

## CHAPTER I

### LEGAL ASSISTANCE UNDER THE 2000 AMENDMENTS TO THE OLDER AMERICANS ACT: THE ACT, REGULATIONS AND LEGISLATIVE HISTORY

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# LEGAL ASSISTANCE UNDER THE 2000 AMENDMENTS TO THE OLDER AMERICANS ACT: THE ACT, REGULATIONS, AND LEGISLATIVE HISTORY

## A. HISTORICAL BACKGROUND

When originally enacted in 1965, the Older Americans Act did not address legal assistance. Between 1970 and 1974, however, the United States Senate Special Committee on Aging conducted hearings which provided evidence that the legal needs of the elderly were not being met. At that time, although some legal services were available to low income persons through local Legal Services Corporation (LSC) offices, few older people were receiving these services. Also, the majority of older people could not afford a private attorney and were not being served through the private bar. The problem was compounded by the scarcity of attorneys (in LSC and other legal aid offices) who had substantial knowledge of older persons' legal rights or experience in protecting those rights. It was concluded that advocacy in the form of specialized legal services had to be developed to help older persons (individually or as part of a class) enforce their rights. Congress responded to this need in 1975 when it incorporated legal assistance (then known as "legal services") into the Act.

In 1975, the Administration on Aging used \$1.2 million of its section 308 Model Project funds to support law-related projects to assist in development of legal assistance programs for the elderly and substantive materials for use in training attorneys. From that beginning, the importance of legal assistance received increasing recognition. Over the years, state and area agencies have demonstrated growing support for legal assistance and increased recognition of the important role played by legal assistance providers as advocates for older persons. Under the Older Americans Act, this recognition has taken the form of specifying legal assistance since 1978 as one of three priority categories of services under Title IIIB; expanding Title IV to include training and national support on legal rights of the elderly; and requiring that each state unit on aging assign sufficient personnel to provide leadership in developing legal assistance programs for older individuals throughout the state.

A brief history and explanation of the Act are discussed below.

The Older Americans Act (42 U.S.C.A. § 3001 *et seq.*) was enacted in 1965. Since that date, it has been amended thirteen times. The Act is Congress' primary vehicle for providing services and funds for meeting the needs of older persons.

Title I of the Act declares its objectives. The Act expressly aims to improve the lives and well being of older persons with respect to income; housing; restorative services; health; employment; retirement; civic, cultural and recreational activities; community services, aging research, and so forth. Title II

is the legislative basis for creation of the Administration on Aging (AoA) and sets forth the duties and functions of the Assistant Secretary for Aging and of AoA. Title III authorizes development and funding of supportive services (Part B), nutrition services (Part C), disease prevention and health promotion services (Part D), and family caregiver support services (Part E) through grants to the states which, in turn, allocate funds to area agencies on aging. Title IV provides funding for training, research and demonstration projects in the field of aging. Title V provides for the development of community service employment programs for low-income persons 55 years of age and older. Title VI provides grants for supportive and nutrition services for Native Americans. Title VII, newly created by the 1992 Amendments, authorizes funding for States to carry out vulnerable elder rights protection activities.

### **The 1967, 1969, 1972, 1973, 1974, 1975, 1977, 1978 and 1981 Amendments**

A history of the amendments made to the Act between 1965 and 1981 can be found at pages 3 through 5 of the 1984 Report of the Senate Committee on Labor and Human Resources, S. REP. No. 467, 98th Cong., 2d Sess.:

*"The Act was first enacted in the 89th Congress and has been amended nine times, in 1967, 1969, 1972, 1973, 1974, 1975, 1977, 1978 and 1981. The original Act established AoA as the Federal-level agency responsible for the administration of programs under the Act and authorized State and community social services programs and research, demonstration, and training projects. Provisions of the original legislation were extended by the amendments of 1967. The 1969 amendments strengthened the title III community service programs and charged State agencies on aging with statewide responsibilities for planning, coordination, and evaluation of programs for older persons. These amendments also added a program of area-wide model projects to test new approaches in meeting the social service needs of older persons, and authorized the foster grandparent and retired senior volunteer programs which provide for part-time volunteer opportunities for older persons. (These latter programs, currently administered by ACTION, were repealed as part of the Older Americans Act in 1973 and were incorporated into the Domestic Volunteer Service Act of 1973.)*

*"Major amendments to the Act occurred in 1972 and 1973. The 1972 amendments created the national nutrition program and authorized grants to public and nonprofit sponsors for the development of congregate meal services in order to meet the nutrition and social service needs of persons 60 years or over. In addition to providing meals, Congress envisioned the program to*

*serve as an important vehicle for fostering social interaction among participants and to facilitate social service delivery.*

*"With the enactment of the 1973 amendments, the Older Americans Act was significantly revised and expanded by the creation of a nationwide network of area agencies on aging. Area agencies were given responsibility for planning and coordination of, and advocating for, programs for older persons within planning and service areas designated by State agencies on aging. Area agencies were to use their limited service funds as catalysts for garnering other service funds for older persons. The 1973 amendments also created a National Information and Resource Clearing House for the aging and the Federal Council on the Aging, and authorized grants for multipurpose senior centers and the community service employment program for older persons.*

*"The 1974 amendments primarily extended authority for the nutrition program for the elderly, and the 1975 amendments extended authority for the other components under the Act including the State and area agency and the community service employment programs. The 1975 amendments also established certain services as priority services under the title III program--transportation, in-home services, legal services, and residential repair services. The amendments in 1977 made minor adjustments in the Act, including extending authorization for donated commodities assistance by the U.S. Department of Agriculture.*

*"Amendments made in 1978 further strengthened and expanded Title III of the Act by consolidating the social services, multipurpose senior center, and nutrition services portions of the Act (previously authorized under separate titles and under separate administrative authorities) in an expanded Title III. These amendments modified the requirement for priority services by requiring that 50 percent of each area agency's allotment be expended on access, in-home, and legal services. In addition, a separate authorization for home-delivered meals under Title III was made. The previous requirement that State and area agencies develop annual plans on aging was altered to allow for a 3-year planning cycle. These amendments also required each state agency to develop a statewide nursing home ombudsman program and added a new Title VI to the Act authorizing grants for social and nutrition services to Indian tribal organizations. The community service employment program was amended to raise the income eligibility requirement for participants from the poverty*

*level to 125 percent of the poverty level and to increase the proportion of funding to States under the program.*

*"The 1981 amendments provided for a 3-year extension for the Act and made certain modifications designed to give State and area agencies more flexibility in administering the title III program. These amendments included modifying State and area planning requirements to allow for plan development on a 2-, 3-, or 4-year basis, to replace prior law requirements for a 3-year planning cycle; modifying the priority service requirement by requiring each area agency to spend an "adequate proportion" of funds on priority services to replace the prior law requirement for a fixed percentage of funds; and allowing a State to transfer up to 20 percent of the separate allotments for supportive and nutrition services between such allotments. Other amendments included placing a fixed authorization level on the U.S. Department of Agriculture commodity program which supplements title III funds for nutrition services. Under title IV, authorizations for certain training, research, and demonstration activities were consolidated. Other amendments emphasized the transition of title V participants to private sector employment under the community service employment program, and eliminated an age definition for older Indians under the program of grants to tribal organizations. Authorization for the National Information and Resource Clearing House for the Aging was eliminated." S. REP. No. 467, 98th Cong., 2d Sess. (Emphasis added.)*

### **The 1984 Amendments**

The 1984 amendments to the Act made a number of technical changes. The term "legal assistance" replaced "legal services," and "older individual" was defined for Title III purposes as "any individual who is 60 years of age or older." The amendments also required that, in the delivery of services, particular attention be paid to minority low-income individuals. "Greatest economic need" was defined as "income below the poverty threshold as established by the Bureau of the Census" and "greatest social need" was defined in terms of "non-economic factors which include physical and mental disabilities, language barriers, and cultural or social isolation including that caused by racial or ethnic status and which restrain an individual's ability to perform normal daily tasks or which threaten his or her ability to live independently."

Regarding services, the 1984 amendments: referenced services to prevent elder abuse; increased authority of states to transfer funds between supportive and nutrition services; required that states spend some service funds for effective demonstration projects in health and nutrition education; and

required area agencies annually to detail the amount expended for each category of "priority service" (including legal assistance) during the previous fiscal year. The language requiring that an "adequate proportion" of funds be spent on priority services was modified to require that an "adequate proportion" be spent on "each" priority service.

The 1984 amendments authorized states to use a portion of their services allotment for state agency administration, in lieu of separate authorization of funds for state agencies. States were also required to assign personnel to provide state leadership in developing legal assistance programs and to provide in-service training for personnel of agencies and programs under the Act.

### **The 1987 Amendments**

The 1987 amendments to the Act contained numerous provisions which impacted on legal assistance.

The 1987 amendments retained the requirement that an "adequate proportion" of Title IIIB funds be expended for each of the three priority services: access, in-home, and legal assistance but added a new provision requiring state plans to specify a minimum percentage of the funds received by each area agency for Title IIIB services which must (absent a waiver by the state) be used to provide each of the three priority services.

Similarly, the act retained the waiver requirements in place prior to the 1987 amendments with some additional requirements. Thus, an area agency requesting a waiver of the requirement that an "adequate proportion" of Title IIIB funds be expended on any one of the three categories of priority services must: (1) demonstrate that services being provided for such category are sufficient to meet the need for such services in the area; and (2) conduct a public hearing, after notice regarding the waiver. An area agency must seek a waiver whenever it proposes to fund legal assistance, access, or in-home services at or below the "minimum proportion" set by the state. Whenever a state agency proposes to grant a waiver, the state agency must publish its intention to do so with the justification for the waiver at least 30 days prior to the effective date of the decision to grant the waiver. During the 30 day notice period, an individual or service provider from the area may request a hearing before the state agency on the waiver request and the state shall afford an opportunity for such a hearing. State agencies granting a waiver of the minimum funding requirement for legal assistance, access or in-home services are required to provide the Commissioner on Aging with a report detailing the demonstration made by the area agency to obtain the waiver and copies of the records of the public hearings conducted by both the area agency and the state agency. The Commissioner must, in turn, provide an analysis of such reports to Congress.

Under the 1987 Amendments, for fiscal years beginning after September 30, 1988, the Administration on Aging is required to collect and report to Congress statistical data and analyses regarding programs and activities carried out with funds provided by the Act, including:

- A. with respect to each type of service provided with such funds-
  - (1) the aggregate amount of such funds expended to provide such service;
  - (2) the number of individuals who received such service;
  - (3) the number of units of such service provided;
- B. the number of senior centers which received such funds;
- C. the extent to which each area agency satisfied the provision of the Act requiring that an adequate proportion of Title IIIB funds be expended for each of the three priority services (access, in-home, and legal assistance), and an analysis of information from states regarding waivers granted for funding priority services;
- D. the extent to which each area agency has satisfied the requirement that preference be given to serving those in greatest social and economic need with particular attention to low-income minority individuals, and an analysis of information regarding the effectiveness of state and area agencies in targeting services to those in greatest need with particular emphasis on low-income, low-income minority, and frail individuals.

Also, under a new provision in the 1987 Amendments, the Commissioner on Aging was required to submit a report to Congress by September 30, 1989 assessing the unmet need for supportive services (such as legal assistance), nutrition services and multipurpose senior centers. This report was to summarize in detail for each state the results of the most recent evaluation conducted by the State Agency under the then current state plan. The report was to recommend administrative action and legislation relating to satisfying the demand for supportive services at senior centers and other sites. The Act specifically authorizes the Commissioner on Aging to issue regulations to ensure that the evaluations required to be summarized in the report include data that are objectively collected and statistically valid.

The 1987 amendments also provided that State and area agencies are prohibited from requiring a legal assistance provider from revealing information that is protected by the "attorney-client privilege."

Finally, the 1987 Amendments continued to stress targeting services to those in greatest social and economic need with special emphasis on low-income minority individuals. The amendments mandated that area agencies

include in each agreement made with a provider of any services the requirement that the provider (1) specify how it intends to satisfy service needs of low-income minority individuals; and (2) attempt to provide services to the population of low-income minority individuals in at least the same proportion as that population bears of the older population as a whole. Similar provisions were added to both the state and area plans sections of the Act.

### **The 1992 Amendments**

The 1992 Amendments to the Older Americans Act brought about significant changes, many of which impact upon legal assistance. Perhaps the most significant change in 1992 was the addition of Title VII, which called for State vulnerable elder rights protection activities.

In the 1992 Amendments, Title VII consolidated and strengthened four key advocacy programs: ombudsman (Chapter 2); prevention of elder abuse, neglect and exploitation (Chapter 3); state elder rights and legal assistance development (Chapter 4); and outreach, counseling, and assistance for insurance and public benefits (Chapter 5). Each of these programs previously existed in other sections of the Act; Title VII brought them all together. In order to be eligible to receive funding for any Title VII program, a State had to fulfill all Sec. 305 State Plan requirements, and had to include seven new assurances and a plan for implementing those assurances (an "Elder Rights Plan") in its State Plan. Any funds which a State received must be used to expand existing vulnerable elder rights protection activities, or to develop new ones.

Chapter 4 of Title VII outlined a program at the state level for improving the quality and quantity of legal and advocacy assistance "as a means for ensuring a comprehensive elder rights system." State agencies were required to foster legal assistance and advocacy activities through coordination with, and assistance to, area agencies on aging and other entities engaged in advocacy activities. Chapter 4 specifically set out nine functions which a State was to undertake in order to achieve the objective of promoting and protecting the rights of older individuals. This enumeration of State roles and responsibilities comprised the bulk of Chapter 4.

The provisions of the Act concerning the ombudsman program were moved from Title III to Chapter 2 of Title VII. The Amendments clarified these provisions, and further delineated the ombudsman's duties and responsibilities. Included among the ombudsman's duties were: (1) representation of the interests of residents before governmental agencies and investigation of legal and other remedies to protect the residents' health, safety, welfare, and rights; (2) identification and resolution of complaints regarding guardians and representative payees of residents; and (3) ensuring that residents have access to ombudsman services. The Amendments also specified procedures for access to records, and clarified what constituted

consent to disclosure of a resident's identity. In addition, the Amendments explained the State's duties regarding provision of legal counsel to the ombudsman and representatives of the Office of Ombudsman, and provision of legal assistance services to residents of long-term care facilities.

The 1992 Amendments required the Assistant Secretary<sup>1</sup> to develop guidelines for choosing and evaluating legal assistance providers and legal assistance developers; to encourage and provide TA to State and area agencies on aging; and to implement uniform data collection procedures for State agencies. In addition, the Assistant Secretary was required to monitor state compliance with the prohibition of conflicts of interest under the Act, and issue regulations containing certain requirements for the designation of an area agency on aging.

Also established by new 1992 provisions were a National Center on Elder Abuse, a National Aging Information Center, and a National Ombudsman Resource Center.

The 1992 Amendments clarified and expanded the duties and functions of State agencies on aging. The State Plan required area agencies to give priority to legal problems related to health, long-term care, nutrition, income, housing, utilities, abuse, neglect, defense of guardianship, and age discrimination. In addition, the Plan had to specify that the State would assign a legal assistance developer who would provide leadership in the development of legal assistance programs for older individuals. The State Plan also had to provide assurances that individuals within State and area agencies on aging were not subject to a conflict of interest. Finally, the State Plan had to contain several new assurances and an implementation plan (an Elder Rights Plan), as required by Sec. 705(a).

New provisions specified which factors the State agency had to take into account in developing its intrastate funding formula, and required that the formula be submitted to the Assistant Secretary for approval. If the Assistant Secretary did not approve the formula provisions, and the State did not fulfill the State Plan requirements, the Assistant Secretary was authorized to withhold that State's funding.

Throughout the Amendments, the drafters strongly emphasized targeting by State and area agencies on aging and all service providers including legal

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<sup>1</sup> *Note:* Following passage of the 1992 Amendments, the Commissioner was elevated to the level of Assistant Secretary for Aging by the Clinton Administration. Thus, we use the new title, "Assistant Secretary," even though the 1992 Amendments used "Commissioner." *Also Note:* In late 1993, Technical Amendments changed the term "Commissioner" to "Assistant Secretary" throughout. [Older Americans Act Technical Amendments of 1993, HR Rep No 103-330, 103d Cong, 1st Sess (1993)].

assistance providers, to those in greatest social and economic need, with particular attention to low-income minorities.

The 1992 Amendments also added various provisions regarding area agencies on aging. These indicated that area plans must establish procedures for coordinating entities which provide services to older persons; establish grievance procedures for older persons who are dissatisfied with or denied services under Title III; and coordinate with nonprofit entities to provide for the development, provision, and expansion of supportive services. In addition, area plans had to ensure that special outreach efforts would be used to identify older individuals residing in rural areas; those with severe disabilities, with limited English-speaking ability, or with Alzheimer's disease, who are eligible for assistance under the Act.

The Technical Amendments of 1993 also made a number of changes to the Act. The amendments redesignated the Commissioner on Aging's position as Assistant Secretary for Aging, and changed the titles of various other officers within the Administration on Aging. In addition, the technical amendments deferred the effective dates of certain provisions of the Act, and extended the date for holding a White House Conference on Aging to May 31, 1995.

### **The 2000 Amendments**

In the Fall of 2000, after nearly six years of effort, the US Senate and House of Representatives approved the 2000 Amendments (HR 782) to the Older Americans Act of 1965. On November 13, 2000, President Clinton signed PL 106-501 into law, re-authorizing the OAA through 2005. The 2000 Amendments retained a number of critical provisions to help the nation's most vulnerable elders to secure essential rights, protections and opportunities. These include: retaining legal assistance as one of the priority services under Title III-B, retaining in Title IV a national legal assistance support system, and retaining major portions of Title VII, the Elder Rights Title, including Chapter 4 on State Legal Assistance Development.

With the 2000 Amendments, Congress reaffirmed its commitment to elder rights and legal assistance. This is evidenced, most notably, by the preservation of the Legal Assistance Developer in Title VII and the maintenance of legal assistance as a priority service in Title III. The Legal Assistance Developer remains the one person who must conceptualize a statewide vision of the delivery of legal assistance to the most vulnerable elderly in the state and then implement it. Similarly, by preserving legal assistance as a priority service in Title III-B, Congress reaffirmed the importance of legal assistance and assured it would be funded for years to come.

Prior to the 2000 Amendments, the OAA was silent on whether legal assistance providers were required to provide their clients with an opportunity

to contribute to the cost of services. In a new section titled "Consumer Contributions," the 2000 Amendments clarified whether contributions for legal assistance were permitted or even encouraged. States are now generally permitted to implement cost sharing measures for services, except for certain excluded services, such as ombudsman, elder abuse prevention, and legal assistance. Voluntary contributions are also permitted provided that the method of solicitation is non coercive. Lastly, the 2000 Amendments reworked some of the language dealing with waivers for funding the priority services. Area agencies still may request the State agencies for waivers of the requirement that a certain proportion of Title III-B funds be expended on each of the three priority services, but generally state and area agencies must still show that the need is otherwise being met.

The 2000 Amendments also retained major portions of Title VII, the Elder Rights title. States are still required to provide leadership in improving the quality and quantity of legal assistance and advocacy through development and coordination of a comprehensive system for vulnerable elder rights protection. This system includes the long-term care ombudsman, elder abuse prevention, the legal services developer, and outreach, counseling, and assistance programs.

On the following pages are fourteen questions and answers about the requirements of the Older Americans Act regarding legal assistance and elder rights.

## **B. FOURTEEN QUESTIONS AND ANSWERS ABOUT LEGAL ASSISTANCE UNDER THE OLDER AMERICANS ACT**

### **Introductory Note**

Chapter 1 of the *Comprehensive Guide* has been revised and updated to reflect the changes made by the 2000 Amendments to the Older Americans Act (OAA). After nearly six years of effort to reauthorize the Act, Congress passed these amendments in the fall of 2000 by the enactment of HR 782.

Note that the legislative history regarding the 2000 Amendments is sparse. The House did not issue a report; only the Senate Committee on Health, Education, Labor and Pensions (HELP) issued a Report on the Older Americans Act 2000 Amendments, Report # 106-300, September 7, 2000. We have referenced legislative history from past versions of the OAA, such as the 1982, 1987, and 1992 Amendments. We have also referenced the most recent Regulations available for the OAA which were promulgated in 1988 for the 1987 Amendments.

Upon issuance of future Regulations or Amendments to the OAA, the *Comprehensive Guide* will be updated again to reflect these changes.

Referenced sections of the 2000 Amendments and 1988 Regulations appear in their entirety on the final pages of this chapter.

*Disclaimer & Note:* At the time this analysis was undertaken in 2001, an official compilation of the Older Americans Act as Amended in 2000 was not available. To assist the many organizations who would benefit from having a complete, consolidated version of the Act which includes the amendments adopted by Congress in 2000, The Center for Social Gerontology prepared its own “unofficial” compilation of the current Act. TCSG relied on this “unofficial” compilation in preparing this analysis. Because it is an official compilation, it is possible that there will be some mistakes in it, and therefore in this analysis. Further, for this reason, all citations refer only to the Older Americans Act Sections. Parallel citations to the codified OAA in the U.S. Code were not available. The codified version of the Older Americans Act prior to the 2000 Amendments is found at 42 U.S.C. §3001 et seq.

For those wishing to view the entire unofficial compilation, it can be found at TCSG’s web site: <http://www.tcsg.org/law/oaa/reauth.htm> However, because it is unofficial, it may contain errors, and TCSG takes no responsibility for any problems these errors may cause.

**1. IS LEGAL ASSISTANCE STILL A PRIORITY SERVICE IN THE OLDER AMERICANS ACT?**

**1.a) Answer**

Legal assistance has been a priority service since 1975 when the priority services were first created under the OAA. In 1975, there were four priority services: transportation, in-home, residential repair, and legal services. In 1978, the four were reduced to three: access, in-home and legal services, and these three have been the priority services since 1978.

The 2000 Amendments retained legal assistance as one of the three categories of priority services under Part B, Supportive Services, and thereby reaffirmed the importance of legal assistance under the OAA. The retention of legal assistance as a priority service is significant because of the importance placed on the priority services under the OAA, and the requirement that each of the priority services be funded by the area agencies. For instance, the area agencies on aging are required to consider the priority services when developing an area plan. The area plan must assure that an “adequate proportion” of Title III-B funds allotted to a given area will be expended for the delivery of each of the three categories of priority services. OAA §306(a)(2). Also, the State plan must provide that the State agency will specify a “minimum proportion” of Title III-B funds received by each area agency that is considered “adequate” and that is to be expended to provide each of the three categories of priority services. OAA §307(a)(2)(C). Furthermore, by preserving legal assistance as a priority service under Title III-B “Supportive Services,” the 2000 Amendments reaffirmed the importance of legal assistance and assured that it would be funded for years to come.

Note: See Question 4 regarding waivers of the requirement that area agencies must fund legal assistance and the other two priority services at least at the minimum level established by the State agency.

**1.b) Statute**

See OAA § 306(a)(2); §307(a)(2)(C).

**1.c) Legislative History**

*(1975 Amendments)*

*The hearings before the Subcommittee on Aging have underscored the need to expand the provision of legal services to the elderly. Perhaps more than any other group, the elderly rely upon complex public and private programs and institutions for their daily subsistence. Many have no experience at dealing with*

*the governmental programs and large bureaucracies upon which they have become largely dependent.*

*Superimposed upon the lives of the elderly is a vast array of complex statutory, regulatory, and decisional law. Their shelter may be provided or secured under Federal or state public or subsidized housing laws, relocation laws, and zoning laws. Their health is often dependent upon Medicare, Medicaid, laws regulating nursing homes, and laws relating to prescription drugs. Their nutrition is often secured by the Title VII Nutrition program, the Food Stamp program, or other Federally established nutrition programs. The source of their incomes may be Social Security, Supplemental Security Income under title XVI of the Social Security Act, other Federal retirement benefit programs, or private pensions. Finally, the dignity of their personal freedom and control of their personal and real property is subject to the complex laws of guardianship, conservatorship, and involuntary commitment. They must have someplace to turn for adequate and effective legal assistance in dealing with a vast complex of crucial legal issues if they are to take full advantage of the Governmental programs designed to benefit the elderly.*

*But, in far too many instances and far too many areas, our nation's elderly lack adequate legal services. Testimony before this Committee showed that although comprising over 20% of the nation's poor, the elderly represent only 6% of the client load of the average legal services program funded by the Community Services Administration – the successor to the Office of Economic Opportunity. Consequently, the Committee is convinced that there is a critical need to expand the provision of legal services specifically designed to meet the legal needs of older Americans. In addition, the situation of a non-destitute elderly person with respect to legal representation may be even more acute than that of an elderly poor person. The former has too much income or resources to qualify for free legal services and yet often cannot afford to hire a private attorney. Moreover, even if resources are available to pay a private attorney, such attorneys may be unavailable since the intricacies of the programs governing an elderly person's life are unfamiliar to many in the private bar. S Rep No 255, 94<sup>th</sup> Cong, 1st Sess 24-25 (1975).*

**2. What is “legal assistance” and what types of delivery systems fall within its definition?**

**2.a) Answer**

The definition of legal assistance was not altered by the 2000 Amendments. The term “legal assistance” still

- (A) *means legal advice and representation provided by an attorney to older individuals with economic or social needs;*  
*and*
- (B) *includes –*
  - (i) *to the extent feasible, counseling or other appropriate assistance by a paralegal or law student under the direct supervision of an attorney; and*
  - (ii) *counseling or representation by a nonlawyer where permitted by law. OAA §102(31) (Emphasis added)*

Several provisions within the definition of “legal assistance” merit closer examination.

First, legal assistance is still the only service definition in the OAA that includes a targeting requirement. Subpart A emphasizes targeting by requiring that legal assistance be provided to “*older individuals with economic or social needs.*”

Second, the 2000 Amendments kept “*legal advice and representation provided by an attorney*” at the beginning of the definition as an independent phrase. This placement indicates that advice and representation *by an attorney* is still a necessary component of any legal assistance program. In Subpart B, the word “direct” was retained to describe the supervision of paralegals and law students by an attorney. It is our contention that while the definition of legal assistance may include services by paralegals, law students, and even nonlawyers “where permitted by law” (e.g. under Titles II (OASDI), XVI (SSI), XVIII (Medicare), and XIX (Medicaid) of the Social Security Act), a delivery method that utilizes nonlawyers alone is not sufficient. The definition stresses at the outset that advice and representation by an attorney is an essential component of legal assistance as defined in the Act.

**2.b) Statute**

See OAA §102(31).

## 2.c) Legislative History

### *(1987 Amendments)*

*The Committee also wishes to note that the use of nonlawyers, where permitted by federal and State law, can be effective in meeting the expanding legal assistance needs of older persons, particularly to discover and assist older persons regarding public benefit problems. While direct attorney supervision of nonlawyer advocates is not required, the Committee believes that the support and utilization of this network by title III-B funded lawyers and other lawyers should be encouraged. The Commissioner should encourage their utilization, and make provision for training and support to nonlawyers. S Rep No 136, 100<sup>th</sup> Cong, 1<sup>st</sup> Sess 52 (1987).*

### *(1984 Amendments)*

*The Committee bill makes minor modifications to the legal assistance program under title III of the Act, substituting the term legal assistance for the term "legal services" in current law, and clarifies that if the grantee is not a Legal Services Corporation project, it must coordinate its services with Legal Services Corporation projects which may be located in the same planning and service area, but makes no substantive change in the provisions of the Act.*

*The Committee is pleased by recent indications of an expanded effort on the part of the private bar to provide legal services to low-income persons, but recognizes that with reductions in a variety of Federal programs funding legal services, including a somewhat diminished amount of funds under title III of the Act being devoted to legal services activities, the need for programs to address the special legal problems of many older persons remains. S Rep No 467, 98<sup>th</sup> Cong, 2d Sess 12 (1984). See also Conf Rep No 1037, 98<sup>th</sup> Cong, 2<sup>nd</sup> Sess 35-36 (1984).*

**3. How much must be spent by the area agencies for provision of legal assistance?**

**3.a) Answer**

The 2000 Amendments made no substantive changes to how much must be spent by the area agencies on providing legal assistance. The Amendments retained legal assistance as one of three priority services in the Act, and retained the requirement that an “adequate proportion” of Title III-B funds be expended by all area agencies on aging for delivery of each of the three categories of priority services: access, in-home, and legal assistance. OAA §306(a)(2)(A-C). (See Question 4 regarding waivers of this funding requirement.)

What constitutes an “adequate proportion” is determined by each State agency on aging, and the 2000 Amendments made only minor changes in the wording that instructs States to make this determination. The 2000 Amendments deviated slightly from prior language that required States to specify a “minimum percentage” of Title III-B funds to be expended for priority services. Under the 2000 Amendments, the wording is a “minimum proportion.” The State plan must provide that the State agency will

*specify a minimum proportion of the funds received by each area agency on aging in the State to carry out part B that will be expended (in the absence of waiver under sections 306(b) or 316) by such area agency on aging to provide each of the categories of [priority services]. OAA §307(a)(2)(C) (Emphasis Added).*

TCSG believes there is no real distinction in requiring a State agency to specify a “minimum percentage,” as opposed to a “minimum proportion” (of Title III-B funds to be expended on priority services). The change in wording actually pales in importance to the fact that the State agency must still specify a minimum -- that is a floor, and not a ceiling -- for funding legal assistance. In fact, the wording change to “minimum proportion” effectively links the state provision even more closely with the area agency’s “adequate proportion” requirement. Both are now “proportions” that must be specified by the State and then expended by the area agencies on each of the three priority services, one of which is legal assistance.

Furthermore, the Amendments retained the “maintenance of effort” requirement that the State plan must assure that any Title III-B legal assistance furnished under the plan will be *in addition* to any legal assistance for older persons furnished with funds from other sources (e.g. under Legal Services Corporation funded programs), and that reasonable efforts must be made to maintain existing levels of legal assistance for older people. OAA §307(a)(11)(D).

In describing State plan requirements, the 2000 Amendments continue to provide that the State agency will evaluate the need for supportive services (including legal assistance), and determine the extent to which other existing programs do or do not meet such needs. However, there were some small but important changes in both wording and placement of this “needs assessment” provision that have important implications for funding of legal assistance.

The prior language stated that the State agency would evaluate the need for supportive services (including legal assistance) and “determine the extent to which existing public or private programs meet such need.” This language was at §307(a)(3)(A), and was totally separate from the provision requiring the State to specify a minimum percentage of IIB funds to be expended on the three priority services which was found at §307(a)(22). In the 2000 Amendments, the State requirement to evaluate the need for supportive services is directly linked, by placement, to the requirement to establish a minimum funding level for the priority services. Further the language in the 2000 Amendments describing what the States may consider in assessing the extent to which needs are being otherwise met was broadened to include services by volunteers. The provision describing the needs assessment and linking it to the establishment of funding levels for priority services now reads:

- (2) *The [State] plan shall provide that the State agency will --*
  - (A) *evaluate ... the need for supportive services (including legal assistance ... information and assistance, and transportation services) ... within the State;*
  - (B) *develop a standardized process to determine the extent to which public or private programs and resources (including volunteers and programs and services of voluntary organizations) that have the capacity and actually meet such need; and*
  - (C) *specify a minimum proportion of the funds received by each area agency on aging in the State to carry out part B that will be expended (in the absence of a waiver ...) by such area agency on aging to provide each of the categories of [priority services]. OAA §307(a)(2)(A-C).*

The addition of “*volunteers and programs and services of voluntary organizations*” to what states are to consider in assessing the unmet need for services is significant because this will include consideration of *pro bono* legal services. Given this, the addition of the phrase “*have the capacity and actually meet such need*” is equally significant. All OAA services are to be targeted to those in greatest social and economic need, and this targeting requirement is particularly strong for legal assistance which is specifically defined as being for “*... older individuals with economic or social needs.*” OAA §102(31)(A)

As states assess the unmet need for legal services, it will be very important for them to focus specifically on the needs of those elders in greatest social and economic need. Their most pressing legal needs are likely to center around basic needs for income, shelter, food, and health care and they are likely to need legal assistance with such things as Medicaid, Medicare, food stamps, SSI, etc. In then looking at the availability of services by other public and private agencies and by pro bono volunteers, it will be important to examine the capacity of the pro bono attorneys to effectively handle these kinds of legal issues and to actually do the outreach necessary to reach and meet the needs of those socially and economically needy elders defined in the Older Americans Act.

As indicated in the Legislative History section below, the Senate Health, Education, Labor and Pensions (HELP) Committee recognized the need to differentiate the extent to which pro bono legal services may exist in a State from the extent to which those volunteer services have the capacity and actually meet the needs of the target populations. The HELP Committee report states:

*In evaluating the need for supportive services ... including the use of volunteers, it is the intent of the committee that special attention be paid to those older individuals with the greatest social and economic needs. S Rep No 399, 106th Cong, 2nd Sess 6 (2000)*

### **3.b) Statute**

See OAA §102(31)(A); §306(a)(2)(A-C); §307(a)(2)(A-C); §307(a)(11)(D).

### **3.c) Legislative History**

*(2000 Amendments)*

*In evaluating the need for supportive services in section 307(a) including the use of volunteers, it is the intent of the committee that special attention be paid to those older individuals with the greatest social and economic needs. Unless special attention is paid, their need for use of alternative resources for supportive services, transportation, and nutrition can be overlooked or may not be accurately assessed. The standardized process to be developed should reach out to these special populations to assess their needs and services that are actually being delivered now. S Rep No 399, 106<sup>th</sup> Cong, 2<sup>nd</sup> Sess 6 (2000).*

(1992 Amendments)

*New funds appropriated to programs under this title [VII] are intended to expand, not supplant, services made available under this title. S Rep No 151, 102<sup>nd</sup> Cong, 1<sup>st</sup> Sess 104 (1991).*

(1987 Amendments)

*[E]ach State shall set a minimum proportion of Title III B funds to be expended by each area agency for each type of service (access, in-home, and legal services). If an area agency expends at least the minimum percentage set by the State, the area agency will have fulfilled the requirement to spend an adequate proportion of funds on such services. The minimum percentage is intended to be a floor, not a ceiling. Area agencies on aging are encouraged to devote additional funds to each of these services to meet local needs. Conf Rep No 427, 100<sup>th</sup> Cong, 1<sup>st</sup> Sess 70-71 (1987).*

(1984 Amendments)

*During the 1981 reauthorization hearings, the committee reached the conclusion that the provision requiring that 50 percent of title III-B funds be spent for the delivery of the three priority areas of services – in-home services; legal services; and "access" services (transportation, outreach, and information and referral) – was too rigid a requirement, and, in the 1981 Amendments, the "50 percent" requirement was struck and a provision that "an adequate proportion" of the allotted amount be expended in the delivery of priority services was substituted. The committee continues to believe that these services should be given priority, and is concerned that current reporting requirements do not result in sufficient information to determine how much is being spent currently on these services. For that reason, H.R. 4785 includes a requirement for annual reporting on funds spent for the priority services. H Rep No 737, 98<sup>th</sup> Cong, 2<sup>nd</sup> Sess 21 (1984). See also, Conf Rep No 1037, 98<sup>th</sup> Cong, 2<sup>nd</sup> Sess 38 (1984).*

**4. When will area agencies be granted a waiver regarding funding legal assistance?**

**4.a) Answer**

The 2000 Amendments retained but condensed the waiver provisions for area agencies regarding the funding of legal assistance and the other two priority services. If an area agency wishes to fund legal assistance at a level below that which the State agency has designated as the “minimum proportion” of Title IIIB funds considered to be adequate, the area agency must still request a waiver from the State agency. The 2000 Amendments condensed the waiver provision so that an area agency requesting a waiver for legal assistance or either or the other two categories of priority services now must: 1) demonstrate to the State agency that the services being provided for such category are sufficient to meet the need for such services in the area, and 2) have conducted a timely public hearing upon request. OAA § 306(b) (*Emphasis Added*).

The 2000 Amendments removed the former Section 306(b)(2) completely, and with it, the notice and hearing requirements involved in obtaining a waiver. This means that an area agency requesting a waiver from the State agency no longer must notify the interested parties or conduct a public hearing before making its request to the State agency. A State agency also no longer must publish its intention to grant a waiver 30 days prior to the decision’s effective date, nor must a state provide the Assistant Secretary with a report containing details of the demonstration made by the area agency to obtain the waiver. Instead, the 2000 Amendments shifted the burden to the interested parties to find out about an area agency’s intention to request a waiver before the area agency requests it, and then request a public hearing with an opportunity to testify.

In addition to the waiver provisions regarding area agencies’ funding of the priority services, the 2000 Amendments added a new waiver provision to Title III for State agencies. OAA §316. The new provision allows the Assistant Secretary (upon receiving an application and sufficient documentation from a State agency) to waive select provisions of Sections 305 (Organization), 306 (Area Plans), and 307 (State Plans), as well as Section 308(b)(5) (transfer of funds between Part B Supportive Services and Part C Nutrition Services) and Section 309(c) (amount of State allotment used for provision of services). The Assistant Secretary may grant the application for waiver if the accompanying documentation is sufficient to establish that --

- (1) *approval of the State legislature has been obtained or is not required with respect to the proposal for which the waiver is sought;*

- (2) *the State agency has collaborated with the area agencies on aging in the State and other organizations that would be affected with respect to the proposal for which waiver is sought;*
- (3) *the proposal has been made available for public review and comment, including the opportunity for a public hearing upon request, within the State (and a summary of all the comments received has been included in the application); and*
- (4) *the State agency has given adequate consideration to the probable positive and negative consequences of approval of the waiver application, and the probable benefits for older individuals can reasonably be expected to outweigh any negative consequences, or particular circumstances in the State otherwise justify the waiver. OAA § 316(a)(1-4) (Emphasis Added).*

While it may appear at first glance that this new state waiver provision could render parts of the state and area plan requirements under the OAA ineffective, keep in mind that the decision to grant a waiver is not automatic. First, the state's waiver request requires an application and supporting documentation sufficient to establish 1-4 above. Then, only the provisions of Sections 305, 306, and 307 requiring statewide uniformity of programs may be waived, and only "... *to the extent necessary to permit demonstrations, in limited areas of a State, of innovative approaches to assist older individuals.*" OAA §316(b)(1). Similarly, the Assistant Secretary may only grant a waiver for state or area plan requirements of Sections 306(a) and 307(a) if "... *granting the waiver will promote innovations or improve service delivery and will not diminish services already provided[.]*" OAA 316(b)(2-3).

Once the waiver is granted, it is limited in scope. While the duration of the waiver is left to the discretion of the Assistant Secretary, it cannot exceed the duration of the State plan. OAA §316(c). Lastly, after a waiver is granted, the State agency must submit a report to the Assistant Secretary evaluating the impact of the waiver on the operation and effectiveness of its programs and services. OAA §316(d).

Under Question 3 above (pages I-18 & I-19), we discussed the importance of the targeting provision which is part of the definition of legal assistance in the Act. This targeting provision, which specifically defines legal assistance as being for " ... *older individuals with economic or social needs*" OAA §102(31)(A) is equally important for this Question on waivers. Any waiver request by an area agency under Section 306(b) to fund legal assistance at less than the "minimum proportion" specified by the state, will need to show more than that legal services are otherwise available. As part of its demonstration to the State agency that legal services being otherwise provided

are sufficient to meet the need, the area agency needs to show that the legal needs of those older persons in social and economic need are being adequately met. Similarly, any request by a State agency to the Assistant Secretary for a Section 316 waiver that would involve legal assistance, would need to consider specifically the probable consequences for the group of older individuals in social and economic need.

#### **4.b) Statute**

See OAA §102(31)(A); §306(b); §316.

#### **4.c) Legislative History**

*(2000 Amendments)*

*[This section] also allows the Assistant Secretary to waive any provisions of section 305 of the act (State organization); section 306 of the act (area plan requirements); section 307 of the act (State plan requirements); prohibitions on transfers of funds between supportive and nutrition services; and requirements related to State maintenance of effort.*

*The Section establishes conditions under which waivers may be granted, including requirements that the State has obtained, if necessary, approval of the State legislature; has collaborated with area agencies and other affected organizations regarding the waiver request; has made the proposal available for review and comment, including the opportunity for a public hearing upon request; and has given consideration to the probable positive and negative consequences of the waiver, among other things.*

*The section also establishes the duration of waivers and reports to the Assistant Secretary. S Rep No 399,, 106<sup>th</sup> Cong, 2<sup>nd</sup> Sess 28 (2000).*

*(1987 Amendments)*

*The waiver provision of Section 306(b)(1) of existing law will [continue to] apply. . . The Conferees also note that they do not intend to require the State agency to hold a separate hearing for each individual or provider who requests such a hearing, but that single hearing at which each individual or provider may testify is sufficient to meet the intent of this section. Furthermore, the hearing may be conducted as part of other hearings being held by the State agency. Conf Rep No 427, 100<sup>th</sup> Cong, 1<sup>st</sup> Sess 71 (1987).*

**5. What if a state has no area agencies on aging? Does the State agency have to set a “minimum proportion” of Title III-B funds for delivery of the priority services, including legal assistance?**

**5.a) Answer**

If a State agency is performing the duties and functions of both a State and area agency, then, as State agency, it must set a “minimum proportion” of Title III-B funds for delivery of each of the three categories of priority services. In the 1970’s, when state and area agencies were initially created under the OAA, states were divided into distinct planning and service areas with one area agency on aging was designated for each planning and service area within the state. OAA §305(a)(1)(E). Some states with small populations and/or small geographic areas, designated their entire state as a single planning and service area. A state is allowed to continue as the single, statewide planning and service area if it made the designation and received approval from the Assistant Secretary on or before October 1, 1980. A state that is the planning and service area for the entire state then must perform the functions of both the State agency and area agency on aging for the entire state. OAA §305(b)(5)(A).

A number of states are currently taking on the dual role of State agency and area agency for their entire state. An area agency on aging must “... *have the ability to develop an area plan and to carry out, directly or through contractual arrangements, a program in accordance with the plan within the planning and service area.*” OAA §305(c)(5) *Emphasis Added*. Therefore, a State agency acting as the sole area agency on aging for an entire state should develop and carry out both an area plan and a State plan. The area plan would assure that an “adequate proportion” of Title III-B funds will be expended for the delivery of legal assistance, while the State plan would assure that the State agency will specify a “minimum proportion” of Title III-B funds that the area agency will expend to provide legal assistance. The State plan would be submitted to the Assistant Secretary for approval under OAA §307(a), and the area plan would be submitted to the State agency under OAA §306(a).

It may appear that it is somewhat redundant for the State agency to develop an area plan and a State plan, and set both an “adequate proportion” and a “minimum proportion,” but there is no real alternative. OAA §307(a); §306(a). If the State agency sets no “minimum proportion” (because it has no area agencies to set one for) then priority services, like legal assistance, could go unfunded. On the other hand, it could make perfect sense for the State office on aging to function as the area agency on aging because the functions of the two agencies are intertwined, and many of their obligations are reciprocal. The challenge for a state with such a dual role is that it maintain enough “separateness of function” such that its role as area agency does not get swallowed up in its role as State agency.

**5.b) Statute**

See OAA §305(a)(1)(E); §305(b)(5)(A); §305(c)(5); §306(a); §307(a).

**6. Must State agencies have a Legal Assistance Developer, and what is the role of the Developer?**

**6.a) Answer**

Under Title III of the 2000 Amendments, each state is still required to “... *assign personnel (one of which is to be known as a legal assistance developer) to provide State leadership in developing legal assistance programs for older individuals throughout the State.*” OAA §307(a)(13). This language was not altered by the 2000 Amendments, and it reaffirms that more than one person is perhaps needed at the state level to provide state leadership and to perform the specific duties of the Legal Assistance Developer. (Further discussion of what is involved in the state providing leadership on legal assistance is included in Questions 7 and 8 below.)

In Title VII, however, the 2000 Amendments did make some changes to Chapter 4, “State Legal Assistance Development” where Section 731(a) was removed entirely and Section 731(b) was substantially reduced. It is our belief that what remains is the core of the Legal Assistance Developer’s work. Under Title VII, each state must still provide a State Legal Assistance Developer and the services of other personnel sufficient to ensure

- 1) *State leadership in securing and maintaining the legal rights of older individuals;*
- 2) *State capacity for coordinating the provision of legal assistance;*
- 3) *State capacity to provide technical assistance, training, and other supportive functions to area agencies on aging, legal assistance providers, ombudsmen, and other persons, as appropriate;*
- 4) *State capacity to promote financial management services to older individuals at risk of conservatorship;*
- 5) *State capacity to assist older individuals in understanding their rights, exercising choices, benefiting from services and opportunities authorized by law, and maintaining the rights of older individuals at risk of guardianship; and*
- 6) *State capacity to improve the quality and quantity of legal services provided to older individuals. OAA §731.*

The above list is evidence of the wide-ranging responsibilities that must be undertaken by the Legal Assistance Developer. The developer is responsible for broadly defined activities, such as providing state leadership in securing the legal rights of older persons, as well as coordinating the provision of legal assistance to older persons within the state. The developer must also provide technical assistance to area agencies, legal providers, and others to coordinate the provision of legal assistance to older people and to make sure

legal assistance is targeted to those older persons in the greatest social and economic need. The developer also has more narrowly defined responsibilities, such as focusing special attention on substantive areas of the law like promoting financial management services to older persons at risk of conservatorship, and maintaining the rights of older persons at risk of guardianship. Under the 2000 Amendments, the Legal Assistance Developer remains the one person in the state who must conceptualize a statewide vision of the delivery of legal assistance to the most vulnerable elderly in the state and then implement it.

It should be noted that the 2000 Amendments call on the Assistant Secretary to “*develop guidelines and a model job description for choosing and evaluating legal assistance developers ...*” (§202(a)(23). The requirement that the Administration on Aging develop such guidelines and job description was first added to the Functions of Assistant Secretary in the 1992 Amendments when Congress placed strong emphasis on the important state leadership role of legal services developers. The requirement that AoA develop a model job description outlining the many important duties of developers was retained in the 2000 Amendments. As of the summer of 2001, AoA has not developed these guidelines/job description. (TCSG and the National Association of Legal Services Developers have developed a model job description which can be obtained from TCSG.)

#### **6.b) Statute**

See OAA §202(a)(23); §307(a)(13); §731.

#### **6.c) Legislative History**

*(2000 Amendments)*

*The Committee intends that States and their legal assistance developers should continue to develop the quality and quantity of legal assistance available to older individuals. Particular focus should continue on issues of elder abuse, neglect, and exploitation; the rights of older individuals living in institutions; those who have cognitive impairments and are therefore at risk of institutionalization or guardianship; access to Social Security, Medicare, and Medicaid; and prevention and remediation of scams and schemes targeted to the elderly. S Rep No 399, 106<sup>th</sup> Cong, 2<sup>nd</sup> Sess 16 (2000).*

*(1992 Amendments)*

*The Committee believes that the Aging Network, through the statewide leadership of State agencies on aging have crucial*

roles to play in promoting and protecting the rights of older individuals, particularly those who are vulnerable due to such factors as their economic status, frailty including dementia, and lack of knowledge about rights and avenues for redress of grievances. The Committee bill authorizes a State Elder Rights and Legal Assistance Development program to establish and emphasize the State agency on aging as the focal point for policy review, analyses, and advocacy at the State level on matters affecting the rights of the elderly. In addition to carrying out specific programs under Title VII, the Committee expects that States will provide leadership in assuring that state and local systems which have responsibilities related to guardianships, protective services and other surrogate decision making mechanisms, age discrimination, pension and health benefits, insurance, consumer protection, public entitlements, and dispute resolution alternatives, and other concerns, are responsible and effective in meeting the needs of elders and in protecting their rights. The Committee bill also builds upon the Act's current requirements that State agencies on aging must provide coordination of the furnishing of legal assistance, and provide advice, technical assistance, and training related to the provision of legal assistance. The Committee compliments state agencies on aging for their commitment to providing such services through legal services developers first established under AoA-funded activity assistance grants in the mid-nineteen seventies. The Committee expects that States will build upon and enhance those efforts under this program. In recognition of the unique nature of legal assistance services, the Committee emphasizes the importance of States working closely with area agencies on aging and legal assistance providers in enhancing and monitoring the quality and quantity of legal assistance including the development of statewide standards for delivering legal assistance. It is the Committee's intent that such activities will increase access by older individuals to legal assistance and other advocacy and elder rights services. S Rep No 151, 102d Cong, 1<sup>st</sup> Sess 107 (1991).

**7. What “other obligations” do State agencies have under the OAA with regard to legal assistance?**

**7.a) Answer**

In addition to having a Legal Assistance Developer, the important “other obligations” for State agencies were retained by the 2000 Amendments. The core Title III requirement that the State agency serve as an “effective and visible advocate” for older individuals was preserved: reviewing and commenting on all State plans, budgets, and policies which affect older persons, and providing technical assistance to any agency, organization, association or individual representing the needs of older people. OAA §305(a)(1)(D).

The 2000 Amendments also retained the strong state requirements regarding delivery of legal assistance. The State agency is still required to coordinate legal assistance within the state, provide technical assistance in the provision of legal assistance to older persons in the state, and support the furnishing of training and technical assistance for legal assistance for older individuals. OAA §307(a)(11)(C). The State agency is also required to evaluate the need for legal assistance, develop a standardized process to determine the extent to which existing programs and resources have the capacity and actually are meeting the need for legal assistance, and establish a “minimum proportion” of Title III-B funds to be expended by each area agency in the absence of a waiver. OAA §307(a)(2)(A-C).

As noted in Question 3 above, the Amendments also retained the “maintenance of effort” requirement. That is, the State agency must assure, to the extent practicable, that any legal assistance furnished with Title III-B funds will be *in addition* to any legal assistance for older persons furnished with funds from other sources (e.g. under Legal Services Corporation funded programs), and that reasonable efforts will be made to maintain existing levels of legal assistance for older people. OAA §307(a)(11)(D).

The 2000 Amendments also retained the 1992 Amendments addition of priority legal issues, which requires the State plan to contain “... *assurances that area agencies on aging will give priority to legal assistance related to income, health care, long-term care, nutrition, housing, utilities, protective services, defense of guardianship, abuse, neglect, and age discrimination.*” OAA §307(a)(11)(E).

The other state obligations retained by the 2000 Amendments include 1) assuring that the AAA’s attempt to involve the private bar, including pro bono and reduced fee services, 2) assuring that legal programs serve those in social or economic need, 3) providing for coordination, advice and TA on the provision of legal assistance, and 4) supporting the furnishing of training and technical assistance. OAA §307(a)(11)(A-C). Lastly, the state has the

responsibility to assure that the area agencies are performing their “other obligations” as described in Section 307(a)(11) and as discussed below in the next question.

## **7.b) Statute**

See OAA §305(a)(1)(D); §307(a)(2)(A-C); §307(a)(11)(A-E).

## **7.c) Legislative History**

*(2000 Amendments)*

*In evaluating the need for supportive service in section 307(a) including the use of volunteers, it is the intent of the committee that special attention be paid to those older individuals with the greatest social and economic needs. Unless special attention is paid, their need for use of alternative resources for supportive services, transportation, and nutrition can be overlooked or may not be accurately assessed. The standardized process to be developed should reach out to these special populations to assess their needs and services that are actually being delivered now. S Rep No 399, 106<sup>th</sup> Cong, 2<sup>nd</sup> Sess 5 (2000).*

*(1992 Amendments)*

*The Committee intends that this new title [VII] will encourage the State, area agencies on aging, and others in the aging network to better coordinate various federal, state and local laws. It is the Committee's expectation that improved and new programs incorporated or established under this title will result in more focused, better coordinated, and more effective advocacy activities of State Units on Aging and the States' aging networks. S Rep No 151, 102<sup>nd</sup> Cong, 1<sup>st</sup> Sess 103 (1991).*

*The Committee believes that the Aging Network, through the statewide leadership of State agencies on aging have crucial roles to play in promoting and protecting the rights of older individuals, particularly those who are vulnerable due to such factors as their economic status, frailty including dementia, and lack of knowledge about rights and avenues for redress of grievances. The Committee bill authorizes a State Elder Rights and Legal Assistance Development program to establish and emphasize the State agency on aging as the focal point for policy review, analyses, and advocacy at the State level on matters affecting the rights of the elderly. In addition to carrying out specific programs under Title VII, the Committee expects that*

*States will provide leadership in assuring that state and local systems which have responsibilities related to guardianships, protective services and other surrogate decision making mechanisms, age discrimination, pension and health benefits, insurance, consumer protection, public entitlements, and dispute resolution alternatives, and other concerns, are responsible and effective in meeting the needs of elders and in protecting their rights. The Committee bill also builds upon the Act's current requirements that State agencies on aging must provide coordination of the furnishing of legal assistance, and provide advice, technical assistance, and training related to the provision of legal assistance. The Committee compliments state agencies on aging for their commitment to providing such services through legal services developers first established under AoA-funded activity assistance grants in the mid-nineteen seventies. The Committee expects that States will build upon and enhance those efforts under this program. In recognition of the unique nature of legal assistance services, the Committee emphasizes the importance of States working closely with area agencies on aging and legal assistance providers in enhancing and monitoring the quality and quantity of legal assistance including the development of statewide standards for delivering legal assistance. It is the Committee's intent that such activities will increase access by older individuals to legal assistance and other advocacy and elder rights services. S Rep No 151, 102d Cong, 1<sup>st</sup> Sess 107 (1991).*

**8. Who may provide legal assistance/with whom may area agencies contract? And what “other obligations” do area agencies have regarding legal assistance under the OAA?**

**8.a) Answer**

Requirements for AAAs in Contracting with Legal Assistance Providers

The 2000 Amendments retain previous requirements regarding who area agencies may contract with to provide legal assistance and also retain several “other obligations” of area agencies regarding legal assistance. These requirements are enumerated in the State Plan section of the Act (307), and the State agency is responsible for assuring that area agencies comply.

Under the 2000 Amendments, area agencies must (1) enter into contracts with providers of legal assistance who can demonstrate the experience and capacity to deliver legal assistance under the Act, and (2) include in those contracts provisions to assure that legal providers will be subject to any Legal Services Corporation Act regulations determined appropriate and adopted as OAA regulations by the Assistant Secretary for Aging. OAA §307(a)(11)(A).

Area agencies must select Title III-B legal assistance providers whose programs are designed to provide legal assistance to older persons with social or economic need, and who have agreed -- if the provider is not a Legal Services Corporation (LSC) project -- to coordinate services with existing LSC projects in the area in order to concentrate the use of IIIB funds on older persons with the greatest such need. OAA §307(a)(11)(B).

Overall, the area agency is responsible for making sure that the legal assistance provider they select is the “... *entity best able to provide ...*” legal assistance services to older persons in economic or social need. OAA §307(a)(11)(B). It should be noted that, as in the 1992 Amendments, the 2000 Amendments state that the area agency’s assessment and determination of whether the selected provider is the “best entity” is to be made “... *pursuant to standards for services promulgated by the Assistant Secretary.*” (§307(a)(11)(B)). The requirement that the Administration on Aging “*develop guidelines for area agencies on aging to follow in choosing and evaluating providers of legal assistance*” was added to the Functions of Assistant Secretary in 1992 and was retained in the 2000 Amendments. (§202(a)(22)). As of August 2001, AoA has not developed these guidelines. In TCSG’s opinion, the development of specific guidelines for AAAs to follow in choosing and evaluating legal assistance providers will be extremely valuable. In our work with the law and aging network over the past three decades, we continue to hear that many AAAs find it difficult to know which is the best entity to provide legal services, and they are seeking guidance. Additionally, AAAs often lack the staff with the necessary expertise to effectively monitor and evaluate the quality

of legal services provided. The guidelines will be a valuable tool to assist in these efforts.

Furthermore, area agencies must still select providers who will give priority to legal issues involving income, health care, long-term care, nutrition, housing, utilities, protective services, defense of guardianship, abuse neglect, and age discrimination. OAA §307(a)(11)(E). This was added in 1992, and legislative history informs us that the list of issues grew out of Congress' concern over a reported lack of targeting by AAA-funded legal programs. The 1991 Senate Committee Report states: "*It is the Committee's expectation that [the listing] will ensure that services are targeted to those in greatest social and economic need.*" S Rep No 151, 102d Cong, 1st Sess 91 (1991).

Area agencies must also make efforts to assure that any legal assistance providers they fund will use the Title III-B funds to provide services that are *in addition* to any legal assistance for older persons furnished with funds from other sources (e.g. with Legal Services Corporation funds). Existing levels of legal assistance for older persons funded through other sources should be maintained, and Title IIIB funds should be used to supplement, not supplant, other resources for this critical service. OAA §307(a)(11)(D).

The Regulations promulgated under the 1987 Amendments (the most recent regulations) also provide specifications regarding the legal provider an area agency must select. They state that an area agency must award funds to the provider that most fully meets the following criteria:

- (1) *has staff with expertise in specific areas of law affecting older persons in economic or social need, for example, public benefits, institutionalization;*
- (2) *has capacity to provide effective administrative and judicial representation in these areas;*
- (3) *demonstrates the capacity to provide support to other advocacy efforts; for example, the long-term care ombudsman program;*
- (4) *demonstrates the capacity to provide legal service to institutionalized, isolated, and homebound older individuals effectively; and*
- (5) *demonstrates the capacity to provide legal assistance in the principal language spoken by clients in areas where a significant number of clients do not speak English as their principal language. 45 CFR §1321.71(c)(1-5).*

#### Multiple Legal Assistance Providers

While the OAA does not address the issue of how many legal providers an area agency should contract with, TCSG believes that area agencies should

not divide limited funding among multiple legal service providers unless it is necessary to meet the need -- particularly of special target groups -- or if most efficient. For example, where a planning and service area needs to address special ethnic or geographic needs, several legal services providers may be required to provide adequate legal assistance to various target groups or in different geographic areas. However, area agencies must keep in mind when contracting with more than one legal services provider that the sum of the amounts paid to each legal provider must equal at least the minimum proportion of funds specified by the State agency to be expended on legal assistance. OAA §306(a)(2)(C); §307(a)(2)(C).

### Restrictions on State and Area Agencies as Service Providers

The 2000 Amendments also retained the restriction that state and area agencies may not provide supportive services (including legal assistance) directly. This is true unless the State agency determines that: 1) direct provision by the State or area agency is necessary to ensure an adequate supply of such services, 2) the services are directly related to the State or area agency's administrative functions, or 3) the service can be provided more economically and with comparable quality by the State or area agency. OAA §307(a)(8)(A). Furthermore, if a state or area agency were to provide legal services directly, the agency would still need to meet all the requirements for legal assistance services under the OAA.

### Other Obligations of Area Agencies

Under the 2000 Amendments, the area agencies are still required to attempt to involve the private bar in providing legal assistance. OAA §307(a)(11)(A)(iii). This includes involving groups within the private bar to furnish services to older individuals on a *pro bono* and reduced fee basis.

#### **8.b) Statute**

See OAA §202(a)(22); §306(a)(2)(C); §307(a)(2)(C); §307(a)(8)(A); §307(a)(11).

#### **8.c) 1988 Regulations**

See 45 CFR §1321.71(c).

#### **8.d) Legislative History**

*(2000 Amendments)*

*[This section] modifies the area plan requirements to specify that each area agency will carry out revised State plan requirements regarding priority services: access, in-home, and*

*legal assistance services. These revised provisions specify that the State agency will use uniform procedures to evaluate the need for supportive services (including legal assistance, information and assistance, and transportation services), nutrition services, and senior centers; develop a process to determine the extent to which public or private programs and resources (including volunteers and programs and services of voluntary organizations) have the capacity and actually meet such need. The area agency must report annually to the State agency regarding expenditures made for the priority services. S Rep No 399, 106<sup>th</sup> Cong, 2<sup>nd</sup> Sess 23 (2000).*

(1992 Amendments)

#### Guidelines/Standards for Selection

*In response to concerns that area agencies have not received the technical assistance necessary to develop legal assistance programs and resources which can effectively identify and resolve legal problems of older Americans, the Committee bill requires the Commissioner to develop guidelines for area agencies to follow in choosing and evaluating providers of legal assistance, and expects that such guidelines will be available by December 30, 1992. The Committee strongly urges the Commissioner to consult with appropriate legal resource centers in developing such guidelines. S Rep No 151, 102d Cong, 1st Sess 90 (1991).*

#### Direct Provision of Services by Area Agencies on Aging

*Current law prohibits AAAs from providing services directly, but allows State agencies to waive the prohibition under certain circumstances. [This has not been changed by the Amendments]. The law provides sufficient flexibility to accommodate circumstances where waivers may be needed. While it is not the intent of the members of the committees of jurisdiction to encourage the granting of waivers, the members note that the law should not be construed to prevent the granting of waivers to local government-based AAAs with a proven record of providing services of comparable quality more efficiently, and a commitment to contribute significant amounts of local resources to the provision of services for older individuals, or otherwise meet the other waiver conditions set forth in the law. Cong Rec Vol 138, No 125, S13499 (Sept. 15, 1992).*

**9. Who must be served, and which older persons are eligible for legal assistance under the OAA?**

**9.a) Answer**

Requirement to Target Those in Greatest Social and Economic Need

The 2000 Amendments did not make any substantive changes to who must be served or which elderly are eligible for legal assistance. Services are to be provided to older persons in social or economic need. Legal assistance continues to be the only service in the OAA that includes, as part of its definition, a targeting requirement. That is, it is defined as “... *legal advice and representation provided by an attorney to older individuals with economic or social needs.*” OAA §102(31). In addition to this definitional requirement, the Act, overall, continues to strongly emphasize targeting services to those older persons in greatest social and economic need, with particular attention to low-income minorities.

“Greatest Economic Need” is defined as “*the need resulting from an income level at or below the poverty line.*” OAA §102(27). Poverty line is defined as “*the official poverty line (as defined by the Office of Management and Budget, and adjusted by the Secretary in Accordance with section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)).*” OAA §102(38).

“Greatest Social Need” is defined in the Act as

“... *the need caused by noneconomic factors, which include--*

*(A) physical and mental disabilities;*

*(B) language barriers; and*

*(C) cultural, social, or geographical isolation, including isolation caused by racial or ethnic status, that--*

*(i) restricts the ability of an individual to perform normal daily tasks; or*

*(ii) threatens the capacity of the individual to live independently.* OAA §102(28).

The importance of targeting those in greatest social and economic need dates back to the very early years of the Act, and the requirements have become increasingly strong over time. Legislative history repeatedly indicates the intent of Congress regarding targeting. Many of the strong provisions that exist today were originally added in 1987, and many were further strengthened in 1992.

*1987 Amendments*

To ensure that services are targeted to those with greatest social and economic need, with particular emphasis on low-income minority individuals,

the 1987 Amendments mandated that area agencies include in each agreement made with a provider of any service, the requirements that the provider: (1) specify how it intends to satisfy service needs of low-income minority individuals; and (2) attempt to provide services to the population of low-income minority individuals in at least the same proportion as that population bears to the older population as a whole. Other targeting provisions were added to both the State and area plan sections of the Act in the 1987 Amendments. These provisions require assurances that outreach efforts will identify those individuals eligible for services, with emphasis on those in rural areas and those in greatest social and economic need, especially low-income minority individuals, and that such groups will be informed of the availability of assistance. In addition, State and area plans were to include provisions for an evaluation of the effectiveness of these special outreach efforts.

### *1992 Amendments*

The 1992 Amendments called for particular targeting of three additional categories of older persons, and required special emphasis on outreach to these groups. These additional groups included: older individuals with severe disabilities, older individuals who have limited English speaking ability, and older individuals with Alzheimer's disease or related disorders. The 1992 Amendments also added a requirement that the caretakers of these older individuals be informed of the availability of assistance.

Title III of the 1992 Amendments specifically addressed targeting for legal services in two ways. First, they required, with respect to legal services, that the State Plan assure that AAAs give priority to legal assistance related to income, health care, long-term care, nutrition, housing, utilities, protective services, defense of guardianship, abuse, neglect and age discrimination. The list of priority issues, which remains in the 2000 Amendments, was included to help ensure targeting. Second, the 1992 Amendments placed restrictions on the role of legal services in guardianship cases to ensure that services go to those in greatest social need -- those who have lost or are at risk of losing their autonomy through guardianship.

Congress also added a number of provisions to Title II in 1992, requiring the Administration on Aging and the Secretary of Health and Human Services to measure and evaluate the effectiveness of State and local efforts in targeting the most socially and economically needy. In addition, AoA was directed to conduct a study on ways in which Federal funds might be more effectively targeted to low-income minority older individuals and older individuals residing in rural areas. This study was to be submitted to the House and the Senate. Finally, in reporting on outreach activities, the Assistant Secretary was directed to consider the effectiveness of State and local efforts to target these needy individuals.

## Prohibition Against Means Testing

While the Act is clear regarding who should be given priority to receive legal services, the legislative history, the regulations and now the Act are equally clear that the use of income and resources in determining who shall be eligible to receive services is prohibited. The challenge under the 2000 Amendments therefore remains, how to target those older persons in greatest social and economic need without utilizing a “means test.” Regulations promulgated under the 1987 Amendments (which are currently the most recent Regulations available for the OAA) define “means test” as “*the use of an older person’s income or resources to deny or limit that person’s receipt of services...*” 45 CFR §1321.3.

In the past, the prohibition against means testing was specifically addressed in the Regulations, 45 CFR §1321.67(c) while the Act dealt with it only indirectly in terms of “targeting.” The 2000 Amendments now address it directly in a new Section 315 which allows states to implement “cost sharing” based on income for many OAA services, but strictly prohibits it for the elder rights services -- including legal assistance -- and certain other outreach, nutrition and tribal services. OAA §315(a) Only voluntary contributions are allowed for these types of services, and Section 315(b)(3) prohibits the use of a “means test” for any service for which voluntary contributions are accepted.

As indicated in the 1988 Regulations, legal assistance providers may not require an older person to disclose information about income or resources as a condition for providing legal assistance, and providers may only inquire about income while in the process of counseling and representation or to determine additional benefits for which a person may be eligible. 45 CFR §1321.71(d-e) Providers clearly may not use an older person’s income as a “means test” to determine whether or not to provide the older person with legal assistance.

The tension created by the statutory requirement for preference to those in greatest need and the prohibition against means testing can be a source of confusion and frustration. TCSG believes the approach to resolving this dilemma lies in the provider working with the State and area agencies to identify those persons who are in greatest need, and then establishing deliberate operational procedures to insure that targeted groups will be reached. One of the most important procedures is to establish clear priority areas that reflect the needs of the target populations

## Other Requirements Regarding Who Must Be Served

The 2000 Amendments added an emphasis on targeting those *older individuals residing in rural areas* to numerous sections in the OAA. For example, Section 202(a)(27), which formerly required the Administration on

Aging (AoA) to evaluate the effectiveness of state and local efforts in targeting the most socially and economically needy, was replaced with a new provision requiring improved rural service delivery. This requires the Assistant Secretary to use research, develop a resource guide, provide training, and submit a report on how the states are improving rural delivery. OAA §202(a)(27)(A-D).

The 2000 Amendments still require that State agencies utilize outreach efforts to identify and reach specific target groups of older persons for assistance. The groups to be targeted still include older persons with: greatest economic and social need (with particular attention to low-income minority persons), severe disabilities, limited English-speaking ability, and older individuals with Alzheimer's disease or related disorders, and now an emphasis has been added targeting older individuals residing in rural areas. OAA §307(a)(16)(A)(i-vi).

To further ensure that legal services go to those in greatest social need, namely those who have lost or are at risk of losing their autonomy through guardianship, the 2000 Amendments retained specific restrictions on the role of legal assistance in guardianship cases. Legal providers are limited to (1) representing older persons who are already under guardianship (wards), or (2) providing the defense against guardianship petitions that have been filed against older persons alleged to be incapacitated. Representation of petitioners can only be provided where the petitioners are age 60 and over, and where other adequate representation is unavailable. OAA §321(a)(6)(B)

### **9.b) Statute**

See OAA §102(31); §202(a)(27)(A-D); §307(a)(11)(E); §307(a)(16)(A)(i-vi); §315; §321(a)(6)(B).

### **9.c) 1988 Regulations**

See 45 CFR §1321.3; 45 CFR §1321.67(c); 45 CFR §1321.71(d-e).

### **9.d) Legislative History**

*(1992 Amendments)*

*The Committee is concerned about the availability and accessibility of supportive services for elderly persons who reside in rural communities. . . [T]he needs of rural elderly is an important area of concern which the Committee intends to monitor with the possibility of future legislation to ensure that older individuals in rural parts of the country can fully benefit from the many. . . programs and services provided under the Act. Furthermore, the Committee expects that the Administration, the States, and area*

agencies on aging, will make every effort to ensure access to needed services by those older individuals, particularly low-income and minority persons, in rural areas.

The Committee is concerned about low-income minority elders' participation in Older Americans Act programs and wishes to enhance efforts by the aging network to target these persons. Targeting services to low-income minority elders was an issue of concern throughout the reauthorization of the Older Americans Act. The Committee heard from many in the aging network of the need to strengthen targeting efforts. It is the intent of the Committee that efforts to provide resources to low-income minority older persons be improved in each planning and service area. S Rep No 151, 102d Cong, 1<sup>st</sup> Sess 89 (1991).

The Committee believes that the Aging Network, through the statewide leadership of State agencies on aging have crucial roles to play in promoting and protecting the rights of older individuals, particularly those who are vulnerable due to such factors as their economic status, frailty including dementia, and lack of knowledge about rights and avenues for redress of grievances. S Rep No 151, 102d Cong, 1<sup>st</sup> Sess 107 (1991).

In response to concerns that many area agencies on aging have not established legal assistance programs which include sufficient outreach, targeting, and community education components, these provisions ensure that area plans for legal assistance give priority to problems related to income, health care, long-term care, nutrition, housing and utilities, guardianship defense, abuse and neglect, and age discrimination. It is the Committee's expectation that these provisions will ensure that services are targeted to those in greatest social and economic need. S Rep No 151, 102d Cong, 1<sup>st</sup> Sess 91 (1991).

#### (1984 Amendments)

The House amendment defines for the purposes of Section 306(a)(5)(A) the terms "greatest economic need" and "greatest social need." As used in this section, social and cultural isolation means isolation within a community resulting directly or indirectly from an individual's ethnic heritage, nationality or race. The Senate bill contains no comparable provision. Conference agreement: Senate recesses. Conf Rep No 1037, 98<sup>th</sup> Cong, 2d Sess 37 (1984).

The Act currently requires State agencies on aging and area plans to assure that preference will be given to providing

*services to older persons with the greatest economic or social needs. Further, State and area plans are required to include proposed methods for carrying out this preference. [Sections 305(a)(2)(E) and 306 (a)(5)(A) respectively.] The committee bill amends these provisions to specify that in serving those persons with the greatest economic or social need, State and area agencies give particular attention to the needs of low-income minority older persons.*

*The Committee is concerned about the findings of a 1982 report by the U.S. Commission on Civil Rights on minority participation in Older Americans Act programs. The Commission report cited a number of barriers to minority participation in Older Americans Act programs. The Commission report cited a number of barriers to minority participation in services sponsored under the Act, such as location of programs outside areas where minority older persons live, lack of transportation services, inadequate knowledge of minority language and cultural differences on the part of staff serving minority groups, and limited outreach to minority groups.*

*The committee intends that the new language added by the bill will draw attention to the Commission's findings and give added impetus to the aging network to improve its efforts in the areas identified by the Commission. H Rep No 737, 98<sup>th</sup> Cong, 2d Sess 20 (1984).*

#### *(1978 Amendments)*

*The conferees wish to emphasize that in carrying out its responsibility to concentrate on the elderly with the greatest need, no project shall, in any way, give a means test or asset test to any applicant; no applicant shall be questioned about his or her means or assets; and no applicant should be directed to seek services through a Legal Services Corporation project. Conf Rep No 1618, 95<sup>th</sup> Cong, 2<sup>nd</sup> Sess 65 (1978).*

*Concentration on the elderly with the greatest need should be effectuated through such means as location of offices, referral of ineligible applicants form Legal Services Corporation projects, development of expertise in certain areas of the law, or general guidelines which the project may post or give to an applicant providing information on the nature of the clientele usually served there and those eligible for services at the Legal Services Corporation project. Conf Rep No 1618, 95<sup>th</sup> Cong, 2<sup>nd</sup> Sess 65 (1978).*

**10. Are contributions for legal services permitted or encouraged under the OAA?**

**10.a) Answer**

Prior to the 2000 Amendments, the Act was silent on the question of voluntary contributions for Part B Supportive Services, including legal assistance; the 2000 Amendments addressed the issue. As discussed in Question 9 above, the Amendments added a new Section 315 entitled "Consumer Contributions," which addresses both cost sharing and voluntary contributions. Section 315(a) allows States -- for the first time in the history of the Act -- to implement cost sharing for certain OAA services. However, it specifically prohibits cost sharing for certain services, including the elder rights services -- ombudsman, elder abuse prevention, and legal assistance. OAA §315(a)(1-2).

The new Section 315 also addresses the issue of voluntary contributions for OAA services, stating that

*(1) In General -- Voluntary contributions shall be allowed and may be solicited for all services for which funds are received under this Act provided that the method of solicitation is noncoercive. OAA §315(b)(1). Emphasis Added.*

Prior to the 2000 Amendments, the OAA addressed voluntary contributions only with respect to Title IIIC Nutrition Services, and was silent on whether providers of legal assistance and other Title IIIB Supportive Services were required to provide their clients with an opportunity to contribute voluntarily to the cost of service. The 2000 Amendments thus clarify that voluntary contributions are allowed for legal assistance, provided that the method of solicitation is "noncoercive" (which is not defined by the OAA and may need to be fleshed out in future regulations). OAA §315(b)(1). The Amendments further require area agencies to consult with the relevant service providers and older individuals in the planning and service area to determine the best method for accepting voluntary contributions. OAA §315(b)(2).

As discussed in Question 9, it is noteworthy that area agencies and service providers are strictly prohibited from "means testing" for any service for which contributions are accepted and from denying services to any person who does not contribute to the cost of the service. OAA §315(b)(3). The area agencies must ensure that each service provider will

- A) *provide each recipient with an opportunity to voluntarily contribute to the cost of the service;*
- B) *clearly inform each recipient that there is no obligation to contribute and that the contribution is purely voluntary;*

- C) *protect the privacy and confidentiality of each recipient with respect to the recipient's contribution or lack of contribution;*
- D) *establish appropriate procedures to safeguard and account for all contributions; and*
- E) *use all collected contributions to expand the service for which the contributions were given. OAA §315(b)(4).*

The 2000 Amendments leave it up to the area agencies to determine how exactly to seek voluntary contributions for legal assistance. Certain parameters are set: the method must be “noncoercive,” confidentiality must be maintained, and a “means test” may not be utilized. Otherwise, it is up to the area agencies to consult with service providers and older individuals in their planning and service area to determine the best method for soliciting and accepting the voluntary contributions. It should be pointed out however, that Congress expressed real concern about contributions, particularly for elder rights services, and stated they may not be appropriate for certain services and situations. The Senate HELP Committee states in its Report --

*The committee expects that States, area agencies on aging, service providers, and older adults will collaboratively examine the best methods of offering the opportunity to voluntarily donate or contribute to services. ... Also, each Older Americans Act funded service should be analyzed individually. For example, an approach appropriate for a congregate meal site or transportation service may not be appropriate for a telephone reassurance or long-term care ombudsman program. States, area agencies on aging, and service providers may determine that voluntary contributions for some services or situations, such as elder abuse, neglect, or exploitation, are not appropriate and will not be solicited. S Rep No 399, 106<sup>th</sup> Cong, 2<sup>nd</sup> Sess 6-9 (2000). Emphasis Added.*

Also noteworthy is the requirement that all collected contributions must be used to expand the service for which the contributions were given. It necessarily follows that any voluntary contributions collected from a legal assistance client must be used to expand legal assistance. OAA §315(b)(4)(E).

#### **10.b) Statute**

See OAA §315(a)(1-2); §315(b)(1-4).

## 10.c) Legislative History

(2000 Amendments)

*The Department of Health and Human Services Office of the Inspector General reported in 1996 that 36 States have implemented cost sharing for services funded at the State or local level. States report that with cost sharing for State and local services, they have expanded both the amount of services and the numbers of people receiving services. The committee understands the need of State and local programs to increase flexibility and for coordination between Older Americans Act programs and programs funded at the State and local levels. In order to expand vital services and to facilitate flexibility, the bill includes a provision to permit States to implement cost sharing for all services provided under the Older Americans Act except for the following services: 1) information and assistance, outreach, benefits counseling, or case management services; 2) ombudsman, elder abuse prevention, legal assistance, or other consumer protection services; 3) congregate and home-delivered meals; and 4) any services delivered through tribal organizations.*

*The committee acknowledges that significant concerns have been raised regarding the inclusion of cost sharing for Older Americans Act services. However, the committee believes that substantial safeguards have been included in order to protect older individuals. Older individuals with income at or below the Federal poverty line are exempted from cost sharing, and States may set the threshold income level above the Federal poverty line. States may not consider any asset or property other than the income when defining who is exempt from cost sharing, when creating the sliding scale to implement cost sharing or when seeking contributions. . . .*

. . .

*The committee is aware of the importance that voluntary participant contributions have played and continue to play in providing additional resources for senior meal programs and other Older Americans Act services resulting in program expansion. For this reason, the committee has included language in the bill that explicitly allows both the acceptance and solicitation of voluntary contributions, so long as the solicitation methods are noncoercive. This provision of the bill is intended to furnish flexibility to local meal programs and other service providers in developing and implementing voluntary financial contribution methods that are appropriate to the particular programs and populations served.*

*It is the committee's intent to allow senior meal programs, at their option, to provide clients written information about voluntary contributions. The committee recognizes noncoercive methods to include, but not be limited to, the provision of written information to clients. This information may be in the form of individualized client benefit summaries or reminders, which may include the number of meals or services received within a specific time period, the actual cost of providing those meals, and a suggested contribution for those services. All solicitation materials should make clear that contributions are entirely voluntary, that there is no obligation to contribute, and that services will not be denied or curtailed if contributions are not made. Whether a participant chooses to make a voluntary contribution and the amount of any such contribution shall be kept confidential.*

*The committee expects that States, area agencies on aging, service providers, and older adults will collaboratively examine the best methods of offering the opportunity to voluntarily donate or contribute to services. Those methods need to take into account methods currently being used for Federal, State, or locally funded services; how cost sharing is to be implemented; and how older individuals using multiple services by one or more providers might be approached. Also, each Older Americans Act funded service should be analyzed individually. For example, an approach appropriate for a congregate meal site or transportation service may not be appropriate for a telephone reassurance or long-term care ombudsman program. States, area agencies on aging, and service providers may determine that voluntary contributions for some services or situations, such as elder abuse, neglect, or exploitation, are not appropriate and will not be solicited.*

*The committee is particularly aware of concerns that the number of low-income and/or minority older individuals receiving services under the act may decline with the implementation of cost sharing. To ensure that this does not happen, before cost sharing is implemented, each State and area agency on aging must develop plans designed to make sure that participation in cost shared services does not decrease. . . . The Assistant Secretary also shall take corrective action in accordance with section 315(d), if the Assistant Secretary finds that there is a disparate impact on low-income minority older individuals in any State or region within the State regarding the provision of services. S Rep No 399, 106<sup>th</sup> Cong, 2<sup>nd</sup> Sess 6-9 (2000). Emphasis Added.*

(1984 Amendments)

#### CONTRIBUTIONS FOR SERVICES

*The Committee bill amends current title III language requiring the State plan to assure that each nutrition project permit recipients of grants or contracts to "charge participating individuals for meals furnished" under the program. The Committee bill changes this language to clarify that nutrition projects may solicit voluntary contributions for services and deletes the reference to charging for meals. The Committee wishes to reemphasize that programs authorized under the Older Americans Act have never depended upon income as a criterion for eligibility to participate, and nothing in S. 2603 imposes any kind of income test as a determinant of eligibility.*

*The Committee recognizes and commends the recent efforts of the Commissioner on Aging and State and area agencies on aging in increasing the level of contributions for services. At the same time, the Committee wishes to emphasize the voluntary nature of contributions and that the manner of collecting contributions by title III service providers should not in any way discourage or prevent older persons from participating in programs authorized by the Act. Any process of soliciting contributions must protect the privacy of each older person and services may not be denied any older person due to failure to make a contribution toward the cost of services.*

*S Rep No 467, 98<sup>th</sup> Cong, 2d Sess 18 (1984).*

**11. What types of data must be collected regarding the use of, and level of support for, legal assistance?**

**11.a) Answer**

The 2000 Amendments retained the majority of the data collection provisions under the OAA, and also retained the protections of confidentiality, particularly for legal assistance clients. The prior data collection provisions at Section 202(a)(19) were redesignated as Section 202(a)(16), but they still require the Administration on Aging to collect statistical data on the programs and activities carried out with funds provided by the OAA. The Administration must collect statistical data on such things as:

- the aggregate amount of funds expended to provide specific services,
- the number of individuals who received the service,
- number of units of service provided, and
- the extent to which area agencies met the requirement to expend an “adequate proportion” of IIB funds for the three priority services, including legal. OAA §202(a)(16)(A-C).

Also, under the new, redesignated Section 202(a)(19), the Administration on Aging must conduct strict monitoring of state compliance with OAA requirements in order to prohibit conflicts of interest and to maintain the integrity and public purpose of services provided and service providers under the OAA. OAA §202(a)(19). The 2000 Amendments also redesignated Section 202(a)(27) as Section 202(a)(24). This provision had previously required the Administration on Aging to conduct a study to determine ways in which Federal funds might more effectively target low income minority older individuals; the new Section 202(a)(24) requires the Administration on Aging to establish a pension counseling and information program and report to Congress on it.

The 2000 Amendments also retained other key data collection provisions, such as the previous Section 202(a)(29), which is now renumbered as Section 202(a)(26). It requires the Administration on Aging to --

*. . . design and implement, for the purposes of compliance with paragraph (19)<sup>2</sup>, uniform data collection procedures for use by State agencies<sup>3</sup>, including*

- A) *uniform definitions and nomenclature;*
- B) *standardized data collection procedures;*

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<sup>2</sup> TCSG believes this reference to “paragraph (19)” is an error in the 2000 Amendments. Because the data collection provisions being referred to here were previously at §202(a)(19) and were redesignated as §202(a)(16) in the 2000 Amendments, we believe that the reference here to “paragraph (19)” should be corrected to read “paragraph (16).”

<sup>3</sup> This data collection system has been developed by AoA and is being used by the states; it is commonly referred to as NAPIS -- National Aging Program Information System.

- C) *a participant identification and description system;*
- D) *procedures for collecting information on gaps in services needed by older individuals, as identified by service providers in assisting clients through provision of supportive services; and*
- E) *procedures for the assessment of unmet needs for services under this Act[.] OAA §202(a)(26).*

The collected data is to be compiled and submitted by the Administration on Aging in a full report to the President and the Congress not later than 120 days after the close of each fiscal year. OAA §207(a). The report still requires specifics on targeting, such as an analysis of information regarding the effectiveness of the state and area agencies in targeting services to older individuals in greatest economic and social need, with particular attention to low-income minority individuals, low-income individuals and frail individuals, and now with a focus also on older individuals residing in rural areas. OAA §207(a). Overall, the central focus is still retained by the 2000 Amendments: Congress and the President must be able to obtain reliable information on the success the OAA's programs are having in reaching their target populations – those in greatest social and economic need, with an emphasis on low-income minority older persons and older persons residing in rural areas.

Lastly, the 2000 Amendments added a new provision on Performance Outcome Measures. Section 202(f) now requires the Assistant Secretary (in collaboration with a representative group of State agencies, tribal organizations, area agencies, and providers of services) to “... *develop and publish by December 31, 2001, a set of performance outcome measures for planning, managing, and evaluating activities performed and services provided under [the OAA].*” OAA §202(f)(1). The Assistant Secretary is required to review performance outcome measures currently in use by state and area agencies, and then develop a proposed set of measures that is to be piloted and evaluated at the state and local levels. OAA §202(f)(2)(A-D). It is TCSG's belief that Performance Outcome Measures do not replace more traditional reporting, but rather they are a complement to traditional reporting. If carefully planned and implemented, Performance Outcome Measures have great potential for delivering more meaningful information on the impact of legal assistance on the lives and well-being of the most vulnerable older people.<sup>4</sup>

It is important to note that throughout its concerns and desires for better data, Congress has consistently recognized the importance of the older individual's right to privacy and of the need to maintain strict confidentiality in the area of legal assistance. Thus, the 2000 Amendments retain provisions

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<sup>4</sup> For more information on Performance Outcome Measures, see Outcome Measures for Title IIIB Legal Assistance Programs: An Introduction, in Best Practice Notes on Delivery of Legal Assistance to Older Persons, Volume 10, No. 3, The Center for Social Gerontology, March 2000. This BPN can be accessed at [www.tcsg.org/bpnotes/bpn.htm](http://www.tcsg.org/bpnotes/bpn.htm).

specifying that State and area agencies are prohibited from requiring a legal assistance provider to reveal confidential information, including identifying information, about clients. (See Question 12 for a more detailed discussion of confidentiality.) However, given that Congress' main concern is the need for reliable information on the success of Older Americans Act programs in reaching and serving target populations -- those in greatest social and economic need, in particular low-income minority older persons -- there is no reason that identifying information about legal services clients should have to be revealed. Information about numbers and types of clients being served and the types of services those clients are receiving can be supplied by legal providers without having to reveal any identifying information.

#### History of Congressional Concern Over Inadequate Data and Concerns About Confidentiality of Client Information

When enacting both the 1992 and 1987 Amendments, Congress expressed serious concern over the lack of reliable data made available to them by the Administration on Aging and took steps to try to correct the inadequacy. The greatest underlying concern expressed by both the House and Senate was the need for reliable information about the success of Older Americans Act programs in reaching and serving target populations -- those in greatest social and economic need, in particular low-income minority older persons.

The House Committee Report on the 1992 Amendments summarized the basis for concern as follows:

*At the same time that our population of senior citizens is growing and increasing the demand for services, Federal and State governments are facing tighter budget constraints. In such a climate, it is imperative that the limited resources available be managed in the most effective way possible. In particular, it is critical that limited resources be targeted to serve those elderly citizens who are in greatest social and economic need, as mandated by the Act. Without reliable data on the clients being served and the nature of services provided, it is impossible to determine whether this mandate is being met. H Rep No 199, 102d Cong, 1st Sess 44 (1991).*

The House Report on the 1992 Amendments went on to caution:

*In designing a description and identification system for participants under the Act, great care must be given to balancing the information acquired for program purposes, with the essential need to protect the right of privacy of individuals receiving services. Efforts which result in the discouragement of individuals*

from participating in program services under the Act must be avoided.

\* \* \*

... The Commissioner shall endeavor to ensure that the system which will be designed does not impose unnecessary burdens on network agencies. It is not the purpose of these provisions to require an additional level of reporting requirements on States and area agencies on aging and service providers. Rather, it is the intention of the committee that data collection procedures will be streamlined and that consideration will be given to collecting only that data which serves a useful purpose for planning, monitoring, and evaluating programs, and by methods that are not cumbersome to those providing the data. H Rep No 199, 102d Cong, 1st Sess 44 (1991).

Similar concerns and cautions were expressed on the Senate side. The Senate Committee Report on the 1992 Amendments states:

*The quality and usefulness of the data currently collected by the Administration on Aging has been questioned throughout the reauthorization of the Older Americans Act. The clarity and accuracy of the data are pivotal to many other OAA issues, especially targeting services to low-income, minority elders. The unreliability of current data makes it impossible to determine the degree to which low-income, minority, frail and other such categories of elders are being served. . . . The Committee is particularly concerned about the usefulness of the unduplicated count of participants as a measure of participation and directs AoA . . . to assess whether the measure should continue to be used. S Rep No 151, 102d Cong, 1st Sess 86 (1991).*

In 1987, the Senate also cautioned against burdensome reporting requirements and emphasized the need for confidentiality in legal services reporting. The Senate Committee's report on the 1987 Amendments states:

*The reporting requirements for legal assistance services providers are to be uniform nationally, and as consistent as possible with those used by the Legal Services Corporation. While the committee wishes to protect the identity of legal assistance clients, . . . this provision is not intended to exempt legal services from routine reporting requirements. S Rep No 136, 100th Cong, 1st Sess 50 (1987).*

## **11.b) Statute**

See OAA §202(a)(16); §202(a)(19); §202(a)(24); §202(a)(26); §202(f); §207(a).

## 11.c) Legislative History

(2000 Amendments)

*Section 201 also requires the Assistant Secretary to develop and publish by December 31, 2001, performance outcome measures to be used for planning, managing, and evaluating activities under the act. The Assistant Secretary is required to use data collected by State and area agencies on aging, and by service providers in developing these measures. This section also specifies the process for developing performance outcome measures, including review of measures currently in use, development of a proposed set of measures, pilot testing, evaluation of the testing, and recommendations for modification. S Report No 399, 106<sup>th</sup> Cong, 2<sup>nd</sup> Sess 21 (2000).*

(1992 Amendments)

*The Committee was greatly disturbed by testimony ... on the poor quality of data collected by the Administration on Aging. In March 1991, the General Accounting Office completed a comprehensive review of the Administration on Aging's current information system. In sum, the GAO found that the current system is incapable of generating reliable information on who is being served by the Administration on Aging programs and what services are being provided to individual program participants. Problems . . . include flaws in the Administration on Aging data collection instrument as well as weaknesses in the methodology used by the Administration on Aging to collect data. In particular, it was reported that data collected on minority participation, service utilization, and numbers of participants are invalid and unreliable due to the lack of uniform definitions and nomenclature, both within states and nationally; and the lack of standardized data collection procedures and the absence of technical assistance provided to states, area agencies on aging, and service providers.*

*... Other methodological problems include: 1) the absence of clear guidelines on how the minority and income status of participants should be determined, and 2) the lack of standardized, national data collection procedures ....*

*...*

*[I]t is imperative that the limited resources available be managed in the most effective way possible. In particular, it is critical that limited resources be targeted to serve those elderly citizens who are in greatest social and economic need, as mandated by the Act. Without reliable data on the clients being*

*served and the nature of the services provided, it is impossible to determine whether this mandate is being met.*

*In designing a description and identification system for participants under the Act, great care must be given to balancing the information acquired for program purposes, with the essential need to protect the right of privacy of individuals receiving services. Efforts which result in the discouragement of individuals from participating in program services . . . must be avoided . . .*

*...The Commissioner shall endeavor to ensure that the system which will be designed does not impose unnecessary burdens on network agencies. ... it is the intention of the committee that data collection procedures will be streamlined and that consideration will be given to collecting only that data which serves a useful purpose for planning, monitoring, and evaluating programs, .... H Rep No 199, 102d Cong, 1<sup>st</sup> Sess 43-44 (1991).*

*The quality and usefulness of the data currently collected by the Administration on Aging has been questioned throughout the reauthorization of the Older Americans Act (OAA). The clarity and accuracy of the data are pivotal to many other OAA issues, especially targeting services to low-income, minority elders. The unreliability of current data makes it impossible to determine the degree to which low-income, minority, frail and other such categories of elders are being served. The Committee urges the AoA to collect unambiguous, accurate, reliable data nationwide and provide technical assistance to those who are responsible for collecting the data throughout the aging network. The Committee is particularly concerned about the usefulness of the unduplicated count of participants as a measure of participation and directs AoA . . . to assess whether the measure should continue to be used.*

*In response to concerns that burdensome reporting requirements, ... the Committee expects the Task Force established by Section 207(d) to examine current reporting requirements under the Act and make recommendations for streamlining any duplication with reporting requirements of other Federal, State, and private programs. It is the expectation of the Committee that the Commissioner will devise appropriate means to alleviate any burdens which current reporting requirements may place upon service providers. ....*

*... The Committee believes that information on activities, service utilization, and kinds of services provided is crucial for the congressional budget, appropriations, and oversight processes. The Committee also believes that information on functions, staffing patterns, and funding sources is crucial for planning within the aging network. S Rep No 151, 102d Cong, 1<sup>st</sup> Sess 90 (1991).*

## **12. Does the OAA address the issue of attorney-client confidentiality?**

### **12.a) Answer**

The 2000 Amendments continued to specifically recognize the vital importance of confidentiality in the relationships between legal providers and their clients. They did not make changes to any of the three sections that mention attorney-client privilege. OAA §§ 306(d); 307(f); 705(b). The OAA still provides that area agencies, states, and State agencies are prohibited from requiring any provider of legal assistance to reveal any information that is protected by the attorney-client privilege.

Legislative history from the 1987 Amendments makes it clear that information Congress intends to protect includes any information that would reveal to the state or area agency the identity of clients. *Rep No 97, 100<sup>th</sup> Cong 1<sup>st</sup> Sess 122 (1987)*. Legislative history also indicates that prohibited information-collecting does not include information needed for the purposes of evaluation, planning, or needs assessment, since this information could be obtained without disclosure of identifying information, such as the names and addresses of Title III-B clients.

### **12.b) Statute**

See OAA §306(d); §307(f); §705(b).

### **12.c) Legislative History**

*(1987 Amendments)*

*The bill provides that States and state agencies on aging may not require legal assistance providers under the Act to reveal any information that is protected by the attorney-client privilege. Agencies would not be prohibited from collecting any information they need for the purposes of evaluation, planning or needs assessment. That kind of information may be readily obtained without the disclosure of the names and addresses of clients served with Title III funds.*

*The Committee's intent in including the new confidentiality provisions is to clarify that names, addresses and telephone numbers of clients serviced with Older Americans Act funds will remain privileged information. The Committee understands that some legal assistance providers may be reluctant to contract with area agencies without this assurance. Many older individuals might be hesitant to ask for the legal advice and counsel they need if they thought others would have access to their identifying information. This assurance of confidentiality makes it easier for older persons to seek the assistance they need to resolve their*

*legal problems, and it makes it easier for legal assistance providers to serve them in good faith.* H Rep No 97, 100<sup>th</sup> Cong, 1<sup>st</sup> Sess 12 (1987).

**13. Are there specific restrictions and regulations applicable to legal assistance providers under the OAA?**

**13.a) Answer**

The 2000 Amendments leave unchanged the provision of the Act dealing with regulations applicable to legal assistance providers. This requires legal assistance providers to be subject to those regulations under the Legal Services Corporation (LSC) Act (other than restrictions and regulations governing eligibility for legal assistance under the LSC Act and governing membership of local governing boards) determined by the Assistant Secretary for Aging to be appropriate to legal assistance under the Older Americans Act and adopted as OAA regulations. OAA §307(a)(11)(A)(ii).

As noted, the most recent regulations promulgated for the OAA were issued in 1988 for the 1987 Amendments to the Act. The Administration on Aging is currently in the process of drafting regulations for the 2000 Amendments, and TCSG will update this information when new regulations are issued. For the present, we provide information on the existing Regulations from 1988. The entire text of those Regulations can be found on the final pages of this Chapter; the official version can be found at 45 CFR §1321.71.

The OAA Regulations promulgated under the 1987 Amendments provide a fairly long listing of restrictions/regulations adapted from those of LSC, and adopted by the Assistant Secretary to apply to OAA legal assistance providers. However, the listing is preceded by a qualifying statement that: *"Nothing in this section is intended to prohibit any attorney from providing any form of legal assistance to an eligible client, or to interfere with the fulfillment of any attorney's professional responsibilities to a client."* 45 CFR §1321.71(b). The list includes: (1) limits on providing legal assistance in fee-generating cases; (2) prohibited political activities; (3) prohibitions on lobbying; (4) prohibited demonstrations, boycotts, and strikes; and (5) limitations on the use of funds to pay dues to organizations engaged in activities prohibited by the regulations.

Some explanation of the regulations is found in the Supplementary Information to the proposed 1988 regulations in Vol. 53, No. 60, Federal Register of March 29, 1988, pages 10111-12. That explanation states --

*Section 307(a)(15)(A) of the Act requires that the State plan contain an assurance that any recipient of funds for legal assistance ". . . will be subject to specific restrictions and regulations promulgated under the Legal Services Corporation Act. . . as determined appropriate by the Commissioner." This provision was first included in the Act in the 1987 amendments. Accordingly, the title III regulations which were issued in 1980 drew upon the regulations of the Legal Services Corporation*

*(LSC) in covering the provision of legal services under the Older Americans Act. However, based on the Commissioner's statutory responsibility to determine which LSC regulations were appropriate to Title III, the treatment of legal services in the 1980 regulations was limited so as to be proportionate to the coverage of other services provided under Title III. In 1985, when the current Title III regulations were issued, a different approach to the treatment of legal services was adopted. At that time, the coverage of legal services was significantly expanded with the result that legal assistance regulations constituted approximately one-quarter of the entire Title III regulations. This extensive coverage was disproportionate to the coverage of other services provided under Title III. It should be stated that even in this extended discussion of legal assistance, many of the LSC regulations were not included in the Title III regulations.*

*After reassessing the current regulations in preparation for revisions to accommodate the 1987 amendments to the Act, it was concluded that the extensive discussion of legal assistance was inappropriate for the following reasons: (1) Under regulatory reform unnecessary regulations in other areas of the Title III program have been reduced; (2) While legal assistance is important, it is one among many services which are provided with Title III funds; and (3) The detailed definitions of lobbying activities set forth in current LSC regulations (issued July 29, 1987 at 52 FR 28434) are not needed to carry out the purposes of Title III.*

*Since the States are provided the greatest possible flexibility in the manner in which other services are provided, the extent of regulatory detail in the treatment of legal assistance has been reviewed and commensurately reduced. The revised regulation seeks to assure that Title III legal assistance funds are used solely to carry out the purposes of the Act and not for extraneous activities, such as lobbying and other political activities. Thus, the intent of these regulations is the same as that of the LSC regulations but offered without the same level of detail. Vol. 53, No. 60, Federal Register, March 29, 1988, pages 10111-12.*

### **13.b) Statute**

See OAA §307(a)(11)(A)ii.

### **13.c) Regulations**

See 45 CFR §1321.71(f)-(k).

**14. Does the OAA provide for a national support system for legal assistance/law and aging?**

**14.a) Answer**

Title IV of the 2000 Amendments retained and strengthened the requirement for a National Support System on Law and Aging. Section 411 provides the general authority to the Assistant Secretary to make grants for Title IV training, research, program evaluation, development of “best practice” models for service delivery, and provision of technical assistance in developing and delivering services. It states that *“the Assistant Secretary may make grants to and enter into contracts with States, public agencies, private nonprofit agencies, institutions of higher education, and organizations, including tribal organizations...”* OAA 411(a) (Emphasis Added).

While this authority gives the Assistant Secretary discretion as to funding many Title IV activities, there are a number of activities that Congress has said must be funded, including national support for legal assistance. The 2000 Amendments clearly state such a support system must be funded. Section 420 provides

- a) *PROGRAM AUTHORIZED - The Assistant Secretary shall make grants and enter into contracts, in order to*
  - 1) *provide a national legal assistance support system (operated by one or more grantees or contractors) of activities to State and area agencies on aging for providing, developing, or supporting legal assistance for older individuals, including—*
    - A) *case consultations;*
    - B) *training;*
    - C) *provision of substantive legal advice and assistance;*  
*and*
    - D) *assistance in the design, implementation, and administration of legal assistance delivery systems to local providers of legal assistance for older individuals; and*
  - 2) *support demonstration projects to expand or improve the delivery of legal assistance to older individuals with social or economic needs.*
- b) *ASSURANCES – Any grants or contracts made under subsection (a)(2) shall contain assurances that the requirements of section 307(a)(11) [State plan requirements for legal assistance] are met.* OAA §420(a-b) (Emphasis Added).

To assure that the entities selected to provide the national legal assistance support are equipped to provide effective, high quality support services, Congress further specified in the 2000 Amendments --

*c) ASSISTANCE – To carry out subsection(a)(1), the Assistant Secretary shall make grants to or enter into contracts with national nonprofit organizations experienced in providing support and technical assistance on a nationwide basis to States, area agencies on aging, legal assistance providers, ombudsmen, elder abuse prevention programs, and other organizations interested in the legal rights of older individuals. OAA §420(c)*

The 2000 Amendments retained the four components of a National Legal Assistance Support System: case consultation; training; provision of substantive legal advice; and assistance with delivery systems, that is, assistance with the design, implementation, and administration of legal assistance delivery. Each activity is a valuable resource in developing systems of legal assistance for older people, and in improving the quality and accessibility of such services, as part of the overall system of services for older people. The National Support Centers in Law and Aging, funded under the Administration on Aging, provide a wide range of assistance, including case consultation to Title III legal assistance providers, training for professionals concerning elder rights, substantive legal advice on issues important to older individuals, and working with state and area agencies to expand and improve delivery of legal assistance services and the targeting of those services to those in greatest social and economic need.

#### **14.b) Statute**

See OAA §§ 411(a); §420(a-c).

#### **14.c) Legislative History**

*(2000 Amendments)*

*Section 401 amends the purpose statement of title IV as follows: to expand the Nation's knowledge and understanding of the older population and the aging process; to design, test, and promote innovative ideas and best practices in programs and services for older individuals; to train personnel in the field of aging; and to increase awareness by all citizens to assume personal responsibility for their own longevity.*

*Section 401 authorizes the Assistant Secretary to make grants to, and enter into contracts with, States, public agencies, private nonprofit agencies, institutions of higher education, and tribal organizations in order to carry out education and training,*

*applied social research, program evaluation, demonstration programs, and technical assistance. S Rep No 399, 106<sup>th</sup> Cong, 2<sup>nd</sup> Sess 30 (2000).*

*Section 401 amends Section 424 of the act to require the Assistant Secretary to award funds to national nonprofit organizations experienced in providing support and technical assistance to States, area agencies, ombudsmen, elderly abuse prevention programs, and other organizations that assist older individuals with legal rights activities (in addition to legal assistance providers listed in current law). S Rep No 399, 106<sup>th</sup> Cong, 2<sup>nd</sup> Sess 32 (2000).*

**C. SELECTED PROVISIONS FROM THE OLDER AMERICANS ACT**

**TITLE I -- DECLARATION OF OBJECTIVES; DEFINITIONS**

\* \* \*

**Sec. 102. Definitions**

Sec. 102. For the purposes of this Act --

\* \* \*

(27) The term "greatest economic need" means the need resulting from an income level at or below the poverty line.

(28) The term "greatest social need" means the need caused by noneconomic factors, which include--

(A) physical and mental disabilities;

(B) language barriers; and

(C) cultural, social, or geographical isolation, including isolation caused by racial or ethnic status, that--

(i) restricts the ability of an individual to perform normal daily tasks; or

(ii) threatens the capacity of the individual to live independently.

\* \* \*

(31) The term "legal assistance"--

(A) means legal advice and representation provided by an attorney to older individuals with economic or social needs; and

(B) includes--

(i) to the extent feasible, counseling or other appropriate assistance by a paralegal or law student under the direct supervision of an attorney; and

(ii) counseling or representation by a nonlawyer where permitted by law.

\* \* \*

(38) The term "poverty line" means the official poverty line (as defined by the Office of Management and Budget, and adjusted by the Secretary in Accordance with section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2))).

\* \* \*

## TITLE II -- ADMINISTRATION ON AGING

\* \* \*

### Sec. 202. Functions of Assistant Secretary

Sec. 202. (a) It shall be the duty and function of the Administration to—

\* \* \*

(16) collect for each fiscal year, for fiscal years beginning after September 30, 1988, directly or by contract, statistical data regarding programs and activities carried out with funds provided under this Act, including--

(A) with respect to each type of service or activity provided with such funds--

(i) the aggregate amount of such funds expended to provide such service or activity;

(ii) the number of individuals who received such service or activity; and

(iii) the number of units of such service or activity provided;

(B) the number of senior centers which received such funds; and

(C) the extent to which each area agency on aging designated under section 305(a) satisfied the requirements of paragraph (2) and (4)(A) of section 306(a);

\* \* \*

(19) conduct strict monitoring of State compliance with the requirements in effect, under this Act to prohibit conflicts of interest and to maintain the integrity and public purpose of services provided and service providers, under this Act in all contractual and commercial relationships;

\* \* \*

(22) develop guidelines for area agencies on aging to follow in choosing and evaluating providers of legal assistance;

(23) develop guidelines and a model job description for choosing and evaluating legal assistance developers referred to in *sections 307(a)(13) and 731*;

(24) establish and carry out pension counseling and information programs described in section 215;

\* \* \*

(26) design and implement, for purposes of compliance with paragraph (19), uniform data collection procedures for use by State agencies, including--

*(Note: The reference above to "paragraph (19)" should reference paragraph (16) on data collection. TCSG expects this will be corrected in a technical amendment in the future.)*

- (A) uniform definitions and nomenclature;
- (B) standardized data collection procedures;
- (C) a participant identification and description system;
- (D) procedures for collecting information on gaps in services needed by older individuals, as identified by service providers in assisting clients through the provision of the supportive services; and
- (E) procedures for the assessment of unmet needs for services under this Act; and

(27) improve the delivery of services to older individuals living in rural areas through—

- A) synthesizing results of research on how best to meet the service needs of older individuals in rural areas;
- B) developing a resource guide on best practices for States, area agencies on aging, and service providers;
- C) providing training and technical assistance to States to implement these best practices of service delivery; and
- D) submitting a report on the States' experiences in implementing these best practices and the effect these innovations are having on improving service delivery in rural areas to the relevant committees not later than 36 months after enactment

\* \* \*

Sec. 202. (f)(1) The Assistant Secretary, in accordance with the process described in paragraph (2), and in collaboration with a representative group of State agencies, tribal organizations, area agencies on aging, and providers of services involved in the performance outcome measures shall develop and publish by December 31, 2001, a set of performance outcome measures for planning, managing, and evaluating activities performed and services provided under this Act. To the maximum extent possible, the Assistant Secretary shall use data currently collected (as of the date of development of the measures) by State agencies, area agencies on aging, and service providers through the National Aging Program Information System and other applicable sources of information in developing such measures.

(2) The process for developing the performance outcome measures described in paragraph (1) shall include--

- (A) a review of such measures currently in use by State agencies and area agencies on aging (as of the date of the review);

(B) development of a proposed set of such measures that provides information about the major activities performed and services provided under this Act;

(C) pilot testing of the proposed set of such measures, including an identification of resource, infrastructure, and data collection issues at the State and local levels; and

(D) evaluation of the pilot test and recommendations for modification of the proposed set of such measures.

\* \* \*

### **Sec. 207. Reports**

Sec. 207. (a) Not later than one hundred and twenty days after the close of each fiscal year, the Assistant Secretary shall prepare and submit to the President and to the Congress a full and complete report on the activities carried out under this Act. Such annual reports shall include--

(1) statistical data reflecting services and activities provided to individuals during the preceding fiscal year;

(2) statistical data collected under section 202(a)(19);

(3) statistical data and an analysis of information regarding the effectiveness of the State agency and area agencies on aging in targeting services to older individuals with greatest economic need and older individuals with greatest social need, with particular attention to low-income minority individuals, older individuals residing in rural areas, low-income individuals, and frail individuals (including individuals with any physical or mental functional impairment); and

(4) a description of the implementation of the plan required by section 202(a)(17).

\* \* \*

## **TITLE III -- GRANTS FOR STATE AND COMMUNITY PROGRAMS ON AGING PART A -- GENERAL PROVISIONS**

\* \* \*

### **Sec. 305. Organization**

Sec. 305. (a) In order for a State to be eligible to participate in programs of grants to States from allotments under this title --

(1) the State shall, in accordance with regulations of the Assistant Secretary, designate a State agency as the sole State agency to--

\* \* \*

(D) serve as an effective and visible advocate for older individuals by reviewing and commenting upon all State plans, budgets, and policies which affect older individuals and providing technical

assistance to any agency, organization, association, or individual representing the needs of older individuals; and

(E) divide the State into distinct planning and service areas (or in the case of a State specified in subsection (b)(5)(A), designate the entire State as a single planning and service area), in accordance with guidelines issued by the Assistant Secretary, after considering the geographical distribution of older individuals in the State, the incidence of the need for supportive services, nutrition services, multipurpose senior centers, and legal assistance, the distribution of older individuals who have greatest economic need (with particular attention to low-income minority individuals and older individuals residing in rural areas) residing in such areas, the distribution of older individuals who have greatest social need (with particular attention to low-income minority individuals and older individuals residing in rural areas) residing in such areas, the distribution of older individuals who are Indians residing in such areas, the distribution of resources available to provide such services or centers, the boundaries of existing areas within the State which were drawn for the planning or administration of supportive services programs, the location of units of general purpose local government within the State, and any other relevant factors; . . .

\* \* \*

Sec. 305. (b)

\* \* \*

(5)(A) A State which on or before October 1, 1980, had designated, with the approval of the Assistant Secretary, a single planning and service area covering all of the older individuals in the State, in which the State agency was administering the area plan, may after that date designate one or more additional planning and service areas within the State to be administered by public or private nonprofit agencies or organizations as area agencies on aging, after considering the factors specified in subsection (a)(1)(E). The State agency shall continue to perform the functions of an area agency on aging for any area of the State not included in a planning and service area for which an area agency on aging has been designated.

\* \* \*

Sec. 305. (c) An area agency on aging designated under subsection (a) shall be—

\* \* \*

(5) in the case of a State specified in subsection (b)(5), the State agency; and shall provide assurance, determined adequate by the State agency, that the area agency on aging will have the ability to develop an area plan and to carry out, directly or through contractual or other arrangements, a program in accordance with the plan within the planning and service

area. In designating an area agency on aging within the planning and service area or within any unit of general purpose local government designated as a planning and service area the State shall give preference to an established office on aging, unless the State agency finds that no such office within the planning and service area will have the capacity to carry out the area plan.

\* \* \*

### **Sec. 306. Area Plans**

Sec. 306. (a) Each area agency on aging designated under section 305(a)(2)(A) shall, in order to be approved by the State agency, prepare and develop an area plan for a planning and service area for a two-, three-, or four-year period determined by the State agency, with such annual adjustments as may be necessary. Each such plan shall be based upon a uniform format for area plans within the State prepared in accordance with section 307(a)(1). Each such plan shall—

\* \* \*

(2) provide assurances that an adequate proportion, as required under section 307(a)(2), of the amount allotted for part B to the planning and service area will be expended for the delivery of each of the following categories of services—

(A) services associated with access to services (transportation, outreach, information and assistance, and case management services);

(B) in-home services, including supportive services for families of older individuals who are victims of Alzheimer's disease and related disorders with neurological and organic brain dysfunction; and

(C) legal assistance;

and assurances that the area agency on aging will report annually to the State agency in detail the amount of funds expended for each such category during the fiscal year most recently concluded;

\* \* \*

Sec. 306. (b) Each State, in approving area agency on aging plans under this section, shall waive the requirement described in paragraph (2) of subsection (a) for any category of services described in such paragraph if the area agency on aging demonstrates to the State agency that services being furnished for such category in the area are sufficient to meet the need for such services in such area and had conducted a timely public hearing upon request.

\* \* \*

Sec. 306. (d) An area agency on aging may not require any provider of legal assistance under this title to reveal any information that is protected by the attorney-client privilege.

\* \* \*

## **Sec. 307. State Plans**

Sec. 307. (a) Except as provided in the succeeding sentence and section 309(a), each State, in order to be eligible for grants from its allotment under this title for any fiscal year, shall submit to the Assistant Secretary a State plan for a two-, three-, or four-year period determined by the State agency, with such annual revisions as are necessary, which meets such criteria as the Assistant Secretary may by regulation prescribe. If the Assistant Secretary determines, in the discretion of the Assistant Secretary, that a State failed in 2 successive years to comply with the requirements under this title, then the State shall submit to the Assistant Secretary a State plan for a 1-year period that meets such criteria, for subsequent years until the Assistant Secretary determines that the State is in compliance with such requirements. Each such plan shall comply with all of the following requirements:

\* \* \*

- (2) The plan shall provide that the State agency will—
- (A) evaluate, using uniform procedures described in section 202(a)(29), the need for supportive services (including legal assistance pursuant to 307(a)(11), information and assistance, and transportation services), nutrition services, and multipurpose senior centers within the State;
  - (B) develop a standardized process to determine the extent to which public or private programs and resources (including volunteers and programs and services of voluntary organizations) that have the capacity and actually meet such need; and
  - (C) specify a minimum proportion of the funds received by each area agency on aging in the State to carry out part B that will be expended (in the absence of a waiver under sections 306(b) or 316) by such area agency on aging to provide each of the categories of services specified in section 306(a)(2).

\* \* \*

- (4) The plan shall provide that the State agency will conduct periodic evaluations of, and public hearings on, activities and projects carried out in the state under this title and title VII, including evaluations of the effectiveness of services provided to individuals with greatest economic need, greatest social need, or disabilities, with particular attention to low-income minority individuals and older individuals residing in rural areas.

\* \* \*

- (8)(A) The plan shall provide that no supportive services, nutrition services, or in-home services will be directly provided by the State agency or an area agency on aging in the State, unless in the judgment of the State agency –

- (i) provision of such services by the State agency or the area agency on aging is necessary to assure an adequate supply of such services;
- (ii) such services are directly related to such State agency's or area agency on aging's administrative functions; or
- (iii) such services can be provided more economically, and with comparable quality, by such State agency or area agency on aging.

\* \* \*

(11) The plan shall provide that with respect to legal assistance—

(A) the plan contains assurances that area agencies on aging will (i) enter into contracts with providers of legal assistance which can demonstrate the experience or capacity to deliver legal assistance; (ii) include in any such contract provisions to assure that any recipient of funds under division (i) will be subject to specific restrictions and regulations promulgated under the Legal Services Corporation Act (other than restrictions and regulations governing eligibility for legal assistance under such Act and governing membership of local governing boards) as determined appropriate by the Assistant Secretary; and (iii) attempt to involve the private bar in legal assistance activities authorized under this title, including groups within the private bar furnishing services to older individuals on a pro bono and reduced fee basis;

(B) the plan contains assurances that no legal assistance will be furnished unless the grantee administers a program designed to provide legal assistance to older individuals with social or economic need and has agreed, if the grantee is not a Legal Services Corporation project grantee, to coordinate its services with existing Legal Services Corporation projects in the planning and service area in order to concentrate the use of funds provided under this title on individuals with the greatest such need; and the area agency on aging makes a finding, after assessment, pursuant to standards for service promulgated by the Assistant Secretary, that any grantee selected is the entity best able to provide the particular services;

(C) the State agency will provide for the coordination of the furnishing of legal assistance to older individuals within the State, and provide advice and technical assistance in the provision of legal assistance to older individuals within the State and support the furnishing of training and technical assistance for legal assistance for older individuals;

(D) the plan contains assurances, to the extent practicable, that legal assistance furnished under the plan will be in addition to any legal assistance for older individuals being furnished with funds from sources

other than this Act and that reasonable efforts will be made to maintain existing levels of legal assistance for older individuals; and

(E) the plan contains assurances that area agencies on aging will give priority to legal assistance related to income, health care, long-term care, nutrition, housing, utilities, protective services, defense of guardianship, abuse, neglect, and age discrimination.

\* \* \*

(13) The plan shall provide assurances that each State will assign personnel (one of whom shall be known as a legal assistance developer) to provide State leadership in developing legal assistance programs for older individuals throughout the State.

\* \* \*

(16) The plan shall provide assurances that the State agency will require outreach efforts that will--

(A) identify individuals eligible for assistance under this Act, with special emphasis on--

- (i) older individuals residing in rural areas;
- ii) older individuals with greatest economic need (with particular attention to low-income minority individuals and older individuals residing in rural areas);
- (iii) older individuals with greatest social need (with particular attention to low-income minority individuals and older individuals residing in rural areas);
- (iv) older individuals with severe disabilities;
- (v) older individuals with limited English-speaking ability; and
- (vi) older individuals with Alzheimer's disease or related disorders with neurological and organic brain dysfunction (and the caretakers of such individuals); and

(B) inform the older individuals referred to in clauses (i) through (vi) of subparagraph (A), and the caretakers of such individuals, of the availability of such assistance.

\* \* \*

(19) The plan shall include the assurances and description required by section 705(a). [*Regarding Elder Rights Plans*]

\* \* \*

Sec. 307. (f) Neither a State, nor a State agency, may require any provider of legal assistance under this title to reveal any information that is protected by the attorney-client privilege.

\* \* \*

## **Sec. 315. Consumer Contributions**

### **Sec. 315. (a) COST SHARING --**

(1) **IN GENERAL** -- Except as provided in paragraphs (2) and (3), a State is permitted to implement cost sharing for all services funded by this Act by recipients of the services.

(2) **EXCEPTION** -- The State is not permitted to implement the cost sharing described in paragraph (1) for the following services:

(A) Information and assistance, outreach, benefits counseling, or case management services.

(B) Ombudsman, elder abuse prevention, legal assistance, or other consumer protection services.

(C) Congregate and home delivered meals.

(D) Any services delivered through tribal organizations.

\* \* \*

### **Sec. 315. (b) VOLUNTARY CONTRIBUTIONS --**

(1) **IN GENERAL** -- Voluntary contributions shall be allowed and may be solicited for all services for which funds are received under this Act provided that the method of solicitation is noncoercive.

(2) **LOCAL DECISION** -- The area agency on aging shall consult with the relevant service providers and older individuals in agency's planning and service area in a State to determine the best method for accepting voluntary contributions under this subsection

(3) **PROHIBITED ACTS** -- The area agency on aging and service providers shall not means test for any service for which contributions are accepted or deny services to any individual who does not contribute to the cost of the service.

(4) **REQUIRED ACTS** -- The area agency on aging shall ensure that each service provider will--

(A) provide each recipient with an opportunity to voluntarily contribute to the cost of the service;

(B) clearly inform each recipient that there is no obligation to contribute and that the contribution is purely voluntary;

(C) protect the privacy and confidentiality of each recipient with respect to the recipient's contribution or lack of contribution;

(D) establish appropriate procedures to safeguard and account for all contributions; and

(E) use all collected contributions to expand the service for which the contributions were given.

\* \* \*

## **Sec. 316. Waivers**

Sec. 316. (a) IN GENERAL- The Assistant Secretary may waive any of the provisions specified in subsection (b) with respect to a State, upon receiving an application by the State agency containing or accompanied by documentation sufficient to establish, to the satisfaction of the Assistant Secretary, that—

- (1) approval of the State legislature has been obtained or is not required with respect to the proposal for which the waiver is sought;
- (2) the State agency has collaborated with the area agencies on aging in the State and other organizations that would be affected with respect to the proposal for which the waiver is sought;
- (3) the proposal has been made available for public review and comment, including the opportunity for a public hearing upon request, within the State (and a summary of all the comments received has been included in the application); and
- (4) the State agency has given adequate consideration to the probable positive and negative consequences of approval of the waiver application, and the probable benefits for older individuals can reasonably be expected to outweigh any negative consequences, or particular circumstances in the State otherwise justify the waiver.

Sec. 316. (b) REQUIREMENTS SUBJECT TO WAIVER- The provisions of this title that may be waived under this section are—

- (1) any provision of sections 305, 306, and 307 requiring statewide uniformity of programs carried out under this title, to the extent necessary to permit demonstrations, in limited areas of a State, of innovative approaches to assist older individuals;
- (2) any area plan requirement described in section 306(a) if granting the waiver will promote innovations or improve service delivery and will not diminish services already provided under this Act;
- (3) any State plan requirement described in section 307(a) if granting the waiver will promote innovations or improve service delivery and will not diminish services already provided under this Act;
- (4) any restriction under paragraph (5) of section 308(b), on the amount that may be transferred between programs carried out under part B and part C; and
- (5) the requirement of section 309(c) that certain amounts of a State allotment be used for the provision of services, with respect to a State

that reduces expenditures under the State plan of the State (but only to the extent that the non-Federal share of the expenditures is not reduced below any minimum specified in section 304(d) or any other provision of this title).

Sec. 316 (c) DURATION OF WAIVER- The application by a State agency for a waiver under this section shall include a recommendation as to the duration of the waiver (not to exceed the duration of the State plan of the State). The Assistant Secretary, in granting such a waiver, shall specify the duration of the waiver, which may be the duration recommended by the State agency or such shorter time period as the Assistant Secretary finds to be appropriate.

Sec. 316. (d) REPORTS TO SECRETARY – With respect to each waiver granted under this section, not later than 1 year after the expiration of such waiver, and at any time during the waiver period that the Assistant Secretary may require, the State agency shall prepare and submit to the Assistant Secretary a report evaluating the impact of the waiver on the operation and effectiveness of programs and services provided under this title.

**Sec. 321.**

**TITLE III, PART B -- SUPPORTIVE SERVICES AND SENIOR CENTERS  
PROGRAM AUTHORIZED**

Sec. 321. (a) The Assistant Secretary shall carry out a program for making grants to States under State plans approved under section 307 for any of the following supportive services:

\* \* \*

(6) services designed to provide to older individuals legal assistance and other counseling services and assistance, including—

(A) tax counseling and assistance, financial counseling, and counseling regarding appropriate health and life insurance coverage;

(B) representation—

(i) of individuals who are wards (or are allegedly incapacitated); and

(ii) in guardianship proceedings of older individuals who seek to become guardians, if other adequate representation is unavailable in the proceedings; and

(C) provision, to older individuals who provide uncompensated care to their adult children with disabilities, of counseling to assist such older individuals with permanency planning for such children;

\* \* \*

## TITLE IV -- TRAINING, RESEARCH, AND DISCRETIONARY PROJECTS AND PROGRAMS

\* \* \*

### **Sec. 411. Program Authorized**

Sec. 411. (a) IN GENERAL- For the purpose of carrying out this section, the Assistant Secretary may make grants to and enter into contracts with States, public agencies, private nonprofit agencies, institutions of higher education, and organizations, including tribal organizations, for—

- (1) education and training to develop an adequately trained workforce to work with and on behalf of older individuals;
- (2) applied social research and analysis to improve access to and delivery of services for older individuals;
- (3) evaluation of the performance of the programs, activities, and services provided under this section;
- (4) the development of methods and practices to improve the quality and effectiveness of the programs, services, and activities provided under this section;
- (5) the demonstration of new approaches to design, deliver, and coordinate programs and services for older individuals;
- (6) technical assistance in planning, developing, implementing, and improving the programs, services, and activities provided under this section;
- (7) coordination with the designated State agency described in section 101(a)(2)(A)(i) of the Rehabilitation Act of 1973 (29 U.S.C. 721(a)(2)(A)(i)) to provide services to older individuals who are blind as described in such Act;
- (8) the training of graduate level professionals specializing in the mental health needs of older individuals; and
- (9) any other activities that the Assistant Secretary determines will achieve the objectives of this section.

\* \* \*

### **Sec. 420. Demonstration and Support Projects for Legal Assistance for Older Individuals.**

Sec. 420. (a) PROGRAM AUTHORIZED- The Assistant Secretary shall make grants and enter into contracts, in order to--

- (1) provide a national legal assistance support system (operated by one or more grantees or contractors) of activities to State and area agencies on aging for providing, developing, or supporting legal assistance for older individuals, including--
  - (A) case consultations;
  - (B) training;
  - (C) provision of substantive legal advice and assistance; and

- (D) assistance in the design, implementation, and administration of legal assistance delivery systems to local providers of legal assistance for older individuals; and
- (2) support demonstration projects to expand or improve the delivery of legal assistance to older individuals with social or economic needs.

Sec. 420. (b) ASSURANCES- Any grants or contracts made under subsection (a)(2) shall contain assurances that the requirements of section 307(a)(11) are met.

Sec. 420. (c) ASSISTANCE- To carry out subsection (a)(1), the Assistant Secretary shall make grants to or enter into contracts with national nonprofit organizations experienced in providing support and technical assistance on a nationwide basis to States, area agencies on aging, legal assistance providers, ombudsmen, elder abuse prevention programs, and other organizations interested in the legal rights of older individuals.

\* \* \*

## **TITLE VII -- ALLOTMENTS FOR VULNERABLE ELDER RIGHTS PROTECTION ACTIVITIES**

### **SUBTITLE A -- STATE PROVISIONS**

#### **CHAPTER 1 -- GENERAL STATE PROVISIONS**

##### **Sec. 701. Establishment.**

The Assistant Secretary, acting through the Administration, shall establish and carry out a program for making allotments to States to pay for the cost of carrying out vulnerable elder rights protection activities.

##### **Sec. 702. Authorization of Appropriations.**

Sec. 702. (a) Ombudsman Programs. -- There are authorized to be appropriated to carry out chapter 2, such sums as may be necessary for fiscal year 2001, and such sums as may be necessary for subsequent fiscal years.

Sec. 702. (b) Prevention of Elder Abuse, Neglect, and Exploitation. -- There are authorized to be appropriated to carry out chapter 3, such sums as may be necessary for fiscal year 2001, and such sums as may be necessary for subsequent fiscal years.

Sec. 702. (c) Legal Assistance Development Program. -- There are authorized to be appropriated to carry out chapter 4, such sums as may be necessary for fiscal year 2001, and such sums as may be necessary for subsequent fiscal years.

\* \* \*

**Sec. 705. Additional State Plan Requirements.**

Sec. 705. (a) Eligibility. -- In order to be eligible to receive an allotment under this subtitle, a State shall include in the State plan submitted under section 307-

(1) an assurance that the State, in carrying out any chapter of this subtitle for which the State receives funding under this subtitle, will establish programs in accordance with the requirements of the chapter and this chapter;

(2) an assurance that the state will hold public hearings, and use other means, to obtain the views of older individuals, area agencies on aging, recipients of grants under title VI, and other interested persons and entities regarding programs carried out under this subtitle;

(3) an assurance that the State, in consultation with area agencies on aging, will identify and prioritize statewide activities aimed at ensuring that older individuals have access to, and assistance in securing and maintaining, benefits and rights;

\* \* \*

(7) a description of the manner in which the State agency will carry out this title in accordance with the assurances described in paragraphs (1) through (6).

Sec. 705. (b) Privilege.—Neither a State, nor a State agency, may require any provider of legal assistance under this subtitle to reveal any information that is protected by the attorney-client privilege.

\* \* \*

**CHAPTER 4 -- STATE LEGAL ASSISTANCE DEVELOPMENT PROGRAM**

**Sec. 731. State Legal Assistance Development**

A State agency shall provide the services of an individual who shall be known as a State legal assistance developer, and the services of other personnel, sufficient to ensure--

(1) State leadership in securing and maintaining the legal rights of older individuals;

(2) State capacity for coordinating the provision of legal assistance;

(3) State capacity to provide technical assistance, training, and other supportive functions to area agencies on aging, legal assistance providers, ombudsmen, and other persons, as appropriate;

(4) State capacity to promote financial management services to older individuals at risk of conservatorship;

(5) State capacity to assist older individuals in understanding their rights, exercising choices, benefiting from services and opportunities authorized by law, and maintaining the rights of older individuals at risk of guardianship; and

(6) State capacity to improve the quality and quantity of legal services provided to older individuals.

**D. SELECTED PROVISIONS FROM THE 1988 REGULATIONS:**

45 CFR §1321.3 Definitions.

"Means test," as used in the provision of services, means the use of an older person's income or resources to deny or limit that person's receipt of services under this part.

45 CFR §1321.51 Confidentiality and disclosure of information.

(a) A State agency shall have procedures to protect the confidentiality of information about older persons collected in the conduct of its responsibilities. The procedures shall ensure that no information about an older person, or obtained from an older person by a service provider or the State or area agencies, is disclosed by the provider or agency in a form that identifies the person without the informed consent of the person or of his or her legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal, State, or local monitoring agencies.

(b) A State agency is not required to disclose those types of information or documents that are exempt from disclosure by a Federal agency under the Federal Freedom of Information Act, 5 U.S.C. 552.

(c) A State or area agency on aging may not require a provider of legal assistance under this part to reveal any information that is protected by attorney client [sic] privilege.

45 CFR §1321.71 Legal Assistance

(a) The provisions and restrictions in this section apply only to legal assistance providers and only if they are providing legal assistance under section 307(a)(15) of the Act.

(b) Nothing in this section is intended to prohibit any attorney from providing any form of legal assistance to an eligible client, or to interfere with the fulfillment of any attorney's professional responsibilities to a client.

(c) The area agency shall award funds to the legal assistance provider(s) that most fully meet the standards in this subsection. The legal assistance provider(s) shall:

(1) Have staff with expertise in specific areas of law affecting older persons in economic or social need, for example, public benefits, institutionalization and alternatives to institutionalization;

- (2) Demonstrate the capacity to provide effective administrative and judicial representation in the areas of law affecting older persons with economic or social need;
- (3) Demonstrate the capacity to provide support to other advocacy efforts, for example, the long-term care ombudsman program;
- (4) Demonstrate the capacity to provide legal services to institutionalized, isolated, and homebound older individuals effectively; and
- (5) Demonstrate the capacity to provide legal assistance in the principal language spoken by clients in areas where a significant number of clients do not speak English as their principal language.

(d) A legal assistance provider may not require an older person to disclose information about income or resources as a condition for providing legal assistance under this part.

(e) A legal assistance provider may ask about the person's financial circumstances as a part of the process of providing legal advice, counseling and representation, or for the purpose of identifying additional resources and benefits for which an older person may be eligible.

(f) A legal assistance provider and its attorneys may engage in other legal activities to the extent that there is no conflict of interest nor other interference with their professional responsibilities under this Act.

(g) No provider shall use funds received under the Act to provide legal assistance in a fee generating case unless other adequate representation is unavailable or there is an emergency requiring immediate legal action. All providers shall establish procedures for the referral of fee generating cases.

(1) "Fee generating case" means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client from public funds, or from the opposing party.

(2) Other adequate representation is deemed to be unavailable when:

- (i) Recovery of damages is not the principal object of the client; or
- (ii) A court appoints a provider or an employee of a provider pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction; or

(iii) An eligible client is seeking benefits under Title II of the Social Security Act, 42 U.S.C. 401, et seq., Federal Old Age, Survivors, and Disability Insurance Benefits; or Title XVI of the Social Security Act, 42 U.S.C. 1381, et seq., Supplemental Security Income for Aged, Blind, and Disabled.

(3) A provider may seek and accept a fee awarded or approved by a court or administrative body, or included in a settlement.

(4) When a case or matter accepted in accordance with this section results in a recovery of damages, other than statutory benefits, a provider may accept reimbursement from out-of-pocket costs and expenses incurred in connection with the case or matter.

(h) A provider, employee of the provider, or staff attorney shall not engage in the following prohibited political activities:

(1) No provider or its employees shall contribute or make available Older Americans Act funds, personnel or equipment to any political party or association or to the campaign of any candidate for public or party office; or for use in advocating or opposing any ballot measure, initiative, or referendum;

(2) No provider or its employees shall intentionally identify the Title III program or provider with any partisan or nonpartisan political activity, or with the campaign of any candidate for public or party office;

(3) While engaged in legal assistance activities supported under the Act, no attorney shall engage in any political activity.

(i) No funds made available under the Act shall be used for lobbying activities, including but not limited to any activities intended to influence any decision or activity by any nonjudicial Federal, State or local individual or body. Nothing in this section is intended to prohibit an employee from:

(1) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies;

(2) Informing a client about a new or proposed statute, executive order, or administrative regulation;

(3) Responding to an individual client's request for advice only with respect to the client's own communications to officials unless otherwise prohibited by the Older Americans Act, Title III regulations or other applicable law. This provision does not authorize publication of lobbying materials or training of clients on lobbying techniques or the composition of a communication for the client's use; or

(4) Making direct contact with the area agency for any purpose;

(5) Providing a client with administrative representation in adjudicatory or rulemaking proceedings or negotiations, directly

affecting that client's legal rights in a particular case, claim or application;

(6) Communicating with an elected official for the sole purpose of bringing a client's legal problem to the attention of that official; or

(7) Responding to the request of a public official or body for testimony, legal advice or other statements on legislation or other issues related to aging; provided that no such action will be taken without first obtaining the written approval of the responsible area agency.

(j) While carrying out legal assistance activities and while using resources provided under the Act, no provider or its employees shall:

(1) Participate in any public demonstration, picketing, boycott, or strike, except as permitted by law in connection with the employee's own employment situation;

(2) Encourage, direct, or coerce others to engage in such activities; or

(3) At any time engage in or encourage others to engage in:

(i) Any illegal activity; or

(ii) Any intentional identification of programs funded under the Act or recipient with any political activity.

(k) None of the funds made available under the Act may be used to pay dues exceeding \$100 per recipient per annum to any organization (other than a bar association), a purpose or function of which is to engage in activities prohibited under these regulations unless such dues are not used to engage in activities for which Older Americans Act funds cannot be used directly.