

juvenile offenders who have not been charged as adults because charges against juveniles are generally considered to be civil in nature. Finally, it would not apply to persons who are held involuntarily in mental health facilities.

Intermittent imprisonment poses close questions, which will be resolved on a case-by-case basis by the Corporation, determined by whether the person is predominantly incarcerated or free. For example, persons on furlough or on daytime work-release should be considered to be incarcerated; however, persons serving a term of successive weekends in prison would be considered not to be incarcerated.

#### *Section 1637.4 Change in Circumstances*

This section addresses the situation where there is a change of circumstances after litigation is undertaken on behalf of an eligible client and the individual becomes incarcerated. Such a change poses special practical problems. When a program learns that its client has become incarcerated in a prison, it must use its best efforts to discontinue representation of the individual. Incarceration, however, may be of short duration and, in some circumstances, by the time the recipient has succeeded in withdrawing from the matter consistent with its ethical duty to the client, the incarceration may have ended and with it the basis for the prohibition. To address such a situation, the rule provides an exception to the general prohibition. The exception would allow the continued representation by the recipient when the anticipated duration of the incarceration is likely to be brief and the litigation will outlast the period of the incarceration. As a guideline, the recipient should consider incarceration which is expected to last less than 3 months to be brief. This exception for a brief incarceration does not permit a recipient to take on new issues or matters for the client during the brief incarceration.

When incarceration has occurred after litigation has begun and its duration is uncertain, there may be circumstances where a court will not permit withdrawal in spite of the recipient's best efforts to do so, generally because withdrawal would prejudice the client and is found to be inconsistent with the recipient's professional responsibilities. One comment urged the Corporation to deal with this issue by adding language to the text. The Board determined that a commentary discussion of the matter provides sufficient guidance to recipients. The LSC Act includes

provisions requiring recipients to comply with the applicable codes of professional responsibility, and it is not necessary to include a reference to that requirement in every regulation where it might apply. Accordingly, whether continued representation in such circumstances would be deemed to violate the regulation will be determined on a case-by-case basis by the Corporation. Recipients are advised to document their efforts to withdraw and renew their efforts if it appears that the incarceration will be of longer duration than originally anticipated.

During the period in which the recipient is seeking alternate counsel or other proper ways to conclude its involvement in such litigation, it may file such motions as are necessary to preserve its client's rights in the matter under litigation. The recipient may not file any additional, related claims on behalf of that client, however, unless failure to do so would jeopardize an existing claim or right of the client.

#### *Section 1637.5 Recipient Policies, Procedures and Recordkeeping*

This section requires recipients to establish written policies and procedures to ensure compliance with this part. Recipients are also required to maintain documentation adequate to demonstrate compliance with this part.

#### **List of Subjects in 45 CFR Part 1637**

Grant programs; Legal services; Prisoners

For the reasons set forth in the preamble, 45 CFR Part 1637 is revised as follows:

#### **PART 1637—REPRESENTATION OF PRISONERS**

Sec.

- 1637.1 Purpose.
- 1637.2 Definitions.
- 1637.3 Prohibition.
- 1637.4 Change in circumstances.
- 1637.5 Recipient policies, procedures and recordkeeping.

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

##### **§ 1637.1 Purpose.**

This part is intended to ensure that recipients do not participate in any civil litigation on behalf of persons incarcerated in Federal, State or local prisons.

##### **§ 1637.2 Definitions.**

(a) *Incarcerated* means the involuntary physical restraint of a person who has been arrested for or convicted of a crime.

(b) *Federal, State or local prison* means any penal facility maintained under governmental authority.

##### **§ 1637.3 Prohibition.**

A recipient may not participate in any civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison, whether as a plaintiff or as a defendant, nor may a recipient participate on behalf of such an incarcerated person in any administrative proceeding challenging the conditions of incarceration.

##### **§ 1637.4 Change in circumstances.**

If, to the knowledge of the recipient, a client becomes incarcerated after litigation has commenced, the recipient must use its best efforts to withdraw promptly from the litigation, unless the period of incarceration is anticipated to be brief and the litigation is likely to continue beyond the period of incarceration.

##### **§ 1637.5 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. Fortuno,**  
*General Counsel.*

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#### **LEGAL SERVICES CORPORATION**

##### **45 CFR Part 1638**

##### **Restriction on Solicitation**

**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, which prohibits an LSC recipient from representing an individual who had not sought legal advice from the recipient but whom the recipient advised to seek legal representation or take legal action. In addition to setting out the prohibition on solicitation, this final rule also provides guidance on activities that do not fall within the restriction, such as the representation of clients under a statutory or private ombudsman program.

**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)(18), a restriction in the Corporation's FY 1996 appropriations act, Pub. L. 104-134, 110 Stat. 1321 (1996), which prohibits an LSC recipient from representing an individual who had not sought legal advice from the recipient but whom the recipient advised to seek legal representation or take legal action. The Committee held hearings on staff proposals on July 8 and 19 and the Board adopted an interim rule on July 20 for publication in the **Federal Register**. The interim rule was published on August 29, 1996 (61 FR 45755).

The Corporation received five timely comments on the interim rule, and the Committee held public hearings to discuss the written comments and to hear oral comments on December 13, 1996, and January 5, 1997. The Committee made a few changes to the interim rule and recommended a final rule to the Board, which adopted the Committee's recommendation on January 6, 1997, for publication as a final rule.

The Corporation's FY 1997 appropriations act became effective on October 1, 1996, see Pub. L. 104-208, 110 Stat. 3009 (1996). 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 appropriate section number of the FY 1996 appropriations act.

Generally, this final rule prohibits LSC recipients and their employees from representing any individuals to whom they have given in-person unsolicited advice. It also prohibits recipients and their employees who have given such advice from referring the person receiving the advice to another LSC recipient.

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

#### *Section 1638.1 Purpose*

The purpose of this rule is to ensure that recipients do not obtain clients through in-person unsolicited advice to seek legal representation or to take legal action.

#### *Section 1638.2 Definitions*

This section defines "in-person" to include a face-to-face conversation and

other personal contacts, such as a personal letter or telephone call. While the ordinary meaning of "in-person" is limited to "face-to-face" contacts, for the purposes of this part, a personal letter or phone call from a recipient or a recipient's employee to an individual advising that individual to obtain counsel or take legal action would constitute "in person" advice.

"Unsolicited advice" is defined as advice to obtain counsel or take legal action given by a recipient or employee of a recipient to an individual with whom the recipient does not have an attorney-client relationship and who did not seek legal advice or assistance from the recipient. It does not include advice to obtain counsel or to take legal action that an individual receives from others, such as social workers, judges or neighbors.

#### *Section 1638.3 Prohibition*

This section prohibits LSC recipients and their employees from representing any individual to whom they have given in-person unsolicited advice. It also prohibits recipients and their employees who have given such advice from referring the person receiving the advice to another LSC recipient. A recipient may, however, refer a person who has received unsolicited advice from one of the recipient's employees to a private attorney who takes the case pro bono, but the recipient may not count the case toward its private attorney involvement requirement as set out in 45 CFR part 1614.

#### *Section 1638.4 Permissible Activities*

There is a continuing need for community legal education about laws that affect clients and about the service provided by the program. Representation of clients resulting from such activities does not constitute solicitation. This section explicitly notes, therefore, that it is permissible to represent individuals who seek assistance as a result of the recipient's participation in community legal education activities such as outreach activities, public service announcements, maintaining an ongoing presence in a courthouse to provide advice at the invitation of the court, disseminating community legal education publications and presentations to groups that request it. This is true even if these activities include descriptions of legal rights and responsibilities, and descriptions of the recipient's services as well as ways to access the services. An individual who seeks assistance from the recipient after involvement in one of these activities may be represented provided that the

request for assistance did not result from in-person unsolicited advice.

Paragraph (c) of this section is new and was added in response to public comments which urged the Corporation to clarify that the rule would not prevent representation or referral of clients under certain ombudsman programs normally undertaken by recipients under grant or contract. Such programs are intended to provide assistance to certain vulnerable populations, such as the institutionalized or disabled. Ombudsmen are persons who are generally charged with investigating complaints about abuses by government or others, reporting findings to appropriate officials, and taking actions to bring about remedies or other equitable results.

An example in one comment described a Georgia program under which the recipient, acting as an ombudsman, investigates conditions in nursing homes and personal care homes in Atlanta. Under the program, an ombudsman responds to complaints by residents and makes unannounced visits to the homes. When the ombudsman identifies legitimate problems, the ombudsman is also required by State law and the Federal Older Americans Act to be an advocate for the residents in trying to alleviate those conditions. Part of the role as advocate is to advise residents that they should take legal action and, when necessary, refer clients to legal counsel. Specific statutory ombudsman programs referenced in the comments include the Protection and Advocacy for Individuals with Mental Illness ("PAIMI"), the Protection and Advocacy for Individual Rights ("PAIR"), the Protection and Advocacy for Persons with Developmental Disabilities ("PADD"), and the ombudsman program under the Older Americans Act.

The Board agreed with the comments and this final rule is revised to include a provision that clarifies that the prohibition in this rule does not apply to Federal and State statutory or private ombudsman programs. The purpose of § 504(a)(18) is to prevent recipients from soliciting clients by requiring that clients initiate the legal assistance. According to the legislative history of this provision, Congress determined that it is inappropriate for Federally funded legal aid offices to solicit clients at a time when programs continue to turn away clients due to lack of resources. The ombudsman programs are created by Congress and the States to provide aid and protection to certain vulnerable populations, whose members, because of disabilities or fear of repercussions,

are unable to seek the assistance they need. Under grants or contracts, LSC recipients might be expected to investigate, report and provide referral or legal assistance to these vulnerable people. Reading the restriction on solicitation together with the State and other Federal statutes establishing ombudsman programs, the Corporation believes that Congress intends § 504 to prohibit legal services programs from soliciting clients who are otherwise able to independently seek legal aid, but does not intend § 504 to prohibit assistance to those served by Federal and State statutory or private ombudsman programs for individuals who are unable to seek independently the legal and other care that they need.

#### Section 1638.5 Recipient Policies

This section requires that recipients establish written policies to implement the requirements of this part.

#### List of Subjects in 45 CFR Part 1638

Grant programs; Legal services; Solicitation.

For reasons set forth in the preamble, 45 CFR Part 1638 is revised as follows:

### PART 1638—RESTRICTION ON SOLICITATION

- Sec.  
1638.1 Purpose.  
1638.2 Definitions.  
1638.3 Prohibition.  
1638.4 Permissible activities.  
1638.5 Recipient policies.

**Authority:** Sec. 504(a)(18), Pub. L. 104-208, 110 Stat. 3009; Pub. L. 104-134, 110 Stat. 1321.

#### § 1638.1 Purpose.

This part is designed to ensure that recipients and their employees do not solicit clients.

#### § 1638.2 Definitions.

(a) *In-person* means a face-to-face encounter or a personal encounter via other means of communication such as a personal letter or telephone call.

(b) *Unsolicited advice* means 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.

#### § 1638.3 Prohibition.

(a) Recipients and their employees are prohibited from representing a client as a result of in-person unsolicited advice.

(b) Recipients and their employees are also prohibited from referring to other recipients individuals to whom they have given in-person unsolicited advice.

#### § 1638.4 Permissible activities.

(a) This part does not prohibit recipients or their employees from providing information regarding legal rights and responsibilities or providing information regarding the recipient's services and intake procedures through community legal education activities such as outreach, public service announcements, maintaining an ongoing presence in a courthouse to provide advice at the invitation of the court, disseminating community legal education publications, and giving presentations to groups that request them.

(b) A recipient may represent an otherwise eligible individual seeking legal assistance from the recipient as a result of information provided as described in § 1638.4(a), provided that the request has not resulted from in-person unsolicited advice.

(c) This part does not prohibit representation or referral of clients by recipients pursuant to a statutory or private ombudsman program that provides investigatory and referral services and/or legal assistance on behalf of persons who are unable to seek assistance on their own, including those who are institutionalized or are physically or mentally disabled.

#### § 1638.5 Recipient policies.

Each recipient shall adopt written policies to implement the requirements of this part.

Dated: April 14, 1997.

**Victor M. Fortuno,**  
General Counsel.

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### LEGAL SERVICES CORPORATION

#### 45 CFR Part 1640

#### Application of Federal Law to LSC Recipients

**AGENCY:** Legal Services Corporation.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements a provision in the Legal Services Corporation's ("Corporation" or "LSC") FY 1996 appropriations act that is currently incorporated by reference in the Corporation's FY 1997

appropriations act, which subjects LSC recipients to Federal law relating to the proper use of Federal funds. This rule identifies applicable Federal law and sets out the mechanism by which recipients must agree to be subject to such law and the consequences of a violation of the law.

**EFFECTIVE DATE:** 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)(19) of Public Law 104-134, 110 Stat. 1321(1996), the Corporation's FY 1996 appropriations act, which required LSC-funded recipients to agree by contract that, with regard to their use of LSC funds, they would be subject to Federal law related to the proper use of Federal funds. The Committee held hearings on staff proposals on July 9 and 19, and the Board adopted an interim rule on July 20 for publication in the **Federal Register**. The interim rule was published on August 29, 1996, at 61 FR 45760.

The Corporation received five timely public comments on the rule and held public hearings on December 13, 1996 and January 5, 1997, to discuss written comments and hear oral comments. The Committee made changes and recommended a final rule to the Board which adopted the Committee's recommendation on January 6, 1997 for publication as a final rule.

The Corporation's FY 1997 appropriations act became effective on October 1, 1996, see Pub. L. 104-208, 110 Stat. 3009 (1996). 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 appropriate section number of the FY 1996 appropriations act.

Briefly, this rule requires LSC recipients to agree to be subject to "Federal laws relating to the proper use of Federal funds" in their use of LSC funds. This rule puts recipients and their employees on notice that LSC funds are Federal funds for the purposes of the applicable Federal laws cited in this rule and that a violation of such laws would subject the recipient or individual employee to potentially serious sanctions.

A section by section analysis of this final rule is provided below.

#### Section 1640.1 Purpose

The purpose of this final rule is to ensure that recipients' LSC funds are considered Federal funds for the purposes of Federal law relating to the proper use of Federal funds. This rule also identifies applicable Federal laws and delineates the consequences to the recipient of violations of such law.