

Conversely, it does not apply to parolees and probationers, even though they are persons who have been convicted of a crime and who are still under the jurisdiction of the corrections department, because they are no longer physically held in custody in a prison. The definitions would include persons who are held involuntarily in a mental health facility if they were committed as a result of their arrest for a crime. On the other hand, a person held in a mental health facility because of a civil commitment would not be incarcerated and could be represented. The term would also not include juvenile offenders who have not been charged as adults because charges against juveniles are generally considered to be civil in nature.

Intermittent imprisonment poses close questions, which would be resolved on a case-by-case basis, 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.

"Federal, State or local prison" is defined as a facility that is maintained under governmental authority for purposes of housing persons who are incarcerated. It includes private facilities under contract with State corrections departments to house convicted criminals. It also includes local jails.

Section 1637.3 Prohibition

This section states the prohibition on participation in litigation or administrative proceedings challenging the conditions of incarceration on behalf of a person who is incarcerated in a Federal, State or local prison.

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 a practical problem on which the regulation seeks to provide guidance. 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 recipient's attorney to continue representation 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.

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. Whether continued representation in such circumstances would be deemed to violate the regulation will be determined on a case-by-case basis. Recipients should, however, document their efforts to withdraw and renew the effort 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-law; Legal Services; Prisoner litigation.

For reasons set forth in the preamble, 45 CFR Chapter XVI is amended by adding part 1637 as follows:

PART 1637—RESTRICTION ON LITIGATION ON BEHALF 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: Pub. L. 104-134, 110 Stat. 1321, 42 U.S.C. 2996g(e).

§ 1637.1 Purpose.

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

§ 1637.2 Definitions.

(a) *Incarcerated* means the involuntary physical restraint, in a facility dedicated to such restraint, of a person who has been arrested for or convicted of a crime.

(b) *Federal, State or local prison* means any facility maintained under governmental authority for purposes of housing persons who are incarcerated.

§ 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: August 20, 1996.

Suzanne B. Glasow,

Senior Counsel for Operations & Regulations.
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45 CFR Part 1638

Restriction on Solicitation

AGENCY: Legal Services Corporation.
ACTION: Interim rule with request for comments.

SUMMARY: This interim rule is intended to implement a restriction contained in the Legal Services Corporation's ("LSC" or "Corporation") FY 1996

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. Although this rule is effective upon publication, the Corporation also solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: This interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St NE., 11th Floor, Washington, DC 20002-4250.

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 this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and which carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comment for review and consideration by the Committee. After receipt of public comment, the Committee intends to hold public hearings to discuss the written comments and to hear oral comments. It is anticipated that a final rule will be issued which will supersede this interim rule.

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

Section 1638.1 Purpose

The purpose of this new 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 or who did not seek legal advice or assistance from the recipient. It does not include advice to obtain counsel or 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 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 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

While recipients are prohibited from soliciting clients, there is a continuing need for community legal education about laws that affect clients and about the service provided by the program. This section explicitly notes, therefore, that it is permissible to participate 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 giving

presentations to groups that request it. These activities may 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 these activities may be represented provided that the request did not result from in-person unsolicited advice.

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-law; Legal services; Solicitation.

For reasons set forth in the preamble, 45 CFR Chapter XVI is amended by adding part 1637 as follows:

45 CFR 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. 104-134, 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 or 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 it.

(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.

§ 1638.5 Recipient policies.

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

Dated: August 20, 1996.

Suzanne B. Glasow,
Senior Counsel for Operations & Regulations.
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45 CFR Part 1639

Welfare Reform

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule is intended to implement a provision in the Legal Services Corporation's ("Corporation" or "LSC") FY 1996 appropriations act which restricts recipients from initiating legal representation or challenging or participating in any way in an effort to reform a Federal or State welfare system. Although this rule is effective upon publication, the Corporation also solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: This interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First Street NE., 11th Floor, Washington, DC 20002-4250.

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)(16) of the Corporation's FY 1996 appropriations act, Pub. L. 104-134, 110 Stat. 1321 (1996), which restricts recipients of LSC funds from initiating

legal representation or participating in any other way involving efforts to reform a Federal or State welfare system. The Committee held hearings on July 10 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. §§ 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comment on the rule for review and consideration by the Committee. After receipt of public comments, the Committee intends to hold public hearings to discuss written comments and hear oral comments. It is anticipated that a final rule will be issued which will supersede this interim rule.

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

Section 1639.1 Purpose

The purpose of this new rule is to ensure that LSC recipients do not initiate litigation or challenge or participate in any effort to reform a Federal or State welfare system. In addition, the rule clarifies when recipients can engage in legal representation of a client seeking specific relief from a welfare agency and incorporates § 504(e) of 110 Stat. 1321, which permits recipients to use non-LSC funds to comment on public rulemaking or respond to requests from legislative or administrative officials.

Section 1639.2 Definitions

Federal or State welfare system is defined to include the Federal and State AFDC programs under Title IV-A of the Social Security Act, 42 U.S.C. § 601 *et seq.* These programs are the current Federal-State welfare cash assistance programs for needy families with dependent children. It would also include new programs or provisions enacted by Congress to replace or modify these programs, such as the block grant proposals for cash assistance in Title I of H.R. 3734, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, adopted by Congress on August 1, 1996. Also

included in the definition would be any components or requirements from other public benefit or human service programs that are a part of the AFDC program, such as requirements of establishment of paternity and cooperation with child support enforcement. In addition, it would also include State changes in AFDC or JOBS programs, State efforts to implement any Federal block grant cash assistance program for needy families with children, and State efforts to eliminate AFDC and replace it with a new program (for example, the Wisconsin Works program). Federal or State welfare system would also include any State AFDC programs or their replacements conducted under waivers granted either by the Department of Health and Human Services pursuant to § 1115 of the Federal Social Security Act or by enacted legislation.

Finally, the definition would include State General Assistance, General Relief, Direct Relief, Home Relief or similar state means-tested programs for basic subsistence which operate with State funding or under State mandate, and new programs enacted by States to replace or modify these programs. For example, if a State eliminated or replaced its General Assistance program, the new program would be included within the definition. In a State with county-run State General Assistance programs, State legislation or regulatory changes in those programs would be included within the definition of *Federal or State welfare system*.

Federal or State welfare system does not include other Federal programs such as: the Job Training Partnership Act and pending legislation that would revise and consolidate job training, vocational education, and other training programs such as the Workforce Development Act; the Food Stamp Program, adult nutrition programs, child nutrition programs, Women and Infants Care (WIC) program, and the school lunch program; Social Security and Supplemental Security Income; Medicaid; Medicare; Unemployment Insurance; Veterans Benefits; Child Support Enforcement; and child welfare programs including adoption assistance, foster care and termination of parental rights.

Reform of a Federal or State welfare system means an effort or action initiated or undertaken to effect legislative or regulatory proposals for changes in key components of the Federal or a State welfare system. For example, Federal legislative proposals to block grant the AFDC program and State legislative or regulatory proposals which implement any new Federal