

**LEGAL SERVICES CORPORATION****45 CFR Parts 1610 and 1636****Use of Non-LSC Funds; Client Identity and Statement of Facts****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. The rule requires LSC recipients to identify by name each plaintiff they represent in any litigation. In the case of pre-litigation negotiation, the regulation requires recipients representing plaintiffs to notify potential defendants of the names of the plaintiffs represented by the recipient. The rule also requires that a plaintiff sign a written statement of facts on which a complaint is based before the recipient engages in litigation or before it undertakes pre-litigation negotiations on the plaintiff's behalf. Although this interim 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.

This rule also amends part 1610 to reference 5 interim rules included in this publication of the Federal Register in the definition of "Activity prohibited by or inconsistent with Section 504."

**DATES:** This interim rule and the revision to part 1610 are 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)(8), a restriction in the Corporation's FY 1996 appropriations act which requires LSC recipients to identify the plaintiffs they represent and have the plaintiffs sign written statements of the facts underlying the claims. 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 on the rule 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 1636.1 Purpose**

The purpose of the rule is to ensure that during pre-litigation settlement negotiations and when filing a complaint in a court of law or otherwise participating in litigation against a defendant, Corporation recipients identify their clients to the adverse party. The rule also seeks to ensure that recipients undertake such activities based on facts which support the complaint.

**Section 1636.2 Requirements**

This section sets forth the requirement that recipients identify the plaintiffs in all court complaints filed and prior to engaging in any pre-litigation settlement negotiations. The disclosure of a client's identity is not required when a court of competent jurisdiction has entered an order protecting the client from such disclosure to prevent probable, serious harm to significant client interests. In addition, this section requires that prior to the recipient entering in any pre-litigation settlement negotiations or prior to filing the complaint in court, each recipient obtain from the client being represented a signed statement of the facts supporting the complaint. The section does not apply to defendants represented by a recipient for counterclaims filed against a plaintiff. The requirements also do not apply to a recipient's delivery of advice and brief services to attempts to resolve matters for a client through negotiations in

which there is no contemplation of litigation.

The statement of facts is to be written in English and in the client's language if the client does not understand English. If the client's language is only an oral and not a written language, such as the Navajo language, the statement in English should be certified to have been translated orally to the client prior to the client's signing.

In a few emergency situations, it may be necessary for the recipient to negotiate with a prospective defendant or to file an action before the plaintiff's statement of facts can be prepared or signed. This section allows the recipient to proceed without a signed statement in such emergencies, if delay in proceeding is reasonably likely to cause harm to a significant interest of the client. Emergency situations might include threats to take the client's child out of State, to assault the client, or to evict the client without following the required legal procedures. Where a recipient proceeds on an emergency basis, a statement must be prepared and signed as soon as possible.

**Section 1636.3 Access to Written Statements**

This part provides a right of access to the statements of facts for certain specified governmental officials and their agents but not for adverse parties and others. The required statement of facts must be available in order for the auditors and monitors to review in order to confirm that the statement of facts has been obtained. The Corporation does not anticipate that copies of the statement will normally be retained in any LSC files. Access to the statement of facts by parties to the lawsuit is governed solely by the discovery rules of the court. This part does not create any new right of access to information for parties to a lawsuit or for others and the Corporation anticipates that, pursuant to current law, courts will, in most cases, determine that the statement is not discoverable by an adverse party in litigation.

A copy of each statement drafted according to this section should be maintained separate from the client's case file.

**Section 1636.4 Applicability**

This section specifies that the requirements of this part apply not only to cases handled by recipient staff but also to cases for which private attorneys are compensated by the recipient. Attorneys who are handling cases pro bono, however, are not required by the rule to maintain such documentation because *pro bono* attorneys are

uncompensated and do not fall within the prohibition. In addition, it is the Corporation's judgment that the requirement of a plaintiff's statement of facts would be a substantial impediment to the recruitment of *pro bono* lawyers. Besides, the fact that *pro bono* lawyers are volunteering their time provides some protection against their bringing frivolous law suits.

#### *Section 1636.5 Recipient Policies, Procedures and Recordkeeping*

This section requires recipients to establish policies and procedures to ensure compliance with this part and to maintain records sufficient to document compliance with this part.

Amendment to 45 CFR Part 1610 to Reference This Part and Parts 1637, 1638, 1639, and 1642

This interim rule also amends 45 CFR Part 1610 as published as an interim rule at 61 FR 41960 on August 13, 1996, to include references to this part and parts 1637, 1638, 1639 and 1642 in the definition of "Activity prohibited by or inconsistent with Section 504."

#### List of Subjects

##### *45 CFR Part 1610*

Grant programs—law, Legal services.

##### *45 CFR Part 1636*

Client identity, Grant programs, Legal services.

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

#### **PART 1610—[AMENDED]**

1. 45 CFR Part 1610, as published in the Federal Register as an interim rule at 61 FR 41960 is amended by adding Section 1610.2(b)(4), (9), (11), (12) and (14) as follows:

##### **§ 1610.2 Definitions**

\* \* \* \* \*

(b) \* \* \*

(4) Section 504(a)(8) and Part 1636 of this Chapter (Statement of facts and client identification);

\* \* \* \* \*

(9) Section 504(a)(13) and Part 1642 of this Chapter (Attorneys' fees);

\* \* \* \* \*

(11) Section 504(a)(15) and Part 1637 of this Chapter (Prisoner litigation);

(12) Section 504 (a)(16), as modified by Section 504(e), and Part 1639 of this Chapter (Welfare reform);

\* \* \* \* \*

(14) Section 504(a)(18) and Part 1638 of this Chapter (In-person solicitation).

2. Part 1636 is added to read as follows:

#### **PART 1636—CLIENT IDENTITY AND STATEMENT OF FACTS**

Sec.

1636.1 Purpose.

1636.2 Requirements.

1636.3 Access to written statements.

1636.4 Applicability.

1636.5 Recipient policies, procedures and recordkeeping.

Authority: Pub. L. 104-134, 110 Stat. 1321.

##### **§ 1636.1 Purpose.**

The purpose of this rule is to ensure that, when an LSC recipient files a complaint in a court of law or otherwise initiates or participates in litigation against a defendant or engages in pre-complaint settlement negotiations, the recipient identifies the plaintiff it represents and assures that the plaintiff has a colorable claim.

##### **§ 1636.2 Requirements.**

(a) When a recipient files a complaint in a court of law or otherwise initiates or participates in litigation against a defendant, or before a recipient engages in pre-complaint settlement negotiations on behalf of a client who has authorized it to file suit in the event that the settlement negotiations are unsuccessful, it shall:

(1) identify each plaintiff by name in any complaint it files and identify each plaintiff it represents to prospective defendants in pre-litigation settlement negotiations, unless a court of competent jurisdiction has entered an order protecting the client from such disclosure based on a finding, after notice and an opportunity for a hearing on the matter, of probable, serious harm to the plaintiff if the disclosure is not prevented; and

(2) prepare a dated written statement signed by each plaintiff, enumerating the particular facts supporting the complaint, insofar as they are known to the plaintiff when the statement is signed.

(b) The statement of facts must be written in English and, if necessary, in a language other than English that the plaintiff understands.

(c) In the event of an emergency, where the recipient reasonably believes that delay is likely to cause harm to a significant safety, property or liberty interest of the client, the recipient may proceed with the litigation or negotiation without a signed statement of fact, provided that the statement is signed as soon as possible thereafter.

##### **§ 1636.3 Access to written statements.**

(a) Written statements of fact prepared in accordance with this part are to be kept on file by the recipient and made available to the Corporation or to any

Federal department or agency auditing or monitoring the activities of the recipient of the Corporation or to any auditor or monitor receiving Federal funds to audit or monitor on behalf of a Federal department or agency or on behalf of the Corporation.

(b) This part does not give any other party any right of access to the plaintiff's written statement of facts, either in the lawsuit or through any other procedure. Access by other parties to the statement of facts is governed solely by the discovery rules of the court in which the action is brought.

##### **§ 1636.4 Applicability.**

This part applies to cases for which private attorneys are compensated by the recipient as well as to those cases initiated by the recipient's staff.

##### **§ 1636.5 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 1612**

#### **Restrictions on Lobbying and Certain Other Activities**

**AGENCY:** Legal Services Corporation.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This interim rule completely revises the Legal Services Corporation's ("Corporation" or "LSC") regulation on lobbying, rulemaking and other restricted activities. It is intended to implement provisions in the Corporation's FY 1996 appropriations act which prohibit recipients from engaging in any agency rulemaking, in legislative or lobbying activity or in advocacy training. The interim rule also implements statutory exceptions to the prohibitions on rulemaking and lobbying, which permit recipients to comment in public rulemaking, respond to requests from legislative and administrative bodies, and engage in State and local fund raising activities when using non-LSC funds. Finally, the interim rule continues the pre-existing prohibitions on participation in public