



LEGAL SERVICES CORPORATION

45 CFR Part 1638

Restriction on Solicitation

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule revises the Legal Services Corporation’s (LSC or Corporation) regulation prohibiting solicitation of clients. LSC adds definitions for the terms “communicate” and “communication,” revises the existing text to make language more active, and clarifies how recipients may interact with client-eligible individuals. The main goal of these revisions is to formalize the interpretations of LSC’s rule on solicitation that the Office of Legal Affairs (OLA) has issued over the past several years, making clear that recipients may inform client-eligible individuals about their rights and responsibilities and provide them with information about the recipients’ intake processes, as well as how recipients may relay that information without violating either LSC’s Fiscal Year 1996 appropriations statute or the rule prohibiting solicitation.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background.

On April 26, 1996, Congress passed the appropriations act for Fiscal Year 1996. Pub. L. 104-134, 110 Stat. 1321. Through this statute, Congress enacted a series of restrictions applicable to LSC grant recipients’ activities. One of the restrictions was

section 504(a)(18), which states that grant recipients “will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another person or entity or an employee of the person or entity, that is receiving financial assistance provided by the Corporation[.]” Pub. L. 104–134, 110 Stat. 1321, 1321-56.

On May 19, 1996, the Operations and Regulations Committee (Committee) of the LSC Board of Directors requested that LSC staff prepare an interim rule to implement section 504(a)(18), and in April 1997, LSC promulgated part 1638. Consistent with section 504(a)(18), LSC’s rule prohibits a grant recipient from representing an individual who had not sought legal advice from the grant recipient but who the grant recipient had provided in person unsolicited advice to seek legal representation or take legal action. 45 CFR 1638.3(a). Part 1638 also prohibits a grant recipient who has given in-person unsolicited advice to an individual from referring that individual to another LSC grant recipient. 45 CFR 1638.3(b). Finally, LSC included language in part 1638 stating that providing legal information, including information about the availability of counsel and a grant recipient’s intake procedures, are permissible activities. 45 CFR 1638.4(a).

The regulation’s language caused grantees to question whether they can provide information about individuals’ legal rights and the availability of legal assistance through texts, phone calls, and in-person contacts at court clinics. Over the years, OLA has received multiple inquiries from grant recipients and other stakeholders about the types of proposed outreach activities permissible under part 1638. Examples of inquiries include:

- Is it permissible to send text messages to unrepresented individuals explaining defendants’ rights in eviction cases?
- Is it permissible to inform individuals of the availability of legal assistance via mailings and text messages?
- What activities are allowed when interacting with individuals approaching grant recipient attorneys at court-based self-help clinics?

In July 2003, OLA published an advisory opinion (AO) answering a question from the Northwest Justice Project (“NJP”). NJP asked whether they could hand out informational brochures to individuals in the courthouse as part of their administration of the Housing Justice Program (“HJP”). The HJP provided same-day advice and representation from volunteer attorneys to LSC-eligible clients in eviction proceedings in court. The previous coordinator of the HJP, a non-LSC-funded organization, contacted prospective clients at the courthouse, advised them of the availability of services, asked if they would like to discuss their case with a lawyer, and represented some the same day. Upon assuming operation of the program, NJP stopped engaging in direct contact and submitted its inquiry to LSC. NJP contacted LSC because it was concerned that the lack of direct client engagement had led to a decline in the usage of HJP services. LSC confirmed that under part 1638, it would be impermissible for NJP to provide unsolicited advice to prospective clients at the courthouse to advise them of the availability of legal services and ask individuals if they wanted to discuss their case with a lawyer and then accept those individuals as clients. EX-2003-1011, June 9, 2003. This advisory opinion remained LSC’s position until 2016.

In 2016, OLA received a question from a law professor who was researching methods to increase the likelihood that individuals living in poverty would engage with the legal system, including by seeking free legal services. The study proposed to test the effectiveness of different types of mailings sent to defendants in debt collection cases. The professor asked OLA whether part 1638 prohibits a grant recipient from representing individuals to whom the grant recipient has mailed information regarding their rights and identifying the types of legal services provided by the grant recipient. AO 2016-001. OLA opined that a mailing from an LSC grant recipient would violate part 1638 if it provided (1) “unsolicited advice” and (2) constituted a “personal letter.” *Id.* OLA also stated that a mailing that contains only “information regarding legal rights and

responsibilities or . . . information regarding the recipient’s services and intake procedures” does not constitute “unsolicited advice.” Further, a mailing does not constitute a “personal letter” if the letter provides only generic information that is not tailored to the individual receiving the mailing and it does not include specific facts related to the individual’s legal issues. Id. OLA concluded that a mailing that contains unsolicited advice that is not tailored to the individual receiving the mailing is not considered a “personal letter” under § 1638.2(a). Id.

In 2020, OLA issued an advisory opinion addressing a question involving the permissibility of a grant recipient representing individuals that it had either (1) contacted over the telephone or via text message; or (2) initiated contact with through the grant recipient’s ongoing presence in the courthouse. Regarding in-person contact in courthouses, OLA confirmed that part 1638 does not prohibit a grant recipient from initiating contact with individuals if the grant recipient is providing “information regarding legal rights and responsibilities” or providing information about the grant recipient’s intake process while “. . . maintain[ing] an ongoing presence in a courthouse to provide advice at the invitation of the court[.]” AO 2020-004. Additionally, part 1638 does not prohibit a grant recipient from representing an individual that the grant recipient initiated contact with over the telephone or via text message as long as the communication contains only generic information that is not tailored to the individual or the specific facts of the individual’s legal issues. Id.

LSC issued its most recent guidance on part 1638 in 2022. In Program Letter 22-1, LSC advised that grant recipients could send text messages to defendants (tenants) in landlord/tenant cases to notify them that an eviction case has been filed against them; to let them know of any upcoming court appearances; and to inform them of the availability of counsel. Program Letter 22-1. The program letter cited previous guidance from OLA regarding unsolicited advice via text message and mail.

LSC believes regulatory action is justified at this time for two reasons. First, OLA has been applying a nearly thirty-year-old rule concerning communications to new technologies and outreach strategies developed since part 1638 was published. Second, regulatory action is justified because LSC has continued to receive questions from grantees and other stakeholders about whether certain proposed outreach activities are permissible under part 1638. These questions became more compelling as governments began lifting moratoria on filing evictions and pursuing debt collection cases that had been put into place near the beginning of the COVID-19 pandemic. Rulemaking to make part 1638 more consistent with the language of section 504(a)(18) has become more critical to helping grantees inform people living in poverty who are facing eviction or potentially significant financial consequences about their rights and the availability of attorneys to assist them.

On July 25, 2023, the Committee voted to recommend that the LSC Board authorize rulemaking on part 1638. On July 27, 2023, the Board authorized LSC to begin rulemaking. On October 16, 2023, the Committee voted to recommend that the Board authorize publication of a notice of proposed rulemaking (NPRM) in the *Federal Register* for notice and comment. On October 17, 2023, the Board accepted the Committee's recommendation and voted to approve publication of the NPRM. LSC published the notice of proposed rulemaking in the *Federal Register* on October 25, 2023. 88 FR 73303, Oct. 25, 2023. The comment period remained open for sixty days and closed on December 26, 2023.

After consideration of the comments received during the comment period, on April 2, 2024, the Committee voted to recommend that the LSC Board adopt this final rule and approve its publication in the *Federal Register*. On April 8, 2024, the Board voted to adopt and publish this final rule.

Materials regarding this rulemaking are available in the open rulemaking section of LSC's website at <https://www.lsc.gov/about-lsc/laws-regulations-guidance/rulemaking>. After the effective date of the rule, those materials will appear in the closed rulemaking section at <https://www.lsc.gov/about-lsc/laws-regulations-guidance/rulemaking/closed-rulemaking>.

II. Section-by-Section Discussion of Comments and Regulatory Provisions

LSC received seven comments during the public comment period. Comments were received from the following: 1) the National Legal Aid and Defender Association (NLADA) by its Civil Council, the elected representative body that establishes policy for the NLADA Civil Division, and its Regulations Committee; 2) the American Bar Association (ABA) through its Standing Committee on Legal Aid and Indigent Defense (SCLAID); 3) Lakeshore Legal Aid, an LSC-funded recipient; 4) four law students and one private individual. LSC received one telephone call from a LSC grantee former Executive Director after the comment period. All commenters were generally supportive of LSC's proposed changes to part 1638.

III. Proposed Changes.

Section 1638.1 Purpose.

LSC proposed to make no changes to this section. LSC received no comments on this section.

Section 1638.2 Definitions.

LSC proposed to add a definition for the terms *communicate* and *communication* that pertains to mailed, emailed, and texted messages, as opposed to merely in-person engagements. With advances in technology since the inception of this prohibition, this change will provide greater flexibility and

clarity around the methods of communication that are permitted. This change is not intended to require recipients to use particular methods to reach client-eligible individuals. Rather, it clarifies which methods are permissible.

LSC also proposed to amend the definition of the term *in-person* to include virtual engagements such as clinics conducted via Zoom or other videoconferencing software. LSC proposed to make this change to reflect the transition, hastened by the COVID-19 pandemic, to the provision of legal services through virtual means in addition to traditional in-person engagements.

Finally, to account for adding a new definition, LSC proposed to redesignate existing paragraph (b), defining the term *unsolicited advice*, as paragraph (c).

Comments: Commenters generally supported LSC’s proposed changes to provide clarity and greater flexibility for recipients to reach client-eligible members. For example, in the ABA’s view, “the proposed revisions to section 1638 that clearly delineate permissible communication and impermissible in-person solicitation are consistent with what is allowed under Model Rule 7.3. The revisions setting forth permissible communication such as ‘sending information via mailings, text message, email, or other methods of voice or electronic Communication’ meet the ‘easily disregarded’ standard under Rule 7.3, as they do not implicate a potential for undue influence to be exerted by the lawyer in the interaction.” Additionally, at the Committee meeting on January 21, 2024, this comment was discussed, and Board members commented that phone use is still very prevalent in some areas, and it is important for recipients to be able to provide legal information to eligible clients by calling the clients because that is the only viable means of communication.

Some commenters recommended additional refinement of the terms *communicate* and *communication*. One person commented that “further explanation is required for the

record as per why LSC is declining to include live phone calls within its definition of in-person activity” because LSC’s decision to not extend “in-person activity” to phone calls by narrowing the proposed definition to “face-to-face encounters”, is “directly contrary to Model Rule 7.3’s explicit inclusion of prohibiting solicitation via live telephone.”

Another suggested clarifying “what types of communication are not considered solicitation under the rule” because the proposed rule definitions “could potentially include any form of interaction between a recipient and a client-eligible individual.” Additionally, the commenter continued, the rule should specify how recipients may communicate with client-eligible individuals without violating part 1638. Lastly, LSC “may want to consider adopting or adapting the ABA’s guidance on electronic and written communication to clarify its own rule on solicitation. This may help recipients avoid confusion and potential violations of the rule.”

Response: LSC believes the language in the proposed rule provides sufficient clarity and, therefore, will adopt this section with no changes. It is impossible to list out every potential scenario that may arise and language such as “not limited to” and “including” is intended to signal that the examples are not an exhaustive list. LSC agrees with the ABA’s comments that the proposed revisions to this section clearly delineate permissible communication and impermissible in-person solicitation and the changes are consistent with what is allowed under Model Rule 7.3.

Regarding the use of telephone, the definition of “communication” includes methods of voice or electronic communication. The telephone is an example of voice communication but is not the only means of voice communication. In 2020, OLA opined that part 1638 does not prohibit a grant recipient from representing an individual that the grant recipient initiated contact with over the telephone as long as the communication contains only generic

information that is not tailored to the individual or the specific facts of the individual's legal issues. AO- 2020-004 (June 24, 2020).

Section 1638.3 Prohibition.

LSC proposed to edit the text to be active as opposed to passive. For example, “shall not represent” replaced “are prohibited from representing.”

Comments: LSC received one comment in support of the change.

Response: LSC adopts the proposed version in this final rule without change.

Section 1638.4 Permissible activities.

LSC proposed to edit the text of this rule to be active as opposed to passive. Additionally, LSC proposed to revise § 1638.4(a) to permit communication and in-person engagement about individuals’ legal rights and responsibilities and grantees’ intake procedures. LSC believes that the proposed language clarifies that grantees are permitted to send individuals information about rights and responsibilities that could lend itself to individuals filing complaints, either pro se or with the assistance of counsel. This instance may arise in the context of housing cases; for example, in housing habitability and tenant building purchase cases. A grantee may discover that there is a building with numerous safety issues and communicate with the tenants about the warranty of habitability, their options for getting the landlord to make repairs, including affirmative litigation, and the grantee’s intake process. After receiving such legal information, some tenants could conceivably apply for legal assistance to help them pursue legal action to force repairs. This approach is consistent with the text of section 504(a)(18) of LSC’s 1996 appropriation statute, which speaks in general terms about prohibited solicitation. It is critical to closing the justice gap

that grantees are aware that they can advise their client-eligible communities about issues for which affirmative litigation may be an appropriate solution.

Further, LSC proposed to add paragraphs (c) and (e) to incorporate OLA's interpretations of existing part 1638 and the guidance LSC provided in Program Letter 22-1. Finally, LSC proposed to redesignate existing paragraph (c) as paragraph (d) and to revise new paragraph (d) to replace the phrase "physically or mentally disabled" with the person-first term "living with a physical or mental disability."

Comments: Commenters generally supported LSC's proposed changes. The ABA noted that "the range of permissible activities set forth under section 1638.4 reflects the same types of activities in which lawyers in general may engage under Rule 7.3." Additionally, Lakeshore Legal Aid commented that "the proposed changes to section 1638, particularly section 1638.4(b), clarify that this critical notice to tenants is allowable in the regulation itself. This change will encourage legal aid programs to provide the exact notice that tenants need to avail themselves of legal representation, protect their rights, and remain in their homes."

There were two main suggested edits. The first was to make this section "more explicit that this list of permissible activities is an illustrative one, not an exhaustive one. . . The intention of this revision would be undermined if an LSC recipient could look at this regulation a few years from now and come away thinking that a permissible outreach effort should be avoided because it was not one of the specific activities listed in § 1638.4."

The second is regarding the phrase in § 1638.4(a) "at the invitation of the court." NLADA observed that the meaning of the phrase is unclear because "[a]n invitation could be a formal letter, a request by a judge on the record, or a simple

ask by a clerk or other court staff.” They continued: “[m]any LSC recipients work closely with courts to maintain a presence in the courthouse. This increases the ability to provide legal information and reach eligible clients who may in fact be seeking legal advice.” NLADA suggested changing the language to “in cooperation with the court. . . This will also help clarify that LSC recipients do not need to wait for a formal invitation by the court to reach out to court officials and work alongside courts to establish a courthouse presence and reach clients in need of services.” This comment was also discussed at the January 21, 2024, Committee meeting, during which Board members remarked that if the statute does not require recipients to be present in the courthouse “at the invitation of the court,” the phrase should not be included in this rule. Further, recipients should cooperate with courts, but since courthouses are public buildings, recipients should not be precluded from performing important functions for eligible clients if the court has not invited the recipient or is not particularly cooperative.

Lastly, one commenter suggested updating the new paragraph (d), which is a redesignation of existing paragraph (c). The commenter recommended that LSC revise the list of individuals who may not be able to seek legal assistance on their own to include persons who are incarcerated, unhoused, living in institutions or correctional facilities, or living with a physical or mental disability.

Response: LSC agrees it is important for this rule to be flexible enough for recipients to apply the rule to new technologies and circumstances not contemplated at the time of these changes. Therefore, the section will be revised to indicate the listed methods are examples of permissible activities.

Further, LSC agrees that a recipient may have a difficult time proving they were in a courthouse “at the invitation of the court” particularly because the rule does not indicate what constitutes an “invitation.” Although not contemplated in

the NPRM, LSC believes that removal of “at the invitation of the court” is a logical outgrowth of the proposed rule changes. The purpose of this rulemaking was to clarify and simplify part 1638. Removal of this language is not a substantive change, rather it is a technical change to remove ambiguity. As mentioned during the January 21, 2024, Committee meeting, section 504(a)(18) does not require this language. In fact, the statute does not discuss a recipient’s activities in courthouses at all. Further, as the written comments note, a recipient’s ongoing presence in a courthouse is sufficient to establish the court’s approval of the recipient being in the courthouse. Therefore, the term will be removed for the sake of clarity.

Lastly, to achieve active voice, LSC will amend the last clause of § 1638.4(d) to read as “including institutionalized individuals or individuals living with a physical or mental disability.”

Section 1638.5 Recipient policies.

LSC proposed no changes to this section. LSC received no comments on this section.

List of Subjects in 45 CFR Part 1638

Grant programs – law, Legal services.

For the reasons set forth in the preamble, the Legal Services Corporation amends 45 CFR part 1638 as follows:

PART 1638 – RESTRICTION ON SOLICITATION

1. The authority citation for part 1638 is revised to read as follows:

AUTHORITY: 42 U.S.C. 2996g(e).

2. Revise § 1638.2 to read as follows:

§ 1638.2 Definitions.

(a) *Communicate* or *communication* means to share information. Permissible forms of communication include, but are not limited to, sending information via mailings, text message, email, or other methods of voice or electronic communication.

(b) *In-person* means a face-to-face encounter, including virtual clinics or other encounters via videoconference.

(c) *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.

3. Revise § 1638.3 to read as follows:

§ 1638.3 Prohibition.

(a) Recipients and their employees shall not represent a client as a result of in-person unsolicited advice.

(b) Recipients and their employees shall not refer to other recipients individuals to whom they have given in-person unsolicited advice.

4. Revise § 1638.4 to read as follows:

§ 1638.4 Permissible activities.

A recipient may:

(a) Communicate about legal rights and responsibilities or the recipient's services and intake procedures or provide the same information through community legal education activities. Recipients may engage in various activities including, but not limited to, outreach, public service announcements, maintaining an ongoing presence in a courthouse to provide advice, disseminating community legal education publications, and giving presentations to groups that request them.

(b) Communicate to parties in civil cases to notify them that a case has been filed against them; to inform them of upcoming court dates; to inform them that counsel may be available to represent them; and to provide information about intake.

(c) Represent an otherwise eligible individual requesting legal assistance from the recipient as a result of a communication or information provided as described in paragraph (a) of this section, provided that the request has not resulted from in-person unsolicited advice.

(d) Represent or refer clients 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 institutionalized individuals or individuals living with a physical or mental disability.

(e) Represent an individual with whom the recipient initiated contact over the phone or via an electronic platform so long as the communication provides only generic information that is not tailored to the individual or the specific facts of the individual's legal issues.

Dated: April 8, 2024.

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Legal Services Corporation.

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