENDIX 1.—PREPARED STATEMENT OF THE NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS

The National Council of Agricultural Employers (NCAE) appreciates this opportunity to comment on the concerns agricultural employers have with the current structure of the Legal Services Corporation (LSC) and to urge passage of Representative Combest's reauthorization bill and the reforms embodied in H.R. 2884. NCAE commends the Subcommittee for holding this hearing and considering these long overdue reforms.

NCAE is an association of growers, cooperatives and others involved in labor-intensive agriculture. Our members hire approximately 75 percent of the U.S. farm work force. NCAE and its members agree with the premise that every U.S. citizen, regardless of economic status, should have reasonable access to competent legal representation. We believe, however, that LSC-funded recipients are acting far beyond the boundaries of original Congressional intent, and far beyond their accountability to American taxpayers who are footing the bill.

The LSC was created by Congress to provide legal assistance to individuals unable to afford legal counsel. In practice, LSC attorneys have been involved in the following activities against agricultural employers, specific examples of which are mentioned in the American Farm Bureau Federation's testimony delivered to your Subcommittee today:

## Page 2 - NCAE Comments

● Initiation of frivolous, costly litigation and the abandonment of any attempts to resolve farmworker problems through administrative means including such techniques as pre-trial negotiation, mediation and arbitration, and Department of Labor (DOL) administrative complaint procedures. Increasingly, agricultural employers must choose between extortionate legal services settlement proposals or staggeringly expensive legal defense costs in situations where a claim might be quickly adjudicated by DOL. LSC-funded attorneys have used these extorted "settlements" to "prove" that agricultural employers are villains and that the LSC programs are needed.

● LSC-funded attorneys have inappropriately solicited farmworker clients, and, in fact, have enticed farmworkers to leave their jobs.

● Involvement of LSC-funded attorneys in labor disputes, strikes, and union-organizing activities.

● Involvement of LSC-funded attorneys in the direct lobbying of Members of Congress under the guise of adjunct Congressional staff.

Since the Legal Services Corporation Act was passed by Congress more than a decade ago, NCAE has consistently expressed concern about the prohibited activities in which LSC-funded programs have engaged. Increasingly, the Corporation's grantees are involved in unethical and harassing litigation which can only

Page 3 - NCAE Comments

be aimed at forcing large number of growers out of business. NCAE fails to understand how this objective will benefit farmworkers.

The reforms outlined in H.R. 2884 are desperately needed in order to bring accountability to the system. Towards this end, replacing the current LSC with a Legal Services Administration under the Office of Justice Programs within the Department of Justice is of primary importance. An Administrator would be appointed by the President and confirmed by the Senate would be responsible for carrying out the authorities of the Legal Services Administration. The activities of the various grantee organizations would be held accountable to the objectives and goals set out for them, thereby removing the social agenda presently followed by several grantee organizations. Under the present system there is no meaningful monitoring and/or evaluation process to review the effectiveness of the programs operated by the grantee agencies.

Of particular concern to agricultural employers would be the provision barring Legal Services from pursuing a complaint, litigation, or settlement involving an agricultural concern unless all administrative remedies and alternative dispute resolution mechanisms have been exhausted; the plaintiff has been specifically identified by name in any complaint filed; and, an affidavit enumerating all of the facts on which the claim is based is attached to the complaint. Taking someone to court or threatening them with court action should be a last resort, not the first as currently practiced by some grantee organizations. The process of

Page 4 - NCAE Comments

first exhausting administrative remedies and alternative dispute resolution mechanisms will help to prove or disprove a claim prior to the involvement of an LSC grantee organization thus saving large amounts of money for the organization as well as the person and/or company to whom the complaint was filed if the complaint proves false.

Requiring class action suits to be approved by the Legal Services program's board of directors prior to filing will insure that a legitimate claim is being filed and that the named plaintiffs are in fact a party of interest in the proposed suit. Agricultural employers in the past have had some suits filed on behalf of dead plaintiffs as well as plaintiffs that have stated that they did not even know they were a party to a suit.

In short, these and other reforms embodied in H.R. 2884 will insure that Legal Services will be following Congressional intent by providing day-to-day services to poor individuals, not fulfilling their own agenda by engaging in redistricting, union organizing, lobbying or political change through harassing litigation. As stated earlier, the Subcommittee is to be commended for beginning work on this reform package. NCAE is eager to work with the Subcommittee in ensuring that meaningful reforms are instituted and implemented.

APPENDIX 2.—LETTER TO HON. BARNEY FRANK FROM PAUL B. EAGLIN, DATED AUGUST 11, 1989, and Letter to Terrance J. Wear From Paul B. Eaglin, Dated August 11, 1989



**LEGAL SERVICES CORPORATION**  
400 Virginia Ave., S.W., Washington, D.C. 20024-2751

AUG 14 1989

Terrance J. Wear  
President

Wear's Direct Telephone 919/ 395-3855

UNCW Chancellor's Office  
601 South College Road  
Wilmington N. C. 28403-3297

August 11, 1989

The Honorable Barney Frank  
U. S. House of Representatives  
1030 Longworth House Office Building  
Washington D. C. 20515-2104

Dear Congressman Frank:

I am writing to alert your office to continued waste of LSC funds.

I am enclosing a copy of a memorandum prepared for LSC President Wear by Charles Cooper of the McGuire Woods law firm. In addition, I am enclosing my letter objecting to the conclusion of the memo and to Mr. Wear's apparent plans to approach the Executive Branch on behalf of his prospects for nominees to the LSC board.

I plead with you to use the influence of your office, and your oversight authority, to halt this activity. I am too often defeated in board votes to have any realistic hope of stopping this from my position on the board.

I appreciate your strong support for legal services; it is a source of strength for the minority members of the board. I hope that you can be of assistance now to stanch the drain of funds to support the personal political agenda of President Wear and a minority of the board members. In essence, LSC funds have become a PAC for a few board members to utilize on behalf of favored candidates. Please help.

Sincerely,

Paul B. Eaglin

BOARD OF DIRECTORS — William Clark Dewart III, Chairman, Detroit, Michigan

Helenette Bernstein  
El Paso, Texas

LuAnne Swartz  
Baltimore, Maryland

Paul Riglin  
Fayetteville, North Carolina

Pete J. Meador  
Durham, Colorado

Thomas F. Sengul  
Pasadena, California

Charles Callaway Swafford  
South Pittsburg, Tennessee

Beale Joseph Mills  
New Orleans, Louisiana

Robert A. White  
Raleigh, North Carolina

Linda Miller  
Detroit, Michigan

Michael B. Watson  
Jackson, Mississippi



**LEGAL SERVICES CORPORATION**  
400 Virginia Ave., S.W., Washington, D.C. 20024-2751

**Terrance J. Wear**  
President

Wear's Direct Telephone  
(919) 395-3855

August 11, 1989

Mr. Terrance J. Wear  
President  
Legal Services Corporation  
400 Virginia Avenue, S.W.  
Washington D. C. 20024-2751

RE: McGUIRE WOODS

Dear Mr. Wear:

I have received the memorandum that Mr. Cooper provided to you concerning the anti-lobbying concerns that you expressed to him. I am writing to express once again my view that corporation funds should cease to be poured down the "rat-hole" to the McGuire Woods law firm.

You seem to have lost sight of your function as president of this corporation, if indeed you have ever had any insight as to your role. You don't need a legal memorandum from ANY law firm to determine the purpose for which Congress appropriated funds to LSC. We are to serve the legal needs of indigent persons who qualify under the Act. To lobby the Executive Branch on behalf of prospects whom YOU support for membership on the Board of LSC is to convert/to steal LSC funds for your personal use, for you are not paid to engage in such activity. Those individuals who seek board membership, and whom you support, can advocate on their own behalf, but should not have the support of LSC funds via your salaried position, or Mr. Wootten's position, or anyone else who is paid by this corporation.

Common sense should tell you that such lobbying is wrong. You don't need memoranda replete with footnotes and case citations from Mr. Cooper. You cannot possibly claim that you're acting on behalf of the corporation, for the board -- and thus the corporation -- has not resolved as a matter of policy to support any prospects. You're acting on your own, outside the bounds of your authority, to serve not poor persons but individuals whom you favor, and who apparently have no greater sense of their ethical responsibility than you do.

**BOARD OF DIRECTORS -- William Clark Street II, Chairman, Detroit, Michigan**

**Marcelo Bonavita**  
El Paso, Texas

**Luciano Bonavita**  
Baltimore, Maryland

**Paul Bogle**  
Fayetteville, North Carolina

**Pope J. Mendez**  
Dallas, Oklahoma

**Louis Miller**  
Detroit, Michigan

**Thomas F. Seegal**  
Pasadena, California

**Charles Calhoun Swafford**  
South Pasadena, Tennessee

**Beale Joseph Utile**  
New Orleans, Louisiana

**Robert A. White**  
Raleigh, North Carolina

**Michael B. Williams**  
Jackson, Mississippi

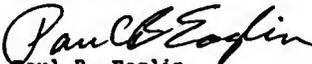
Mr. Terrance J. Wear  
August 11, 1989  
Page 2

As I said in my July 7, 1989 letter to you, Mr. Shea and Mr. Wallace, this misuse - this theft - of corporation funds must stop! I raised other questions in that letter that still await response. I expect to receive answers without delay. In the interval since I sent that letter, you've responded to Mr. Smegal's request for the anti-lobbying memorandum; you've provided documents about the national park service, of all things. It's time that you responded to my letter that asks about the conduct of this relationship with Mr. Cooper's firm.

Mr. Cooper's memorandum mentions at the outset your April 27, 1989 memorandum to him which set this latest project in motion. I want (a) copy of that memorandum in addition to answers to my July 7, 1989 letter, (b) detailed report of expenditures of LSC funds to engage in the lobbying activity that was validated by the memorandum opinion, particularly the lobbying activity of Mr. Wootten, (c) listing of all entities with which LSC personnel have "networked" pursuant to lobbying activity.

Finally, I will remind you that you have no basis for claiming attorney-client privilege with respect to items from the law firm, for the corporation has no legitimate client relationship with Mr. Cooper, whose efforts serve your purpose, not the corporation's. I repudiate any claim on your part that attorney-client privilege obtains with respect to this memo or other items relating to this wrongdoing.

Sincerely,

  
Paul B. Eaglin

pc: Board members

**McGUIRE WOODS  
BATTLE & BOOTHE**  
THE ARMY AND NAVY CLUB BUILDING  
1417 EYE STREET, N.W.  
WASHINGTON, D.C. 20004

**MEMORANDUM FOR TERRY WEAR  
PRESIDENT, LEGAL SERVICES CORPORATION**

**RE: ANTI-LOBBYING RESTRICTIONS ON THE CORPORATION**

By memorandum of April 27, 1989, you requested our views on a series of specific legal issues relating to the following question: "Whether the Legal Services Corporation may contact third parties and ask these third parties to contact the President and members of the White House staff and urge them to nominate certain candidates to the Board of Directors of the Legal Services Corporation." Noting that certain officers and employees of the Corporation may have already contacted third parties on the question of presidential nominations to the Board, you state that the Corporation has viewed such contacts as consistent with relevant anti-lobbying provisions because the contacts relate to the executive branch rather than the legislative branch of the federal government.

We have examined the legal materials that you provided with your April 27 memorandum. We have also independently researched the legal issues you pose, although the time constraints set forth in your request have precluded an exhaustive review. Based upon the materials that we have been able to study to date, our responses to the specific issues posed in your memorandum are as follows:

1. Is the described activity -- requesting third parties to urge the President and members of his staff to nominate certain candidates to the LSC Board of Directors -- "grass-roots" lobbying?

Lobbying -- attempting to influence a decisionmaker, usually a government decisionmaker -- can be either "direct" or "indirect." "Direct" lobbying is "lobbying in its commonly accepted sense" (United States v. Harriss, 347 U.S. 612, 620 (1954)) -- that is, direct communication with the decisionmaker (or members of the decisionmaking body) designed to influence the decision. "Grass-roots" lobbying is a term of art used to describe "indirect" lobbying -- that is, contacting persons other than the decisionmaker (i.e., so-called "third parties," such as special interest groups or the general public) and urging them to communicate expressions of support or opposition for a particular proposal directly to the decisionmaker.

Congress also uses the phrase "publicity or propaganda" to refer to indirect lobbying. Congressional prohibitions on the use of federal funds for "publicity or

propaganda" purposes are often found in riders to appropriations bills.<sup>4</sup> The Comptroller General has uniformly construed provisions prohibiting publicity or propaganda designed to influence legislation as pertaining only to grass-roots lobbying. As a recent Comptroller General opinion put it (B-208593, April 2, 1987):

The Comptroller General has construed this kind of lobbying statute as applying to indirect or "grass-roots" lobbying. In other words, the statute prohibits appeals to members of the public suggesting that they, in turn, contact their elected representatives to indicate support of, or opposition to, pending legislation, thereby expressly or implicitly urging the legislators to vote in a particular manner.

See also B-164105, 56 Comp. Gen. 889, 890-891 (1977).

Appeals to members of the public to "let the Congress know how they feel" on a certain issue or to "contact your representatives and make sure they are aware of your feelings" concerning certain legislation are considered violations of the publicity or propaganda prohibition when the context of the appeal makes clear what views the public is being urged to communicate to their legislators. B-178648, September 21, 1973; B-128938, July 12, 1976; General Accounting Office, Principles of Federal Appropriations Law 3-136 - 3-137 ("GAO Manual"). An appeal to the public to contact members of Congress in regard to a particular issue is not legitimized by including a disclaimer that the appeal is made "regardless of whether those who contact their Congressmen happen to be in agreement with me." B-178648, September 21, 1973.

On the other hand, the Comptroller General has not interpreted such "publicity or propaganda" provisions to prohibit the use of appropriated funds for all communication to the public concerning legislation. In construing these riders, the Comptroller General has recognized: "[E]very agency has a legitimate interest in communicating with the public and with the Congress regarding its function, policies,

---

<sup>4</sup>Publicity or propaganda riders date back at least to the early 1950s. See, e.g., § 702, Labor-Federal Security Appropriation Act, 1952, Public Law 134, 82d Cong., 65 Stat. 223 (1951). The sparse legislative history available on this provision indicates that it was intended by its sponsor "to prevent as far as possible the spending of unreasonable amounts for propaganda and publicity purposes." 97 Cong. Rec. 4098 (1951) (remarks of Representative Smith of Wisconsin). The section's sponsor also expressed the belief, not entirely justified by experience, that "[W]e can well distinguish between what is propaganda and what is educational matter." Id.

and activities." GAO Manual at 3-133. In decision B-178528, July 27, 1973, the Comptroller General noted: "The President, his Cabinet, and other high officials have a duty to inform the public on government policies and, traditionally, high-ranking officials have utilized government resources to disseminate information in explanation and defense of those policies." See also B-164105, 56 Comp. Gen. 889, 890 (1977). Nor do the publicity or propaganda riders impose any requirement of neutrality or balance in the presentation of the views of the federally funded entity. The Comptroller General has recognized that whenever an agency's policies or activities are affected by pending or proposed legislation, "discussion by officials of that policy or activity will necessarily, either explicitly or by implication, refer to such legislation and will presumably be either in support of or opposition to it." B-164105, 56 Comp. Gen. 889-890 (1977). Accordingly, communications setting forth the funded entities position on legislation are permissible, even if their natural consequence is to increase the support for this position. The Office of Legal Counsel of the Department of Justice has accepted the Comptroller General's construction of appropriations riders prohibiting publicity or propaganda activities.

As the Government Accounting Office notes "the term 'lobbying' can . . . refer to attempts to influence decision-makers other than legislators." It thus appears that the activity described in your memorandum does indeed constitute "grass-roots" lobbying within the meaning of federal anti-lobbying provisions. The vast bulk of such provisions, however, pertain exclusively to lobbying of legislators. Accordingly, each provision limiting the lobbying activities of federally funded entities must be examined individually to determine the scope of its coverage.

2. Is the Corporation's lobbying activity prohibited by the Legal Services Corporation Act ("LSCA"), particularly 42 U.S.C. § 2996e(c)(2), or by the provisions of the Internal Revenue Code relating to tax-exempt organizations?

Section 2996e(c)(2) provides as follows:

The Corporation shall not itself --

\* \* \* \*

(2) undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative bodies, except that personnel of the Corporation may testify or make other appropriate communication (A) when formally requested to do so by a legislative body, a committee, or a member thereof or, (B) in connection with legislation or appropriations directly affecting the activities of the Corporation.

On its face, this section is inapplicable to the lobbying efforts focused on the White House. By its terms, Section 2996e(c)(2) prohibits only grass-roots lobbying by the Corporation for the purpose of influencing the "passage or defeat of any legislation by the Congress of the United States or by any state or local legislative bodies . . . ." (Emphasis added.)<sup>3</sup> Grass-roots lobbying activity directed at the White House and designed to influence presidential decisions regarding nominations to the LSC Board simply does not fall within the language of Section 2996e(c)(2) prohibiting the lobbying of legislators. It is clear from other provisions of the LSCA that Congress' decision not to include the Executive Branch of the federal government within Section 2996e(c)(2)'s prohibition was conscious and intentional. In Section 2996f(a)(5) Congress expressly prohibited recipients of LSC grants or contracts from engaging in Executive Branch lobbying. That section provides:

(a) Requisites. With respect to grants or contracts in connection with the provision of legal assistance to eligible clients under this title, the Corporation shall --

\* \* \* \*

(5) insure that no funds made available to recipients by the Corporation shall be used at any time, directly or indirectly, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State, or local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies, or State proposals by initiative, petition . . . .

42 U.S.C. § 2996f(a)(5) (emphasis added). The legislative history of the LSCA confirms that the prohibition against Executive Branch lobbying extends only to

---

<sup>3</sup>The formal request and self-interest exceptions to the ban on lobbying legislators permit only direct, not grass roots, lobbying activity. See 60 Comp. Gen. 423, 428 (1981). Additionally, the Comptroller General has interpreted the term "personnel of the Corporation" in Section 2996e(c)(2) to extend only to members of the Corporation's Board of Directors, its officers, and its employees, but not to entities such as law firms, retained on a fee for service basis. B-231210, June 7, 1988.

recipients of LSC grants and contracts, not to the Corporation itself.<sup>37</sup>

You have also asked that we consider the possible application of the Internal Revenue Code (the "Code") to the political activities of Section 501(c)(3) organizations. Section 501(c)(3) exempts from taxation corporations organized and operated for charitable purposes. In addition to being organized and operated for charitable purposes, a corporation exempt from tax under Section 501(c)(3) must comply with two specific restrictions on its activities. The first restriction is that "no substantial part of the activities of [the corporation] is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h))."<sup>38</sup> The second restriction is that the corporation "does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

The question presented by LSC's third-party contacts is thus initially whether such contacts violate the two restrictions on Section 501(c)(3) organizations specifically contained in Section 501(c)(3) -- the "to influence legislation" restriction and the "participation in . . . any political campaign" restriction.

The Treasury regulations promulgated under Section 501(c)(3) state that an organization will be regarded as "attempting to influence legislation" if it "(a) contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) Advocates the adoption or rejection of legislation." *Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)*. The term "legislation," according to this Treasury regulation, includes action "by the Congress, by any State legislation, by any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure." *Id.*

---

<sup>37</sup>The bill initially passed by the House provided that "neither the corporation nor any recipient shall make funds or personnel available for advocating or opposing any legislative proposals, ballot measures, initiatives, referendums, executive orders or similar enactments or promulgations . . ." (Emphasis added.) H.R. Rep. No. 93-247, 93d Cong., 1st Sess. 8 (1973). The House Report notes that the section was intended "to limit legislative and administrative advocacy . . ." *Id.* The parallel provision in the Senate-passed bill did not apply to executive orders. *See Conf. Rep. No. 93-845, 93d Cong., 2d Sess. 24 (1974)*. The version that ultimately passed retained the House bill's prohibition on Executive Branch lobbying (*Id.* at 25), but limited that prohibition to recipients only.

<sup>38</sup>Subsection (h) of § 501 provides for certain lobbying ceiling amounts and grass-roots expenditures ceiling amounts, the expenditures of amounts in excess of which will result in the denial of a § 501 tax exemption.

Both the statutory language used in Section 501(c)(3) and the definition of "legislation" contained in the applicable Treasury regulation make clear that Section 501(c)(3) prohibits only lobbying activities having to do with legislation and the Legislative Branch of government. It does not appear that Section 501(c)(3) restricts contacts with the Executive Branch concerning matters that are not "legislation." As Professor Hopkins has written: "Legislation" does not include action by the executive branch, such as the promulgation of rules and regulations, nor does it include action by the independent regulatory agencies." B. Hopkins, The Law of Tax-Exempt Organizations §13.2 (Sch ed. 1987).

It should be noted that the Internal Revenue Service has taken the position, both privately (Gen. Counsel Mem. 39, 694 January 22, 1988) and publicly (Notice 88-76, I.R.B. 1966-27, 34), that attempts to influence the Senate's confirmation of a federal judicial nominee constitute carrying on propaganda or otherwise attempting to influence legislation within the meaning of Section 501(c)(3). The Service's position is based on its determination that Senate confirmation of a federal judicial candidate is "legislation."<sup>4</sup> In concluding that attempting to persuade the President to appoint certain individuals to the LSC Board of Directors is not proscribed by the restrictions contained in Section 501(c)(3), we assume that such activities do not, and are not intended to, influence the Senate confirmation of such Board members.

The second restriction contained in Section 501(c)(3) and applicable to charitable corporations is the restriction on "participation in . . . any political campaign." The applicable Treasury regulation provides that a Section 501(c)(3) organization violates the political campaign restriction if "it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office." Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). The applicable regulation further provides that the term "candidate for public office" means "an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local." Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (emphasis added).

Thus, it appears quite clear under the applicable Treasury regulations that the Section 501(c)(3)'s prohibition of political activity is limited to support of or

---

<sup>4</sup>The Service formulated this position, at least in part, in response to an article published in a national tax publication that took the position that activities of a section 501(c)(3) organization designed to influence judicial confirmations are not prohibited. Harmon and Ferster, Attempts To Influence Judicial Confirmations Are Not Lobbying, 36 Tax Notes 1013 (Sept. 7, 1987).

opposition to a candidate for elective public office. Activities with respect to appointed offices are not activities prohibited by Section 501(c)(3). The Internal Revenue Service is in accord with this analysis. (See Gen. Counsel Mem. 39, 694, (January 22, 1988).)"

3. Is a nomination pending before a Senate Committee "legislation" within the meaning of Section 2996e(c)(2)?

---

"We also note that under § 527(f) of the Code, if an organization exempt from tax as a § 501(c) organization expends any amount for an "exempt function" (as that term is defined) then the lesser of the net investment income (interest, dividends, rent, and other gains minus deductions) of the organization or the amount expended for an exempt function will be subject to tax. The term "exempt function" is defined in part as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, State or local public office whether or not such individual . . . [is] selected, nominated, elected, or appointed." Section 527(e)(2).

While the activities prohibited under § 501(c)(3) relate only to legislative lobbying, the expenditures subject to tax under § 527 are expenditures made to influence the holder of any federal public office, whether that office is filled by selection, nomination, appointment, or election. The Treasury regulations under § 527, provide that "public office" must be distinguished from "mere public employment." Treas. Reg. § 53.4946-1(g)(2)(i). Under the regulations, these two terms are distinguished by determining "whether a significant part of the activities of a public employee is the independent performance of policy making functions." Treas. Reg. § 53.4946-1(g)(2)(i). The applicable regulations also provide that in determining whether a particular position in the executive, legislative, or judicial branch of government is a public office, consideration should be given to whether the office was created by Congress or by a governmental body pursuant to authority conferred by Congress.

It appears that § 527 is applicable to the selection process of LSC Board members. Membership on the Board is clearly not "mere public employment" since a significant part of a Board member's activities are the "independent performance of policy making." Additionally, membership on the Board is an office created by Congress. Thus, third-party contacts could be characterized as attempts to influence the selection, nomination, or appointment of an individual to a federal public office. Accordingly, it appears that third party contacts by the Corporation designed to influence the President's nomination of individuals to the LSC Board would subject the Corporation to tax under § 527 of the Code.

As your April 27 memorandum notes, the Corporation has promulgated regulations under 42 U.S.C. § 2996f(a)(5) defining "legislation" to include unicameral decisions such as Senate ratification of treaties and Senate confirmation of presidential appointments. See 45 CFR § 1612.1(f). As previously mentioned, the Internal Revenue Service has taken a similar view with respect to the term "legislation" in Section 501(c)(3). In contrast, the Department of Justice has long taken the view that unicameral action, specifically Senate ratification of treaties, is not encompassed within the term "legislation" as that term is used in the Anti-Lobbying Act, 18 U.S.C. § 1913,<sup>3</sup> and in typical appropriations riders prohibiting the use of appropriated funds for "publicity or propaganda" designed to influence members of Congress regarding pending legislation. More recently, the Office of Legal Counsel of the Department of Justice has concluded that Senate confirmation of presidential appointees is not within congressional prohibitions on the use of appropriated funds for the purpose of influencing Congress on legislation.

While we believe that the Department of Justice has the better of the argument, the important point is that the issue of presidential nominations plainly does not become "legislative" in nature until the nomination is made by the President and is pending before the Senate. Prior to that time, the question is who will be nominated, and that decision lies exclusively with the President. Accordingly, grass-roots lobbying designed to influence the President's nominations to the Board is simply

---

<sup>3</sup>The Anti-Lobbying Act, 18 U.S.C. § 1913, provides as follows:

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

not within federal prohibitions against legislative lobbying.

4. Is the described activity "publicity or propaganda" within the meaning of Section 601 of Public Law 100-459?

Section 601 of Public Law 100-459 provides as follows: "No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress." 102 Stat. 2222. This provision, often called the "anti-puffery" statute, has become commonplace in appropriations bills. The Comptroller General has consistently interpreted appropriations riders prohibiting "publicity or propaganda . . . not authorized by Congress" as prohibiting agency "self-aggrandizement" or "puffery" -- that is, "publicity of a nature intending to emphasize the importance of the agency or activity in question." B-1061139, 31 Comp. Gen. 311, 313 (1952). The prohibition does not apply to "dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws" for which an agency is responsible. *Id.* at 314. The provision thus does not prohibit an agency's legitimate informational activities, such as reports on agency activities, justification of agency policies to the public, and rebuttals to attacks on agency policies. See GAO Manual at 3-148 thru 3-150 for examples of prohibited "publicity and propaganda." As we understand the facts, none of the Corporation's third-party contacts have involved "publicity of a nature tending to emphasize the importance of the agency or activity in question."

The Comptroller General has also applied the prohibition on "publicity or propaganda . . . not authorized by Congress" to so-called "covert propaganda activities." The application of such publicity or propaganda riders to covert propaganda activities apparently originated in an opinion in October 1986 regarding the Small Business Administration ("SBA"). At that time, the Reagan Administration was proposing to transfer the SBA to the Department of Commerce and eliminate SBA's finance and investment programs and some management activities. SBA prepared a substantial amount of public information material explaining and generally supporting the proposed changes. These included a pamphlet entitled "The Future of SBA," suggested editorials, and suggested "letters to the editor." The Comptroller General found the bulk of the material unobjectionable, but expressed "serious difficulties with SBA's distribution of 'suggested editorials' supporting the Administration's reorganization plan." According to the Controller General, "[T]he editorials, prepared by SBA for publication as the ostensible editorial position of the recipient newspapers, are misleading as to their origin and reasonably constitute 'propaganda' within the common understanding of that term." B-223098 (October 10, 1986). The Comptroller General concluded: "[T]he SBA 'suggested editorials' are beyond the range of acceptable agency public information activities and, accordingly, violate the 'publicity and propaganda' prohibition of section 601." *Id.*

More recently, the Comptroller General addressed whether certain activities of the State Department's Office of Public Diplomacy violated a provision in the agency's appropriation act prohibiting "publicity or propaganda . . . not authorized by Congress." The Office of Public Diplomacy had "arranged for the publication of articles which purportedly had been prepared by, and reflected the views of, persons not associated with the government but which, in fact, had been prepared at the request of government officials and partially or wholly paid for with government funds." B-229069 (September 30, 1987). These activities, according to the Comptroller General, went "beyond the range of acceptable agency public information activities because the article was prepared in whole or part by [Office of Public Diplomacy] staff as the ostensible position of persons not associated with the government and the media visits arranged by [the Office of Public Diplomacy] were misleading as to their origin and reasonably constituted 'propaganda' within the common understanding of that term." *Id.*

As we understand the facts here, however, the Corporation's third-party contacts have not involved the preparation of articles, editorials, and similar materials by Corporation employees for publication by and attribution to third-parties. Nor are we aware of any other activity by the Corporation that could fairly be characterized as "misleading." The Corporation's conduct in contacting third-parties, therefore, does not appear to be within the prohibition on covert propaganda activities.

In sum, Section 601 of Public Law 100-459 does not appear to proscribe the Corporation's conduct in asking third-parties to support certain candidates for nomination to the LSC Board.

5. Is Part 1612 (45 CFR § 1612.1-1612.13) of the Corporation's Regulations relevant?

As you note, Part 1612 of the Corporation's Regulations applies only to recipients of LSC funding, prohibiting them from engaging in a wide range of lobbying activities, including "grass roots" and "administrative" lobbying. Moreover, Congress has in effect suspended the applicability of Part 1612 by forbidding the Corporation from spending appropriated money to enforce the anti-lobbying provisions. Pub. Law 100-459, 102 Stat. 2226-2227. Accordingly, the provisions of Part 1612 do not restrict the activities of the Corporation or its officers and employees.

We hope that the foregoing is responsive to your requests. If we can be of further assistance, please do not hesitate to call.

Charles J. Cooper

APPENDIX 3.—LETTER TO HON. BARNEY FRANK FROM RICHARD C. HEFFERN, PRESIDENT, LEGAL AID SOCIETY OF NORTHEASTERN NEW YORK, INC., AND PHILIP T. DUNNE, TREASURER, DATED NOVEMBER 1, 1989



**LEGAL AID SOCIETY** of Northeastern New York, Inc.

55 COLUMBIA STREET ALBANY, N.Y. 12207-2791 (518) 462-6765

November 1, 1989

RICHARD C. HEFFERN  
PRESIDENT  
DENISON RAY  
EXECUTIVE DIRECTOR

SUPERVISING ATTORNEYS  
WENDE WALKER  
MARY M. WYMOND

ATTORNEYS  
JOHNE E. BARRETT  
MICHAEL J. FOSTER  
WESLAW HARRIS  
LEWIS STYLL  
BARBARA WYMER

PARALEGALS  
NANCY G. BOON  
MARTHA M. CARONIA  
DARLINE EICH  
JIMMY M. GREEN  
ALBERT JACKSON  
J.D. MATHEWS  
CATHY ROBERTS  
HELENA STRASSER

VOLUNTEER LAWYER  
COORDINATORS  
ROSEMARY KANEWIN  
CAROLYN J. MENDEZ

ACCOUNTANT  
BARBARA L. HALL

EXECUTIVE ASSISTANT  
MARY MAGUIRE

SUPPORT STAFF  
LELA BORNHAGEN  
SALLY BROWN  
BETTY FREEMAN  
CHARLES LYNDEN  
GAIL PRICE  
GREGORY ZIN  
CYNTHIA ZEPH  
LAW LIBRARIAN  
GRACIA LIU

The Hon. Barney Frank, Chairperson  
Subcommittee on Administrative Law and  
Governmental Relations  
Committee on the Judiciary  
United States House of Representatives  
Room B351-A  
Rayburn House Office Building  
Washington DC 20515

Dear Congressman Frank:

You are a member of the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, United States House of Representatives. It has just come to our attention that on July 19, 1989, Terrance J. Waar, President of the Legal Services Corporation (LSC) testified before you and cited the Legal Aid Society of Northeastern New York (LAS) as an example of the alleged waste, fraud and abuse which he claimed was to be found in the national Legal Services program. As the President and Treasurer of LAS we went to object in the strongest possible terms to the false characterizations, inaccurate conclusions and misstatements of fact made by Mr. Waar.

We are both members of the private Bar. Partners in two major law firms in Albany, respectively, we serve voluntarily on the Board of Directors of LAS as a public service. Ours is an active and involved Board and we have extensive knowledge of the operations of LAS, including the matters alluded to by Mr. Waar. Contrary to the assertions he made, the Legal Aid Society of Northeastern New York is an outstanding example of dedicated, competent staff serving the public interest and rendering excellent legal representation to thousands of low-income families gravely in need of legal help.

LAS has a distinguished record of service and its fiscal operations have consistently been found to be sound. The Final Report of LSC's 1986 monitoring visit stated on page 7 that:

"The monitor determined that LAS maintains sufficient accounting records; the authorization and approval systems are reasonably adequate; and most of the accounting transactions appeared to be adequately documented."

BRANCH OFFICE  
10-12 LAKE AVENUE  
SARATOGA SPRINGS, N.Y.  
12866  
(518) 587-5188

Serving Albany, Rensselaer, Saratoga, Schenectady, Warren and Washington Counties

The 1987 Audit, conducted by Paat Marwick & Main, one of America's most outstanding auditing firms, found that:

"As a result of our examination, we did not identify any condition that we believe to be a material weakness in internal accounting control."

Mr. Wear, typically of the arronaous natura of his testimony, asserted that our "auditor had not conducted a 1987 audit."

Our financial management system was the same in 1988 as in 1987 but our bookkaapar, who was under a graat daal of amotional strass from the aftermath of his father's death and his mother's prolonged illness, did not maintain the financial records in accordance with our system. He also authorizad the receipt by himself of several thousand dollars in overtima. He balliaved he had workad tha overtime and had earnad that monay but he failed to obtain tha naccassary approval in advance of payment. He was wrong to hava gone outside LAS policy, raadily agraad to repay the money and has baen doing so every month.

Mr. Waar's tastimony attampst to put this situation in the worst possible light at tha sacrifice of tha truth:

1. Mr. Wear makas it saam as if LSC had uncovered the problem: "LSC found ... "; "Documents retrieved during a visit ... "; "The misappropriation was detected ...". In fact, LAS informed the LSC monitoring team at the outset of its visit at a time whan tha team knew nothing of the problem.

2. Tha allagation that "tha bookkeepar took advantaga of tha program's lack of financial controls to misappropriate these funds" is simply wrong. LAS had adequate controls, as the auditors and LSC had previously found; it was not a misappropriation but a good faith, albeit impropar, payment for work the bookkaaper believad he had performad.

3. The charge that we have no fiscal records for 1989 is falsa. Saa tha facts set forth in paragraph 5.

4. We were not raquirad to report this to LSC. Wa investigatad tha matter thoroughly, learned the bookkeeper's side of the matter, which LSC nevar attampad to do, and concluded that tha incident occurrad in good faith and so was not a misappropriation. There was no loss becausa the bookkeeper agreed to repay the money and has started doing so. Hence the condition requiring that wa raport tha mattar to LSC did not apply (although, as

noted, we reported it anyway at the time of the monitoring visit). Among the evidence that this was not a misappropriation is the fact that the bookkeeper openly showed the payments to himself on the payroll register and again on his W-2 form. He made no attempt to hide the fact of payment.

5. Mr. Wear contends that LAS did not take this matter seriously and is in fiscal chaos. Nonsense. The facts belie those claims:

- The Executive Director reported the matter to the two of us immediately. The Finance Committee and the Executive Committee met about this matter on a number of occasions.
- The Executive Director's Executive Assistant was immediately assigned to the bookkeeping on an interim basis and to put the financial records in order. She did so diligently, writing checks for accounts payable, meeting payroll, setting up new vendor files (the bookkeeper had only let this lapse during 1988), entering codes from the Chart of Accounts in order to prepare the general ledger, and reorganizing the financial records.
- The Executive Assistant prepared a detailed analysis each month of money spent, income received and funds available so that we always knew our financial status and could plan accordingly.
- The Finance Committee and Board of Directors considered and adopted several new policies to strengthen the fiscal controls even further.
- We hired an accounting firm to prepare the general ledger for 1988 that the bookkeeper had let slide.
- We promptly informed our auditor of the problem and instructed the auditor to perform extra tests regarding payroll, overtime, travel advances and other possible means whereby employees could have received unauthorized funds; met with the auditor to discuss the results of those tests, all of which were negative; met again with the auditor following the 1988 audit and thoroughly discussed their recommendations; and adopted policies to comply with those recommendations.

- We involved the Administrator of our state support center in helping us to get on top of the problem. She is an experienced accountant and provided invaluable assistance.
- The Executive Director prepared, and the Finance Committee and Board adopted, as we do every year, a detailed dynamic budget based upon the very specific information concerning our financial status which, as noted above, we of course had available.
- The Executive Director kept the two of us, as the chief fiscal officers of LAS, closely informed of developments. We met and discussed matters on a number of occasions.

All of those steps had been taken by the time of the monitoring visit in June 1989. Mr. Wear knew or should have known of these developments but his testimony was calculated to lead you to believe we had ignored the situation.

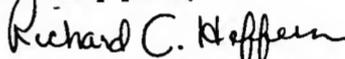
We have gone on to:

- Upgrade the bookkeeper position to that of an accountant and have hired an Accountant with a great deal of experience with not-for-profit organizations.
- Revise the Chart of Accounts to more precisely reflect the nature and source of expenditures.
- Publish a new Accounting Manual which is a model of its kind.
- Prepare a detailed cash flow projection to assure we would have the requisite funds as needed throughout the balance of the year.

We resent the spuriousness of Mr. Wear's comments. We have been on top of this situation from the onset, we seized upon the problem as an opportunity to make our fiscal management stronger than ever, and we do not appreciate LSC's misrepresentations to suit their own political motives. In fact, except for some practical suggestions made by the monitoring team, LSC has done absolutely nothing to help. Periodically LSC has written to demand additional information, some of its demands repetitive and overlapping, but it has never offered one iota of support or assistance.

If you have any questions or want more information, we would be pleased to respond. We are concerned that the Legal Aid Society of Northeastern New York not be tarnished unjustly. LAS is a Legal Services program you can be proud of, as we are, and we want to correct the false impressions left by Mr. Wear. Thank you for your consideration of this letter.

Sincerely yours,



Richard C. Heffern, President



Philip T. Dunne, Treasurer

RCH/PTD:mm

xc: Terrance Wear, President, LSC

○



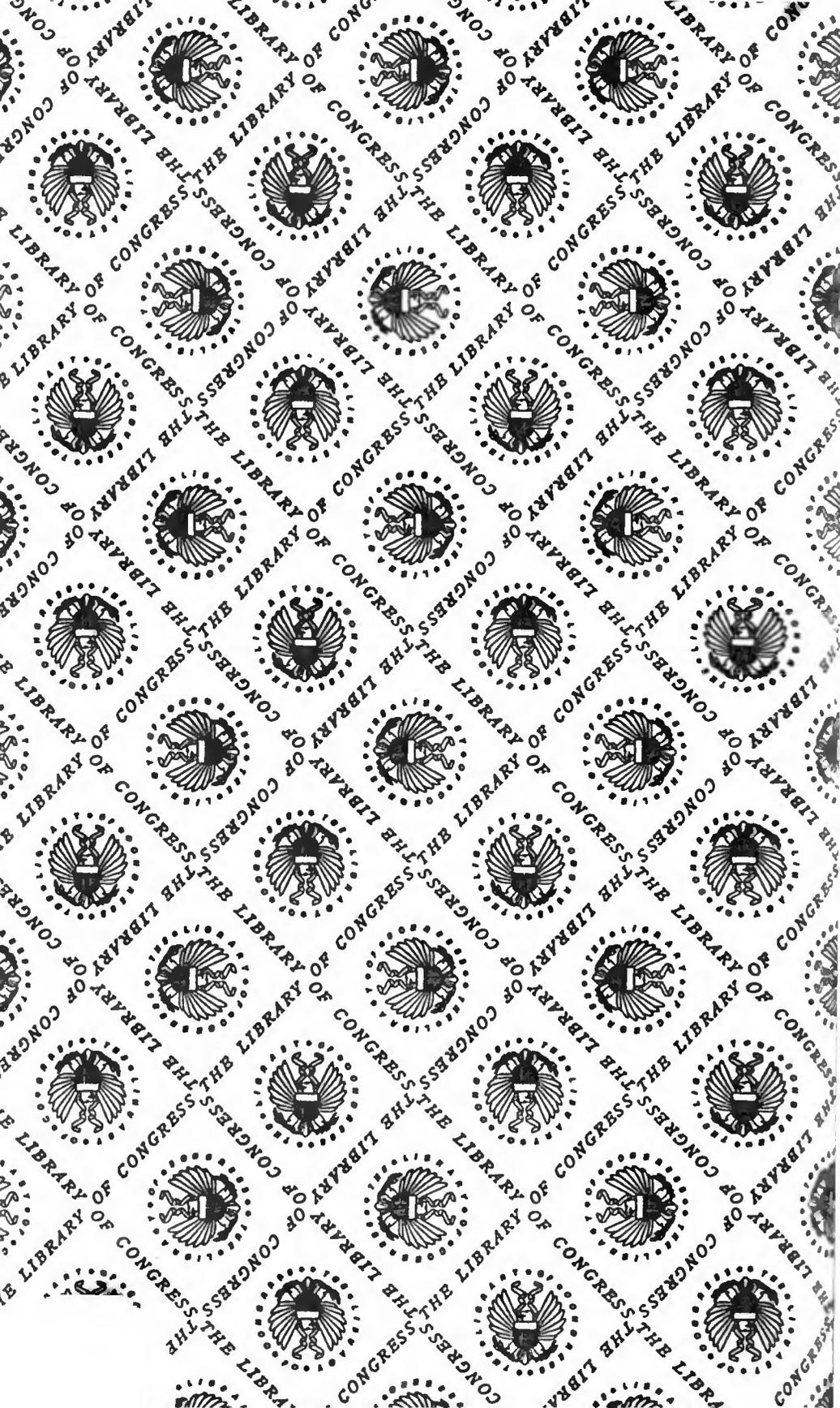
1870  
1871  
1872  
1873  
1874  
1875  
1876  
1877  
1878  
1879  
1880

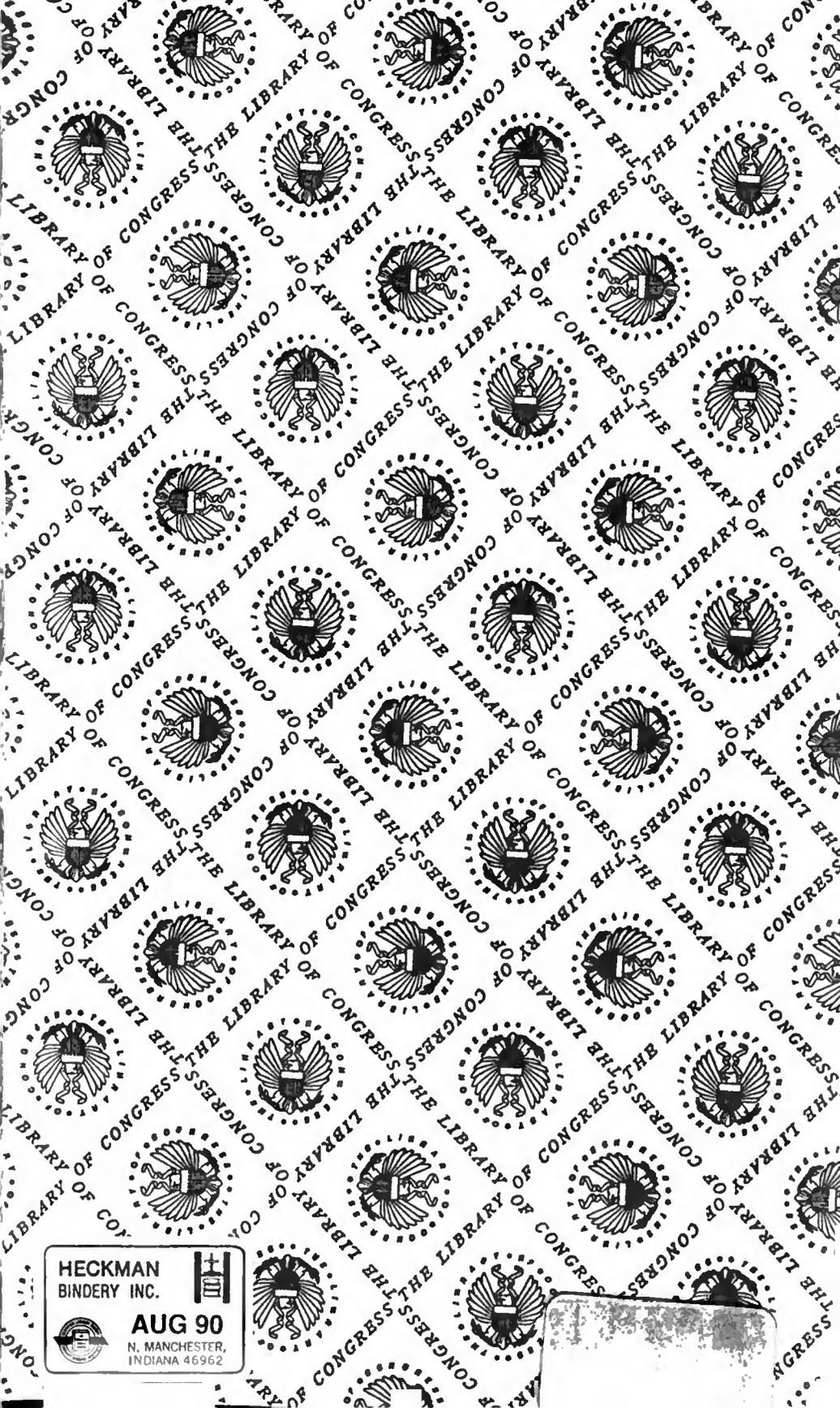


-.

317 90







HECKMAN  
BINDERY INC.



**AUG 90**

N. MANCHESTER,  
INDIANA 46962



LIBRARY OF CONGRESS



0 018 387 622 3