

(A) *Subsections (c)(3), (d)(1), and (d)(2)—Exemption (k)(2).* Records in this system of records may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could: inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement efforts by permitting the record subject and other persons to whom the subject might disclose the records or accounting of records to avoid criminal penalties, civil remedies, or disciplinary measures; interfere with a civil or administrative action or investigation by allowing the subject to tamper with witnesses or evidence, and to avoid detection or apprehension, which may undermine the entire investigatory process; or reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to obtain information from future confidential sources, and result in an unwarranted invasion of the privacy of others.

(B) *Subsection (d)(3), and (d)(4).* These subsections are inapplicable to the extent that an exemption is being claimed from subsections (d)(1) and (2). Accordingly, exemptions from subsections (d)(3), and (d)(4) are claimed pursuant to (k)(2).

(C) *Subsection (e)(1).* In the collection of information for investigatory purposes it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of the investigation or adjudication. In some instances, it will be only after the collected information is evaluated in light of other information that its relevance and necessity for effective investigation and adjudication can be assessed. Collection of such information permits more informed decision-making by the Department when making required disciplinary determinations. Accordingly, application of exemption (k)(2) may be necessary.

(D) *Subsection (e)(4)(G) and (H).* These subsections are inapplicable to the extent exemption is claimed from subsections (d)(1) and (2).

(E) *Subsection (e)(4)(I).* To the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is

necessary to protect the confidentiality of sources of information and to protect the privacy and physical safety of witnesses and informants. Accordingly, application of exemption (k)(2) may be necessary.

(F) *Subsection (f).* The agency's rules are inapplicable to those portions of the system that are exempt. Accordingly, application of exemption (k)(2) may be necessary.

(iv) *Exempt records from other systems.* In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

\* \* \* \* \*

Dated: October 17, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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## LEGAL SERVICES CORPORATION

### 45 CFR Part 1638

#### Restriction on Solicitation

**AGENCY:** Legal Services Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rule revises the Legal Services Corporation (LSC or Corporation) regulation prohibiting solicitation of clients. LSC proposes to add definitions for “communicate” and “communication,” revise the existing text to make language more active, and clarify how recipients may interact with client-eligible individuals. The main goal of these revisions is to formalize the interpretations that the Office of Legal Affairs 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 recipient's intake process, as well as how recipients may relay that information without violating either LSC's Fiscal Year 1996 appropriations statute or LSC's regulations.

**DATES:** Comments must be submitted by December 26, 2023.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* [lscrulemaking@lsc.gov](mailto:lscrulemaking@lsc.gov). Include “Comments on Revisions to Part 1638” in the subject line of the message.
- *Mail:* Elijah Johnson, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Part 1638 Rulemaking.
- *Hand Delivery/Courier:* Elijah Johnson, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Part 1638 Rulemaking.

**Instructions:** Electronic submissions are preferred via email with attachments in Acrobat PDF format. LSC will not consider written comments sent to any other address or received after the end of the comment period.

**FOR FURTHER INFORMATION CONTACT:** Elijah Johnson, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007; (202) 295-1638 (phone), or [johnsone@lsc.gov](mailto:johnsone@lsc.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On April 26, 1996, Congress passed the appropriations act for Fiscal Year 1996. Public Law 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[.]

Public Law 104-134, 110 Stat. 1321, 1321-56.

On May 19, 1996, the Operations and Regulations Committee of the LSC Board requested LSC staff to 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 prohibited a grant recipient from representing an individual who had not sought legal advice from the grant recipient but was advised to seek legal representation or take legal action by the grant recipient. Part 1638 also prohibits grant recipients who have given in-person unsolicited advice to an individual from referring the individual receiving the advice to

another LSC grant recipient. *Id.* 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 broad definition of "in-person" may restrict more conduct than Congress intended when it enacted the prohibition on client solicitation. Section 504(a)(18) applies only to "in-person advice." It does not mention "personal encounters via other means of communication," which part 1638 does. 45 CFR 1638.2(a). Congress appears to have based section 504(a)(18) on ABA Model Rule 7.3, which generally prohibits "in-person, live telephone, or real-time electronic communications." Model Rule 7.3 also prohibits solicitation through "written, recorded or electronic communications," but only when such communications are abusive. Thus, part 1638's inclusion of "a personal letter" in the definition of "in-person" goes beyond the statutory language of section 504(a)(18) and the use of the same term by ABA Model Rule 7.3. The ABA updated Rule 7.3 in 2013. The changes, among other things, added electronic communications and reinforced the distinction between in-person contacts and written contacts (an electronic contact is in the same category as an "in-person" contact only when it is a "real-time electronic contact.").

The regulation's existing language has caused grantees to question whether they can provide information about the 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 what proposed outreach activities are permissible under part 1638. Some of the examples include:

- sending text messages explaining defendants' rights to unrepresented individuals in eviction cases;
- informing individuals of the availability of legal assistance via mailings and text messages; and
- individuals approaching grant recipient attorneys at court-based self-help clinics.

In July 2003, OLA published an advisory opinion 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 communicate with 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 for increasing 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 about part 1638 that addressed 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 grant recipients 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 have become more compelling as governments began lifting moratoria on filing evictions and pursuing debt collection cases that they had 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 Operations and Regulations Committee voted to

recommend that the 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 this 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 this NPRM.

## II. Proposed Changes

### § 1638.1 Purpose

LSC proposes to make no changes to this section.

### § 1638.2 Definitions

LSC proposes 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 additional technology since the inception of this prohibition, this change will provide greater flexibility and clarity around the methods of communication that are permitted. This is not intended to require recipients to use various methods to reach client-eligible individuals; rather it clarifies which methods are permissible.

LSC also proposes to amend the definition of the term *in-person* to include virtual engagements such as clinics conducted via Zoom or other videoconferencing software. LSC proposes 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 proposes to redesignate existing paragraph (b), defining the term *unsolicited advice*, as paragraph (c).

### § 1638.3 Prohibition

LSC proposes to edit the text to be active as opposed to passive. For example, "shall not represent" would replace "are prohibited from representing."

### § 1638.4 Permissible Activities

LSC proposes to edit the text to be active as opposed to passive. Additionally, LSC proposes 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 should be clearer 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 proposes to add paragraphs (c) and (e) to incorporate OLA's interpretations of existing part 1638 and the guidance LSC provided in PL 22-1. Finally, LSC proposes 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."

### § 1638.5 Recipient Policies

LSC proposes no changes to 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 proposes to amend 45 CFR part 1638 as follows:

## PART 1638—RESTRICTION ON SOLICITATION

- 1. Revise the authority citation for part 1638 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 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) 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 seeking legal assistance from the recipient as a result of a communication or information provided as described in § 1638.4(a), 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 those who are institutionalized or 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.

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