

receipts and disbursements in a manner directed by the Corporation.

Dated: November 26, 1996.

Victor M. Fortuno,

General Counsel.

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45 CFR Part 1617

Class Actions

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule revises the Legal Services Corporation's ("Corporation" or "LSC") interim regulation concerning class actions. The revisions are intended to implement a restriction contained in the Corporation's Fiscal Year ("FY") 1996 appropriations act which is currently incorporated by reference in the Corporation's FY 1997 appropriations act. The restriction prohibits the involvement of LSC recipients in class actions.

DATES: This final rule is effective on January 1, 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 LSC staff to prepare an interim rule to implement § 504(a)(7), a restriction in the Corporation's FY 1996 appropriations act, Pub. L. 104-134, 110 Stat. 1321 (1996), which prohibited involvement of LSC recipients in class actions. The Committee held public hearings on staff proposals on July 8 and 19, and the Board adopted an interim rule on July 20 for publication in the Federal Register. Although the interim rule was effective upon publication, see 61 FR 41963 (Aug. 13, 1996), the Corporation also solicited comments on the rule for review and consideration by the Committee and Board.

The Corporation received 7 comments on the interim rule. The Committee held public hearings on the rule on September 29, 1996, and made several recommendations for revisions to the Board. The Board adopted this final rule on September 30, 1996.

The Corporation's FY 1997 appropriations act became effective on October 1, 1996, see Pub. L. 104-208, 110 Stat. 3009. 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.

The interim rule was intended to implement a clear prohibition in the Corporation's FY 1996 appropriations act on any participation in class actions by LSC recipients. Other than providing a transition period for programs to withdraw from pending cases, the appropriations act provided no exceptions and allowed for no Corporation waivers to the prohibition. The legislative history of this provision indicates an intent that legal services programs should focus their resources on representation of individual poor clients and not be involved in any class actions. Accordingly, the interim rule contained a strict prohibition on participation in class actions with no exceptions or waivers. This final rule continues the interim rule's strict prohibition but better clarifies those activities that constitute participation in class actions.

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

Section 1617.1 Purpose

The purpose of this rule is to prohibit involvement by LSC recipients in class actions.

Section 1617.2 Definitions

The definition of "class action" in the interim rule deferred to widely accepted Federal and local court rules and statutory definitions. Thus, a class action for the purposes of this part was defined as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure or the comparable State statute or rule of civil procedure governing the action in the court where it is filed. No comments challenged the definition, and no changes have been made to the definition in this final rule.

The definition of "initiating or participating in any class action" in the interim rule was intended to clarify that any involvement in a class action is prohibited prior to an order granting relief. Public comments on part 1617 generally asked for more clarity as to the scope of the definition. In general, the Board decided that it should state in the rule that all participation, whether before or after entry of an order, is prohibited; and the final rule reflects that change. In addition, the Board decided to address some of the specific issues addressed by the comments.

One comment urged the deletion of "non-adversarial" before "monitoring," stating that any action, even an adversarial action, should be allowed once an order granting relief has been

issued. The Board did not take this approach. Participation in adversarial actions, even after entry of an order, constitutes active participation in a class action, and such involvement is not permitted under the law. The use of the term "non-adversarial" was intentional. The Corporation meant to prohibit any adversarial action after relief is granted, and the term is retained in this final rule. Furthermore, the term "monitoring" is replaced with "activities" because its use seemed to imply a more active role for recipients than was intended.

Comments further indicated that the rule should be more explicit about the types of activities the Corporation considers to be adversarial and non-adversarial. Accordingly, this final rule adds language to clarify what would be considered to be non-adversarial. Non-adversarial activities would include efforts to remain informed about the terms of an order granting relief as well as efforts to explain, clarify, educate or give advice about an order granting relief.

One comment questioned the use of the term "legal assistance" in the definition of "initiating or participating in any class action." Because the term as defined in 45 CFR part 1600 has a different focus than is intended in this definition, the Board changed "legal assistance" to "representation."

Other comments suggested deleting the language in the definition that prohibits program attorneys from assisting their clients to "withdraw from" or "opt out of" a class action. The comments stated that the inclusion of the language in the definition goes beyond the intent of the statutory restriction and has the opposite effect of "participating" in a class action. Arguing that representation to withdraw from or opt out of a class action may be essential to allow individual representation, the comments urged the Corporation to change the rule to allow such representation.

The Board agreed that efforts to withdraw from a class action are consistent with the Congressional intent that LSC recipients provide representation to individual clients and should not be viewed as efforts to participate or to be included in a class action. The Board revised paragraph (b) of the definition of "initiating or participating in any class action" to clarify that the definition does not include the representation of an individual client seeking to withdraw from or opt out of a class by deleting reference to withdrawing or opting out from the definition. This change only authorizes actions by a recipient

necessary to ensure that its client is not included in the class or that any class order would not apply to the recipient's client. Any other activity in the case, however, is not permitted.

In summary, the final rule clarifies the definition of "initiating or participating in any class action" as extending to all types of involvement at all stages of a class action. Recipients may not initiate a class action or participate in one initiated by others, either at the trial or appellate level, nor may they continue involvement in a case that is later certified or otherwise determined by the court to be a class action. However, in response to comments on a situation where the recipient's client does not file for or move for certification of a class action, the Board requested that the following example be included in this commentary regarding the definition of "initiating or participating in a class action": In a case where the recipient files or otherwise initiates action to have the case certified as a class action, participation in the case is prohibited from the point that the recipient takes such actions. On the other hand, if the recipient is representing a client in a pending action that was not filed as a class action, and another party moves to have the case certified as a class action, the recipient will not be deemed to be participating in a class action until the court certifies it as such. Finally, recipients may not act as *amicus curiae* or co-counsel in a class action or intervene in a class action on behalf of individual clients who seek to intervene in, modify, or challenge the adequacy of the representation of a class. Finally, recipients may not represent defendants in a class action.

Certain situations are not within the definition and are thus not prohibited by this rule. For example, recipients may advise clients about the pendency of a class action or its effect on the client and what the client would need to do to benefit from the case. Recipients may represent an eligible client in withdrawing from or opting out of a class action. Furthermore, the definition of a class action would not include a mandamus action or injunctive or declaratory relief actions, unless such actions are filed or certified as class actions.

Recipients may also represent an individual client seeking the benefit of the order, provided that any such involvement is only on behalf of an individual client and does not involve representation of an entire class and may represent an individual client seeking to withdraw from or opt out of a class.

Section 1617.3 Prohibition

This section prohibits LSC recipients from initiating or participating in any class action.

Section 1617.4 Recipient Policies and Procedures

This section requires recipients to adopt written policies and procedures to guide the recipient's staff in ensuring compliance with this rule.

List of Subjects in 45 CFR Part 1617

Grant programs—law, Legal services.

For reasons set out in the preamble, LSC revises 45 CFR part 1617 to read as follows:

PART 1617—CLASS ACTIONS

Sec.

1617.1 Purpose.

1617.2 Definitions.

1617.3 Prohibition.

1617.4 Recipient policies and procedures.

Authority: 29 U.S.C. 2996e(d)(5); 110 Stat. 3009 (1996); 110 Stat. 1321 (1996).

§ 1617.1 Purpose.

This rule is intended to ensure that LSC recipients do not initiate or participate in class actions.

§ 1617.2 Definitions.

(a) *Class action* means a lawsuit filed as, or otherwise declared by the court having jurisdiction over the case to be, a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure or the comparable State statute or rule of civil procedure applicable in the court in which the action is filed.

(b)(1) *Initiating or participating in any class action* means any involvement at any stage of a class action prior to or after an order granting relief. "Involvement" includes acting as *amicus curiae*, co-counsel or otherwise providing representation relating to a class action.

(2) *Initiating or participating in any class action* does not include representation of an individual client seeking to withdraw from or opt out of a class or obtain the benefit of relief ordered by the court, or non-adversarial activities, including efforts to remain informed about, or to explain, clarify, educate or advise others about the terms of an order granting relief.

§ 1617.3 Prohibition.

Recipients are prohibited from initiating or participating in any class action.

§ 1617.4 Recipient policies and procedures.

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part.

Dated: November 26, 1996.

Victor M. Fortuno,

General Counsel.

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45 CFR Part 1632

Redistricting

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule revises the Legal Services Corporation's ("LSC" or "Corporation") regulation on redistricting to implement a new restriction contained in the Corporation's Fiscal Year ("FY") 1997 appropriations act, which extends the rule's prohibition to all the funds of recipients.

DATES: This final rule is effective on January 1, 1997.

FOR FURTHER INFORMATION CONTACT:

Victor M. Fortuno, General Counsel, at (202) 336-8910.

SUPPLEMENTARY INFORMATION: The prior LSC regulation on redistricting that is revised by this final rule allowed recipients to use some non-LSC funds on redistricting activities. New legislation, enacted as Section 504(a)(1) of the Corporation's FY 1996 appropriations act, Pub. L. 104-134, 110 Stat. 1321 (1996), went further than the Corporation's prior rule and prohibited the Corporation from providing financial assistance to any person or entity ("recipient") that makes available any funds, personnel or equipment for use in advocating or opposing any plan, proposal or litigation that is intended to or has the effect of altering, revising or reapportioning a legislative, judicial or elective district at any level of government, including influencing the timing or manner of the taking of a census. This legislative restriction prohibited recipient involvement in redistricting activities, regardless of the source of funds used for such activities. The Corporation's FY 1997 appropriations act continues this restriction, Pub. L. 104-208, 110 Stat. 3009, by incorporating by reference the restrictions in the FY 1996 appropriations act.

On May 19, 1996, the Operations and Regulations Committee ("Committee") of the Corporation's Board of Directors ("Board") requested LSC staff to prepare an interim rule to implement the new statutory restriction on redistricting activities. The Committee held hearings on staff proposals on July 8 and 19, and the Board adopted an interim rule on July 20 for publication in the Federal