

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.

Section 1640.2 Definitions

The statutory restriction provides that recipients must contractually agree to be subject to "all provisions of Federal law relating to the proper use of Federal funds" with regard to their use of LSC funds. The regulation interprets this to mean that, with respect to their LSC funds, all programs should be subject to Federal laws which address issues of waste, fraud and abuse of Federal funds. The legislative history limits the applicable laws to those dealing with waste, fraud and abuse and specifically names the laws which apply. The House Report for H.R. 2076, an earlier unsuccessful effort to enact a provision similar to the provision that was ultimately enacted, states:

[S]ection 504(2) requires all programs receiving Federal funds to comply with Federal statutes and regulations governing waste, fraud, and abuse of Federal funds.

H. Rep. No. _____, 104th Cong., 1st Sess. 116 (July 1995). See also the McCollum/Stenholm bill (H.R. 1806), a recent effort to amend the LSC Act, which expressly cites most of the laws included in this part. Other laws have been added after consultation with the Corporation's Office of the Inspector General, one of whose statutory mandates is to prevent the misuse of LSC funds.

The relevant laws are listed in the definition of "Federal law relating to the proper use of Federal funds" in paragraph (a)(1) of this section. Generally, such laws deal with the bribery of public officials or witnesses; the embezzlement or theft of Federal funds; attempts to defraud the government; the obstruction of Federal audits; and making false statements and claims to the Federal government. One exception makes it clear that qui tam actions authorized by section 3730(b) of Title 31 may not be brought against the Corporation, any recipient, subrecipient, grantee, or contractor of the Corporation, or any employee thereof.

Paragraph (a)(2) clarifies that for the purposes of the laws cited in paragraph (a)(1), the Corporation shall be considered a Federal agency and its funds shall be considered to be Federal funds provided by grant or contract.

Paragraph (b) of this section defines the meaning of a "violation of the agreement." A violation of a recipient's agreement to be subject to Federal law related to the proper use of Federal funds could occur in either of two ways. First, there would be a violation if the recipient were convicted of or judgment were entered against it for a violation of any of the relevant Federal laws by the Federal court having jurisdiction of the

matter, and all appeals were final or the time to file for an appeal had expired.

Second, there would be a violation if an employee or board member of the recipient were convicted of a violation of the enumerated laws and the Corporation found that the offense should be imputed to the recipient because the recipient had knowingly or through gross negligence allowed the illegal activities to occur.

Section 1640.3 Contractual Agreement

This section implements the statutory requirement that, as a condition of receiving a grant or contract with the Corporation, recipients must enter into a contractual agreement that, in regard to LSC funds, they will be subject to Federal law relating to the proper use of Federal funds. The Federal laws in question normally apply to Federal agencies and Federal funds. Because the Corporation is not a Federal agency, it was necessary for Congress to provide in § 504(a)(19) of the Corporation's FY 1996 appropriations act that, for purposes of the application of these laws to recipients, the Corporation shall be considered to be a Federal agency and all funds provided by the Corporation shall be Federal funds provided by grant or contract. This language authorizes the application of Federal law on the proper use of Federal funds to the Corporation's recipients.

This provision also requires that the agreement include a statement that the recipient's employees and board members have been informed of the applicable Federal laws and the potential consequences to them personally and to the recipient if the law is violated. Thus, recipients should familiarize their staff and board with the Federal laws listed in this part and the significance of the agreement made by the recipient. The agreement and § 504(a)(19) mean that, in regard to its LSC funds, the recipient, its board members, and its employees could be subject to Federal criminal prosecution and civil false claims liability for a violation of the Federal statutes listed in this part.

Recipients should also be mindful of the fact that the Corporation's Office of Inspector General ("OIG") has statutory responsibility to investigate the activities covered by the Federal laws listed in this part. Although the agreement would apply only to LSC funds, recipients are also reminded that the Corporation's OIG investigates reports of possible theft or misappropriation of a recipient's non-LSC funds as well as its LSC funds.

Section 1640.4 Violation of Agreement

Paragraph (a) provides that a violation of the agreement as defined in this part would render a recipient's grant or contract terminated by the Corporation. Section 504(a)(19) clearly evidences Congressional intent that a recipient's funding be terminated if there is a violation of the applicable Federal law. Because a violation pursuant to § 1640.2(b)(1) requires a recipient to have been found by a court of law to have violated the applicable Federal law, the Corporation would not be obligated to provide a hearing. For a § 1640.2(b)(2) violation, on the other hand, prior to any termination, the Corporation would be obligated to provide notice and an opportunity to be heard for the sole purpose of determining whether a recipient knowingly or through gross negligence allowed the illegal activities to occur. Once a final decision has been made to impute the violation to the recipient, the law requires that the grant or contract be terminated by the Corporation.

Comments on this section questioned whether it provides sufficient due process rights when there had been a finding by the appropriate court of a violation of applicable Federal law. When a court finds that a recipient had violated the law, the rule provides that the Corporation will terminate the recipient's grant without a hearing. When the appropriate court finds that either a recipient's employee or board member has violated the law, a hearing is required prior to termination of the recipient's grant only on the issue of whether guilt for the violation may be imputed to the recipient because the recipient knowingly or through gross negligence allowed the activities that led to the violation. Comments requested that the rule clarify that the termination proceedings in 45 CFR part 1606 would be provided in such a hearing.

The Board disagreed. Section 504(a)(19) clearly intends that once there has been a finding of a violation of the applicable Federal law, the Corporation must terminate the grant. Section 504(a)(19) provides that a violation of the applicable law "shall render any grant or contractual agreement to provide funding null and void." The legislative history of this provision provides that "any violations of federal laws shall result in termination of the contract." Conf. Rep. to H.R. 2076. Unlike other violations of LSC requirements, a violation of the applicable Federal law at issue in this rule is determined by a court having jurisdiction of the matter. It is not

determined under the administrative hearing rights required by Section 1011 of the LSC Act or the Corporation's rule on terminations, 45 CFR part 1606. Congress used very strong language in § 504(a)(19) by stating that a violation would require that a grant or contract would be "null and void," which indicates to the Corporation that the provision overrides Section 1011 of the LSC Act. However, because the Corporation does not automatically impute guilt for a violation by a recipient employee or board member to a recipient, it has determined to provide a fair hearing to make a determination whether guilt should be imputed to the recipient. However, the Corporation does not intend that part 1606 hearing rights would be used in such a situation. Accordingly, the use of "termination hearing" in this section does not refer to a termination hearing under 45 CFR part 1606.

One comment expressed concern about a clause appearing in §§ 1640.4 (a) and (b), which provides that "During the pendency of any appeal * * * the Corporation may take such steps as it determines necessary to safeguard its funds." The comment expressed concern that the Corporation may take steps that would undercut an appeal by prematurely terminating the operations of a recipient through immediate action, making funds completely inaccessible to the recipient. The comment suggested that the Corporation clarify that the purpose of the provision is to safeguard Corporation funds in the possession of the recipient without interfering with the capacity of clients to receive legal assistance.

The Corporation cannot anticipate that there would never be a situation where it is necessary to act immediately to make LSC funds unavailable to a recipient and, thereby, potentially interfere with a recipient's capacity to provide ongoing legal assistance activities. However, the Corporation is dedicated to ensuring the continued provision of legal assistance in each service area and would utilize the least intrusive actions necessary while protecting LSC funds and ensuring that recipients' appeal rights are not undercut. Under this final rule, the Corporation continues to have the authority and responsibility to take the steps necessary to safeguard its funds.

Section 1640.5 Deleted

The interim rule included a § 1640.5 on reporting requirements. It required a recipient to give telephonic or other actual notice to the Corporation within two (2) working days when the recipient or any of its employees or board

members have been charged with a violation of any of the Federal laws listed in § 1640.2(a). It also clarified that "charged with a violation" means that an individual or governmental entity having authority to initiate such proceedings has initiated action against the recipient or its employees or board members and the proceeding is pending. It also required the recipient to report when the recipient had reason to believe that any of its employees or board members have misused LSC funds under this part.

Comments stated that the 2-day notice requirement in § 1640.5(a) was too short and that recipients needed more time to make a rational determination that there was an actual reason to believe that there had been a misuse of LSC funds in violation of the applicable Federal laws. The comments also expressed confusion on the meaning of the standard for reporting, which required a recipient to report when it had "reason to believe" that there has been a violation. The Committee decided to delete the entire section at the recommendation of the OIG. The OIG will rely on the good faith of the grantees and other existing means for obtaining notice of the existence of a potential problem.

List of Subjects in 45 CFR Part 1640

Grant programs; Legal services.

For reasons set forth in the preamble, 45 CFR Part 1640 is revised as follows:

PART 1640—APPLICATION OF FEDERAL LAW TO LSC RECIPIENTS

Sec.

- 1640.1 Purpose.
- 1640.2 Definitions.
- 1640.3 Contractual agreement.
- 1640.4 Violation of agreement.

Authority: Sec. 504(a)(19), Pub. L. 104-208, 110 Stat. 3009; Pub. L. 104-134, 110 Stat. 1321.

§ 1640.1 Purpose.

The purpose of this part is to ensure that recipients use their LSC funds in accordance with Federal law related to the proper use of Federal funds. This part also identifies the Federal laws which apply, and it provides notice of the consequences to a recipient of a violation of such Federal laws by a recipient, its employees or board members.

§ 1640.2 Definitions.

(a)(1) *Federal law relating to the proper use of Federal funds* means:

- (i) 18 U.S.C. 201 (Bribery of Public Officials and Witnesses);

- (ii) 18 U.S.C. 286 (Conspiracy to Defraud the Government With Respect to Claims);

- (iii) 18 U.S.C. 287 (False, Fictitious or Fraudulent Claims);

- (iv) 18 U.S.C. 371 (Conspiracy to Commit Offense or Defraud the United States);

- (v) 18 U.S.C. 641 (Public Money, Property or Records);

- (vi) 18 U.S.C. 1001 (Statements or Entries Generally);

- (vii) 18 U.S.C. 1002 (Possession of False Papers to Defraud the United States);

- (viii) 18 U.S.C. 1516 (Obstruction of Federal Audit);

- (ix) 31 U.S.C. 3729 (False Claims);

- (x) 31 U.S.C. 3730 (Civil Actions for False Claims), except that actions that are authorized by 31 U.S.C. 3730(b) to be brought by persons may not be brought against the Corporation, any recipient, subrecipient, grantee, or contractor of the Corporation, or any employee thereof;

- (xi) 31 U.S.C. 3731 (False Claims Procedure);

- (xii) 31 U.S.C. 3732 (False Claims Jurisdiction); and

- (xiii) 31 U.S.C. 3733 (Civil Investigative Demands).

(2) For the purposes of the laws listed in paragraph (a)(1) of this section, LSC shall be considered a Federal agency and a recipient's LSC funds shall be considered to be Federal funds provided by grant or contract.

(b) A *violation of the agreement* means:

(1) That the recipient has been convicted of, or judgment has been entered against the recipient for, a violation of any of the laws listed in paragraph (a)(1) of this section, with respect to its LSC grant or contract, by the court having jurisdiction of the matter, and any appeals of the conviction or judgment have been exhausted or the time for the appeal has expired; or

(2) An employee or board member of the recipient has been convicted of, or judgment has been entered against the employee or board member for, a violation of any of the laws listed in paragraph (a)(1) of this section with respect to a recipient's grant or contract with LSC by the court having jurisdiction of the matter, and any appeals of the conviction or judgment have been exhausted or the time for appeal has expired, and the Corporation finds that the recipient has knowingly or through gross negligence allowed the employee or board member to engage in such activities.

§ 1640.3 Contractual agreement.

As a condition of receiving LSC funds, a recipient must enter into a written contractual agreement with the Corporation that, with respect to its LSC funds, it will be subject to the Federal laws listed in § 1640.2(a)(1). The agreement shall include a statement that all of the recipient's employees and board members have been informed of such Federal law and of the consequences of a violation of such law, both to the recipient and to themselves as individuals.

§ 1640.4 Violation of agreement.

(a) A violation of the agreement under § 1640.2(b)(1) shall result in the recipient's LSC grant or contract being terminated by the Corporation without need for a termination hearing. During the pendency of any appeal of a conviction or judgment, the Corporation may take such steps as it determines necessary to safeguard its funds.

(b) A violation of the agreement under § 1640.2(b)(2) shall result in the recipient's LSC grant or contract being terminated by the Corporation. Prior to such termination, the Corporation shall provide notice and an opportunity to be

heard for the sole purpose of determining whether the recipient knowingly or through gross negligence allowed the employee or board member to engage in the activities which led to the conviction or judgment. During the pendency of any appeal of a conviction or judgment or during the pendency of a hearing, the Corporation may take such steps as it determines necessary to safeguard its funds.

Dated: April 14, 1997.

Victor M. Fortuno,

General Counsel.

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