



OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2003-1011

To: Deborah Perluss
Director of Advocacy/General Counsel
Northwest Justice Project
401 Second Ave., S.
Suite 407
Seattle, WA 98104

Date: July 9, 2003

Subject: Interpretation of 45 CFR 1638 (Restriction on Solicitation)

You asked this Office for an opinion as to whether the Northwest Justice Project (NJP) may, consistent with the restrictions on solicitation found in the Corporation's regulations at 45 CFR Part 1638, engage in activities otherwise defined as "in-person unsolicited advice" as part of a program incidental to "maintaining an ongoing presence in a courthouse to provide advice." You asked further, if NJP could provide general information about the availability of services by handing out informational brochures in person to targeted persons in the courthouse.

Brief Answer

NJP may not engage in activities otherwise defined as in-person unsolicited advice, including approaching identified individuals in the courthouse and handing them informational brochures, even if those activities would take place incidental to maintaining an ongoing presence in a courthouse to provide advice.

Background

We understand the facts to be the following:

NJP administers a Housing Justice Program (HJP) at the South King County Courthouse in Kent, Washington. The program provides same-day advice and representation by volunteer attorneys to LSC eligible tenants defending eviction proceedings in court. The court provides office space to the program while NJP provides the program coordinator and other program support (telephone, research materials, copier, fax, office supplies and computer and internet access) for the HJP. Prior to NJP's involvement with the HJP, the program was administered by a non-LSC funded program pursuant to an Equal Justice Works (then, NAPIL) fellowship. Upon the termination of the fellowship, NJP assumed responsibility for the program.

Prior to NJP's involvement with the program, the program coordinator would contact prospective clients at the courthouse, advise them of the availability of services and ask them if they wanted to discuss their case with a lawyer, and would represent the persons that day. The coordinator would also obtain the dockets for future cases and contact the tenants (presumably by phone) to see if the tenant was in need of legal assistance. Since taking over the administration of the program, NJP has ceased engaging in these direct client approach activities because of the restrictions on solicitation applicable to NJP. Instead, a signboard has been placed on an easel outside the courtroom, and, on occasion, the Clerk's Office or presiding Court Commissioner will refer tenants to HJP. NJP is concerned that, in the absence of direct client approach activities, there has been a decline in the usage of HJP services (which is not correlated with a drop in the number of landlord-tenant cases or a reduction in eligible client population).

Analysis

Section 504(a)(18) of the FY 1996 LSC Appropriations act provides that no LSC funds may be used to provide financial assistance to an entity unless the entity "agrees that [the recipient], and the employees [of the recipient], will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action..."¹ This restriction on solicitation has been incorporated by reference in each subsequent appropriations measure, including the current act. Pub. L. 108-7. LSC has implemented the solicitation restriction in regulations at 45 CFR Part 1638. The general prohibition on solicitation is contained in §1638.3(a), which provides that "[r]ecipients and their employees are prohibited from representing a client as a result of in-person unsolicited advice." Under the rule, "in-person" is defined as a "face-to-face encounter or a personal encounter via other means of communications such as a personal letter or telephone call." 45 CFR §1638.2(a). "Unsolicited advice" is defined as "advice to obtain counsel or take legal action given by a recipient or its employee to an individual who did not seek the advice and with whom the recipient does not have an attorney-client relationship." 45 CFR §1638.2(b).

The regulations do permit, however, certain community legal education activities. In particular, §1638.4 allows recipients to engage in community legal education activities such as public service announcements, providing legal education presentations to groups requesting such, distributing legal education publications and maintaining and ongoing presence at a courthouse to provide advice at the invitation of the court. The HJP program itself fits into this last category.

¹ The statute and the implementing rule also contain a restriction on referring persons to whom the recipient has provided unsolicited advice to other LSC recipients. This aspect of the restriction is not pertinent to this Opinion and is not further discussed.

Your letter asks whether activities formerly undertaken under by the previous (non-recipient) program administrator - contacting prospective clients in person at the courthouse to advise them of the availability of services and ask them if they wanted to discuss their case with a lawyer, followed by the representation of those persons that day and personally contacting tenants with upcoming court dates to inquire about a need for legal assistance (and, where such need was indicated, representing those persons when they came into court), are impermissible under the general solicitation ban, or, rather are permitted pursuant to the HJP's status as a permissible "ongoing presence in a courthouse to provide advice at the invitation of the court."

The preamble to the final rule states that "an individual who seeks assistance from the recipient after involvement in one of the [activities permitted under §1638.4] may be represented *provided that the request for assistance did not result from in-person unsolicited advice.*" 62 Fed. Reg. 19423 (April 27, 1997) (emphasis added). As the activities described above constitute "in person unsolicited advice," they are exactly the sorts of activities encompassed and prohibited by the prohibition on solicitation and the fact that the activities would be engaged in as part of a permissible ongoing presence at a courthouse program is immaterial. Accordingly, NJP has been correct in refraining to engage in these activities and may not, consistent with Part 1638, undertake such activities in the future.

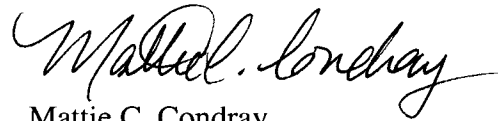
You further inquire whether it would be permissible to make an in-person contact with "a person identified as a tenant-defendant" to hand them an informational brochure about the HJP. Although general distribution of community legal education publications is a permissible activity, the activity you describe is targeted specifically to potential clients and appears to be little different than the above described in-person solicitation, with the form of communication being reduced to writing rather than oral communication. However, solicitation by personal written communications, such as a letter, is specifically included in the definition of "in person." 45 CFR §1638.2(a). As such, the targeted distribution of information at the courthouse to identified persons just prior to their court appearances would amount to in person unsolicited advice in contravention of the regulations.

In contrast, NJP could make informational brochures available in various places in the courthouse, such as in the Clerk's Office. Similarly, the Clerk's Office or the presiding Court Commissioner could hand out brochures in addition to occasionally referring tenants orally. Alternately, if the court would permit, instead of just having a sign in front of the courtroom, an HJP contact person could sit at a table outside the courtroom with the sign and respond to persons who chose to approaching the table for information and assistance. We appreciate your situation and understand that these alternatives may either be unavailable to you or not as efficacious as in person solicitation. However, the statutory and regulatory language is clear in this regard.

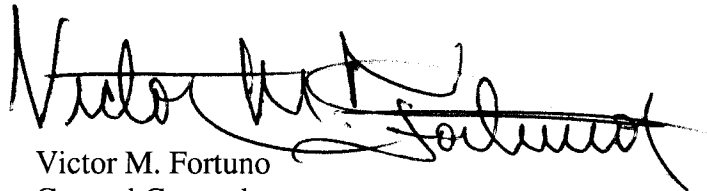
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Very truly yours,



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