

membership or to acquire voting or participatory rights in an organization. This definition does not include payments for training sessions, goods, research materials and other such services. LSC funds may be expended for such services, provided the expenditures are made in accordance with applicable regulations, including 45 CFR Part 1630.

Section 1627.4 Membership Fees or Dues

This section is entirely revised to prohibit any use of LSC funds for payment of membership fees or dues to private or nonprofit organizations. This prohibition includes payment of membership fees or dues for employees and volunteer attorneys to voluntary bar associations that are private or nonprofit organizations.

The prohibition in this final rule, as in the interim rule, does not apply to non-LSC funds and does not extend to the payment of dues to governmental bodies. The comments on these provisions were generally favorable, especially in regard to the provisions allowing payment of dues with LSC funds to bar associations acting in a governmental capacity. Under this rule, payment of dues to a State Supreme Court or to a bar association acting as an administrative arm of the court or in some other governmental capacity in collecting membership fees or dues that are a requirement for an attorney to practice in that State, is deemed to be payment of membership fees or dues to a governmental body, and is not prohibited by this part. A few changes have been made to add clarity. Finally, although not included in the text of the rule, the Board has directed that the prohibition not be applied to FY 1995 carryover funds that were used to pay dues prior to the August 29, 1996 publication of the interim rule.

Several provisions in the prior rule have been deleted because they are inconsistent with the new statutory prohibition. Thus, all references to the circumstances under which recipients could use LSC funds to pay for fees or dues, and all references to procedures required of recipients before they could expend funds for certain payments of fees or dues, are no longer applicable, because the new legislation prohibits the use of any LSC funds to pay dues. Thus, the provisions are no longer relevant.

Section 1627.7 Tax Sheltered Annuities, Retirement Accounts and Pensions

Section 1627.8 of the prior rule is now renumbered as § 1627.7.

Section 1627.8 Recipient Policies, Procedures and Recordkeeping

This new section requires recipients to establish policies and procedures and to maintain records to document compliance with the requirements of this part.

List of Subjects in 45 CFR Part 1627

Grant programs, Legal services.

For reasons set forth in the preamble, 45 CFR part 1627 is amended as follows:

PART 1627—SUBGRANTS AND MEMBERSHIP FEES OR DUES

1. The heading of part 1627 is revised to read as set forth above.
2. The authority citation for part 1627 is revised to read as follows:

Authority: 42 U.S.C. 2996e(b)(1), 2996f(a), and 2996g(e); Pub. L. 104-208, 110 Stat 3009; Pub. L. 104-134, 110 Stat 1321.

- 3.-4. Section 1627.2 is amended by revising paragraph (c) to read as follows:

§ 1627.2 Definitions.

* * * * *

(c) *Membership fees or dues* as used in this part means payments to an organization on behalf of a program or individual to be a member thereof, or to acquire voting or participatory rights therein.

5. Section 1627.4 is revised to read as follows:

§ 1627.4 Membership fees or dues.

(a) LSC funds may not be used to pay membership fees or dues to any private or nonprofit organization, whether on behalf of a recipient or an individual.

(b) Paragraph (a) of this section does not apply to the payment of membership fees or dues mandated by a governmental organization to engage in a profession, or to the payment of membership fees or dues from non-LSC funds.

6. Section 1627.7 is revised to read as follows:

§ 1627.7 Tax sheltered annuities, retirement accounts and pensions.

No provision contained in this part shall be construed to affect any payment by a recipient on behalf of its employees for the purpose of contributing to or funding a tax sheltered annuity, retirement account, or pension fund.

7. Section 1627.8 is revised to read as follows:

§ 1627.8 Recipient policies, procedures and recordkeeping.

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document

the recipient's compliance with this part.

Dated: April 14, 1997.

Victor M. Fortuno,
General Counsel.

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LEGAL SERVICES CORPORATION

45 CFR Part 1636

Client Identity and Statement of Facts

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule implements a restriction contained in the Legal Services Corporation's ("LSC" or "Corporation") FY 1996 appropriations act that is currently incorporated by reference in the Corporation's FY 1997 appropriations act. The rule requires LSC recipients to identify by name each plaintiff they represent in any litigation. In the case of pre-litigation negotiation, the regulation requires recipients to notify potential defendants of the names of plaintiffs represented by the recipient. The rule also requires that a plaintiff sign a written statement of facts on which the plaintiff's complaint is based before the recipient engages in litigation or before it undertakes pre-litigation negotiations on the plaintiff's behalf.

DATES: Effective May 21, 1997.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, (202) 336-8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee ("Committee") of the LSC Board of Directors ("Board") requested the LSC staff to prepare an interim rule to implement § 504(a)(8), a restriction in the Corporation's FY 1996 appropriations act which requires LSC recipients to identify the plaintiffs they represent and have the plaintiffs sign written statements of the facts underlying their claims. The Committee held hearings on staff proposals on July 8 and 19, 1996. An interim rule was adopted by the Board on July 20 and was published in the **Federal Register** on August 29, 1996 (61 FR 45740), to be effective immediately. The Corporation received 9 timely comments on the interim rule. The Committee held public hearings to discuss the written comments and to hear oral comments on December 13, 1996, and January 5, 1997, and made revisions to the interim rule. The Board adopted the Committee's recommended version as a final rule on January 6, 1997.

The Corporation's FY 1997 appropriations act became effective on October 1, 1996, see Pub. L. 104-208, 110 Stat. 3009. It incorporated by reference the § 504 condition on LSC grants included in the FY 1996 appropriations act implemented by this rule. Accordingly, the preamble and text of this rule continue to refer to the applicable section number of the FY 1996 appropriations act.

Generally, this rule implements § 504(a)(8) of the Corporation's FY 1996 appropriations act, which requires recipients to identify the plaintiffs they represent when filing a complaint or initiating or participating in litigation or prior to engaging in any pre-litigation settlement negotiations with a prospective defendant, unless a court issues an order based on a finding that disclosure would cause serious harm to the plaintiff. In addition, the rule requires that, prior to entering into any pre-litigation settlement negotiations with a prospective defendant or prior to filing the complaint in court, each recipient obtain from the client being represented a signed statement of the facts supporting the complaint. The purpose of the rule is to ensure that an LSC-funded program represents eligible clients who have colorable claims when instituting litigation against or negotiating with a defendant.

A section-by-section discussion of this interim rule is provided below.

Section 1636.1 Purpose

The purpose of the rule is to ensure that during pre-litigation settlement negotiations with a prospective defendant and when filing a complaint in a court of law or otherwise participating in litigation against a defendant, LSC recipients identify their clients to the adverse party. The rule also seeks to ensure that recipients undertake such activities based on facts which support the complaint. This final rule revises the interim rule by adding language that clarifies that the purpose of this rule is to ensure disclosure of the plaintiff's identity to the defendant rather than to the public at large. Thus, filings in bankruptcy would not fall under this rule, because they do not implicate any defendant.

Section 1636.2 Requirements

This section sets forth the requirement that recipients identify plaintiffs they represent in all court complaints filed and prior to engaging in any pre-litigation settlement negotiations. The disclosure of a client's identity is not required when a court of competent jurisdiction has entered an order protecting the client from such

disclosure to prevent probable, serious harm to the client.

Public comments pointed out types of cases and certain situations they believed would not fall within the exception for probable serious harm but where the identities of plaintiffs should not be disclosed to the public in a complaint because they are protected by State law or court rules, or public disclosure would cause great embarrassment and humiliation. Comments pointed out, for example, that State law usually protects the identities of juveniles or persons who are mentally incompetent in such cases as guardianships, paternity actions, and juvenile court actions initiated for the protection of the child. Other comments stated that, in certain types of cases, the identity of the plaintiff is generally already known to the defendant, such as divorces and domestic violence cases, or where both parties have agreed to keep the plaintiff's identity confidential.

In response to these comments, the Board agreed to add language to allow a recipient the alternative of providing notice directly to the defendant against whom the complaint is filed where public disclosure would be contrary to law or court rules or practices. This revision is consistent with the purpose of the underlying statutory requirement, which pertains only to complaints or negotiation efforts against a defendant or prospective defendant.

One comment stated that the interim rule seemed to apply to situations where the recipient program is co-counseling with another attorney and, thus, the recipient would need to identify each plaintiff represented by all plaintiffs' attorneys to the defendants. The comment suggested language clarifying this point. The Board revised the rule to clarify that recipients need only identify clients they represent.

One comment pointed out that it is unclear that procedures exist in most jurisdictions for making a motion to the court to protect the identity of a client prior to filing a complaint. Thus, for a client who is in pre-litigation settlement negotiations, it is unclear how a recipient would obtain a court order to protect the identity of a client. The comment suggested that it would require the filing of a separate action to obtain the protective order and requiring extra litigation simply to obtain a protective order goes against judicial efficiency.

No revisions were made to the rule in response to this comment. Section 504(a)(8) applies the exception for probable serious harm to pre-litigation negotiations as well as to complaints filed in court. Therefore, the

Corporation determined it has no discretion to make exceptions for pre-litigation negotiations, either to promote judicial economy or in recognition that procedures for such actions may not exist.

This section also requires that prior to the recipient's entering into any pre-litigation settlement negotiations or prior to filing the complaint in court, each recipient obtain from the client being represented a signed statement of the facts supporting the complaint. The requirement does not apply to defendants represented by a recipient for counterclaims filed against a plaintiff. Nor does it apply to a recipient's delivery of advice and brief services or to attempts to resolve matters for a client through negotiations in which there is no contemplation of litigation.

The statement of facts is to be written in English and in the client's language if the client does not understand English. If the client's language is only an oral and not a written language, such as the Navajo language, the statement in English should be certified to have been translated orally to the client prior to the client's signing.

In a few emergency situations, it may be necessary for the recipient to negotiate with a prospective defendant or to file an action before the plaintiff's statement of facts can be prepared or signed. A recipient may proceed without a signed statement in such emergencies, if delay in proceeding is reasonably likely to cause harm to a significant interest of the client. Emergency situations might include threats to take the client's child out of State, to assault the client, or to evict the client without following the required legal procedures. Where a recipient proceeds on an emergency basis, a statement must be prepared and signed as soon as practicable.

Section 1636.3 Access to Written Statements

This section implements the statutory provision granting a right of access to the statements of facts for certain specified governmental officials and their agents but not for adverse parties and others. Comments stated that the access provisions should be strengthened to limit any potential for abuse by parties not specifically granted access by this rule. The first comment suggested adding language stating that the access provision should not be deemed a waiver of any privilege. The second proposed that language be added referencing the rules protecting client confidentiality generally and those

governing the attorney-client privilege specifically.

In response, the Board revised § 1636.3(b) to limit access for persons and parties who are not specifically provided access under paragraph (a) of this section. The interim rule provided some protection for the statements under the discovery rule. As applied to those not identified in paragraph (a), the final rule has added the protection of other "applicable law," which would include rules protecting client confidentiality generally and those governing the attorney-client privilege specifically. This language is consistent with the access requirements of paragraph (a) but also conforms to the requirement of § 1006(b)(3) in the LSC Act that the Corporation ensure that recipient activities be carried out in a manner consistent with professional responsibilities.

This section does not create any new right of access to information for parties to a lawsuit or for others, and the Corporation anticipates that, in most cases, courts will determine that statements are not discoverable by an adverse party in litigation. Recipients should draft the statements of facts, however, mindful of their local law regarding confidentiality.

A copy of each statement drafted according to this section should be maintained separate from the client's case file.

Section 1636.4 Applicability

This section specifies that the requirements of this part apply not only to cases handled by recipient staff but also to cases for which private attorneys are compensated by the recipient. Attorneys who are handling cases pro bono, however, are not subject to the requirements of this rule, because pro bono attorneys are uncompensated. It is the Corporation's judgment that the requirements of this part, especially the requirement for the plaintiff's statement of facts, would be a substantial impediment to the recruitment of pro bono lawyers. In addition, the fact that pro bono lawyers are volunteering their time serves as an additional impediment to their bringing frivolous law suits.

A judicare program commented that the distinction between PAI attorneys who accept a reduced fee and those who provide free representation is an artificial distinction considering that the reduced fees are insignificant amounts and do not constitute any real incentive for private attorneys to handle PAI cases. According to the program, the reduced fees should not be considered compensation significant enough to provide an exception for judicare

attorneys. The Board disagreed that reduced fees to judicare attorneys are too insignificant to be considered compensation and included no exception for judicare programs.

Section 1636.5 Recipient Policies, Procedures and Recordkeeping

This section requires recipients to establish policies and procedures to ensure compliance with this part and to maintain records sufficient to document compliance with this part.

List of Subjects in 45 CFR Part 1636

Client identity, Grant programs, Legal services.

For reasons set forth in the preamble, 45 CFR part 1636 is revised as follows:

PART 1636—CLIENT IDENTIFY AND STATEMENT OF FACTS

Sec.

- 1636.1 Purpose.
- 1636.2 Requirements.
- 1636.3 Access to written statements.
- 1636.4 Applicability.
- 1636.5 Recipient policies, procedures and recordkeeping.

Authority: Pub. L. 104-208, 110 Stat. 3009; Pub. L. 104-134, 110 Stat. 1321.

§ 1636.1 Purpose.

The purpose of this rule is to ensure that, when an LSC recipient files a complaint in a court of law or otherwise initiates or participates in litigation against a defendant or engages in pre-complaint settlement negotiations, the recipient identifies the plaintiff it represents to the defendant and ensures that the plaintiff has a colorable claim.

§ 1636.2 Requirements.

(a) When a recipient files a complaint in a court of law or otherwise initiates or participates in litigation against a defendant, or before a recipient engages in pre-complaint settlement negotiations with a prospective defendant on behalf of a client who has authorized it to file suit in the event that the settlement negotiations are unsuccessful, it shall:

(1) Identify each plaintiff it represents by name in any complaint it files, or in a separate notice provided to the defendant against whom the complaint is filed where disclosure in the complaint would be contrary to law or court rules or practice, and identify each plaintiff it represents to prospective defendants in pre-litigation settlement negotiations, unless a court of competent jurisdiction has entered an order protecting the client from such disclosure based on a finding, after notice and an opportunity for a hearing on the matter, of probable, serious harm

to the plaintiff if the disclosure is not prevented; and

(2) Prepare a dated written statement signed by each plaintiff it represents, enumerating the particular facts supporting the complaint, insofar as they are known to the plaintiff when the statement is signed.

(b) The statement of facts must be written in English and, if necessary, in a language other than English that the plaintiff understands.

(c) In the event of an emergency, where the recipient reasonably believes that delay is likely to cause harm to a significant safety, property or liberty interest of the client, the recipient may proceed with the litigation or negotiation without a signed statement of facts, provided that the statement is prepared and signed as soon as possible thereafter.

§ 1636.3 Access to written statements.

(a) Written statements of facts prepared in accordance with this part are to be kept on file by the recipient and made available to the Corporation or to any Federal department or agency auditing or monitoring the activities of the recipient or to any auditor or monitor receiving Federal funds to audit or monitor on behalf of a Federal department or agency or on behalf of the Corporation.

(b) This part does not give any person or party other than those listed in paragraph (a) of this section any right of access to the plaintiff's written statement of facts, either in the lawsuit or through any other procedure. Access to the statement of facts by such other persons or parties is governed by applicable law and the discovery rules of the court in which the action is brought.

§ 1636.4 Applicability.

This part applies to cases for which private attorneys are compensated by the recipient as well as to those cases initiated by the recipient's staff.

§ 1636.5 Recipient policies, procedures and recordkeeping.

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part.

Dated: April 14, 1997.

Victor M. Fortunio,
General Counsel.

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