

What You May and May Not Do Under the Legal Services Corporation Restrictions

By Alan W. Houseman and Linda E. Perle

Attorneys in legal aid programs funded by the Legal Services Corporation (LSC) work within a framework of laws and regulations that restrict what they may do on behalf of low-income persons. The LSC Act imposed some restrictions. Appropriation provisions that were enacted during the 1980s and early 1990s imposed more.¹ In 1996 Congress imposed the latest round of restrictions.² Despite these restrictions, most of the

work that needs to be done to address the individual and systemic problems that poor people face can still be done.

The statutes and regulations focus on what legal services programs may not do, not on what they may do. Thus a program may do anything that is not explicitly prohibited by statute or regulation, as long as it is within the individual program's priorities.³

¹ The original 1974 Legal Services Corporation (LSC) Act included, among others, limitations on fee-generating cases, political activities, lobbying and rule making, training and organizing, class actions, representation of juveniles, and representation in criminal, school desegregation, selective service, and certain abortion cases. In 1977 Congress eliminated the limitation on juvenile representation and relaxed some of the other limitations in the original Act, including permitting expanded representation before legislative and rule-making bodies. Between 1979 and 1995 Congress imposed, through the appropriations process, additional legislative restrictions on the use of LSC funds, including expanded and additional restrictions on lobbying and rule making, grass-roots lobbying, training, class actions, abortion cases, and alien representation. On several occasions the LSC board crafted new constraints on program activity through the regulatory process, including a restriction on redistricting and additional limitations on lobbying and rule making.

² See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321 [hereinafter Omnibus Continuing Resolution]. The 1996 restrictions addressed a range of issues. Some, such as the prohibition on participation in class actions, significantly expanded the scope of the existing limitations. Others, such as the prohibitions on attorney fees and prisoner representation, were imposed for the first time. Also, for the first time, Congress restricted recipients' use of non-LSC public funds, including funding from Interest on Lawyers Trust Accounts (IOLTA), and applied most of the 1996 restrictions to the entire entity that was receiving LSC funds. Subsequent appropriations acts incorporated the restrictions laid out in section 504(a) with only minor revisions.

³ Recipient boards must set priorities including procedures for emergency cases. *Id.* § 504(a)(9). Staff must sign an agreement not to undertake cases or matters that are outside the priorities or the emergency procedures. Recipients must report annually to LSC on emergency cases or matters that were not within the recipient's priorities. 45 C.F.R. § 1620 (2001).

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Advocacy in the Courts and Other Adjudicatory Bodies

LSC-funded programs and advocates may represent clients in the courts and before other adjudicatory bodies and may seek individual and systemic relief. On behalf of individual clients, LSC-funded attorneys may sue governmental entities, either directly in court or through procedures for judicial review of agency decisions. In these suits attorneys may seek injunctive and declaratory relief and seek to overturn state laws, regulations, and policies that violate state or federal laws or constitutions. LSC-funded attorneys may also bring mandamus actions to force officials to take specific actions, seek equitable relief that affects groups or categories of persons, or undertake representative actions not designated as class actions that are available under the laws of certain states (including California and Florida).

While legal services programs may not bring class action lawsuits, LSC-funded programs may pursue individual claims, multiple individual claims, and group representation.⁴ All of these actions can cause significant changes in law and policy, changes that extend beyond individual clients.

Attorney Fees. An LSC-funded program may take a case in which attorney fees are available as long as it does not request fees for its work and it follows the rules on referral attempts.⁵ The program must attempt two referrals of a fee-generating case to members of the private bar before undertaking the representation. If the referral attempts are unsuccessful, the program may undertake the representation. Referrals are not required when recovery of damages is not the principal object of the case and when attorney fees are likely to be minimal or unavailable.

Programs also may undertake fee-generating cases without first attempting referrals when the program determines either that, after consultation with private bar representatives, the type of case is not one that private attorneys in the area are willing to take without a fee or that, based on previous experience, attempts to refer the case would be futile.

Nothing in the statute or regulation on fee-generating cases prohibits LSC-funded programs from cocounseling with or referring these cases to private attorneys or other public interest organizations. The non-LSC-funded programs or private attorneys may seek fees for their work if they undertake the representation on a pro bono basis.⁶ This preserves attorney fees as a strategic tool for litigation. Attorneys participating in a program's private attorney involvement program may also claim and collect attorney fees for their work when they agree to undertake the representation on a pro bono basis.⁷

Class Actions. There are many ways to pursue systemic representation in the courts. However, in some instances the only effective tool to address a widespread problem is through class action litigation under Rule 23 or under a comparable state statute. The LSC regulations define "class action" as "a lawsuit filed as, or declared by a 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 rules of civil procedure applicable in the court in which the action is filed."⁸ Although LSC-funded legal aid programs may not represent a class or named plaintiffs or otherwise actively participate in such litigation, programs may still contribute to the effort. A program may transfer non-LSC funds to another

⁴ Omnibus Continuing Resolution § 504(a)(7); 45 C.F.R. § 1617 (2001).

⁵ 42 U.S.C. § 2996(b)(1) (2001); 45 C.F.R. § 1609 (2001).

⁶ Private attorneys who cocounsel with a legal services program on a pro bono basis may recover attorney fees only for the portion of the work on the case actually done by the pro bono attorney. LSC, Program Letter 97-1 (Aug. 7, 1997).

⁷ 45 C.F.R. § 1642.4(b) (2001); 62 Fed. Reg. 25864 (May 12, 1997). The restriction does not apply to private attorneys who receive compensation from the recipient under a private attorney involvement program, *judicare* program, contract, or other financial arrangement.

⁸ 45 C.F.R. § 1617.2(a) (2001).

pro bono lawyer or entity to enable that lawyer or entity to bring the class action.⁹ Programs also may identify and refer individuals who might be appropriate class representatives to other lawyers or organizations that could bring class litigation, or give information on patterns of illegal practices to government authorities that can bring class action lawsuits.

Alien Representation. The restriction on the representation of certain aliens does not preclude all alien representation.¹⁰ LSC-funded programs may still represent

- lawful permanent resident aliens;
- any alien who is married to a U.S. citizen, the parent of a U.S. citizen, or an under-21 unmarried child of a U.S. citizen, provided that such alien has filed an application for adjustment of status to permanent residency and the application has not been denied;
- aliens granted asylum;
- aliens granted refugee status;
- aliens granted conditional entrant status;
- aliens granted withholding of deportation; and
- H-2A nonimmigrant temporary agricultural workers (to the degree that the representation concerns the worker's employment contract).

Programs receiving LSC funding may not give legal assistance "for or on behalf of" an ineligible alien.¹¹ Nevertheless, under the current rule, an LSC-funded program may give assistance to an eligible client even if that assistance benefits an ineligible alien as long as the assistance affects a specific legal right or interest of the eligible client. Thus a program may represent a citizen child in an education case, even if the child's ineligible parents will receive some benefit from a successful resolution of the issue.

Current interpretations of Part 1626 permit programs receiving LSC funding to represent group clients without regard to the citizenship or alien status of its members.¹² In a case that involves numerous individual clients with similar legal problems, legal aid programs may not represent any of the individuals who are ineligible aliens. However, programs may cocounsel with other attorneys in these cases: the legal services program would represent the eligible individuals and the other attorneys would represent the ineligible aliens.

The Kennedy Amendment permits programs to use non-LSC funds to assist otherwise ineligible aliens who are victims of domestic abuse to escape from abusive situations, ameliorate the effects of the abuse, or protect against future abuse.¹³ Programs also may use non-LSC

⁹ See 62 Fed. Reg. 27697 (May 21, 1997) for a discussion of the effect of 45 C.F.R. § 1610 (2001) on the transfer of non-LSC funds.

¹⁰ Omnibus Continuing Resolution § 504(a)(11); 45 C.F.R. § 1626 (2001). As this article goes to press, LSC is engaged in negotiated rule making to develop revisions of Part 1626 to clarify the rule, reduce administrative burdens on recipients, and incorporate changes in the law and interpretations of the rules that LSC has issued since the rule was adopted in 1997.

¹¹ Under section 1626.2(e) of the current regulation, "to provide legal assistance *on behalf of* an ineligible alien is to render legal assistance to an eligible client which benefits an ineligible alien and does not affect a specific legal right or interest of the eligible alien." Ineligible aliens are noncitizens who are not included within the categories of aliens who may be assisted under sections 1626.5 and 1626.10.

¹² See Letter from Suzanne Glasow, senior assistant general counsel, to David B. Neumeyer, executive director, Virginia Legal Aid Society (Dec. 3, 1999) (on file with Alan W. Houseman and Linda E. Perle). Group eligibility is determined solely by the financial status of the group since the client is the group, rather than the individual members of the group, and citizenship is an attribute of an individual. *Id.* As part of the pending negotiated rule making, LSC has indicated reservations about the validity and wisdom of this opinion, but for now it remains the official LSC interpretation.

¹³ Departments of Commerce, Justice and State, and the Judiciary and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-208, § 502(a)(2)(C), 110 Stat. 3009.

funds to work with groups of alien abuse victims to increase domestic violence services that are available in areas with large immigrant populations, to challenge failures by law enforcement to respond to domestic violence calls in neighborhoods with large alien populations, to increase the availability of emergency shelter and financial assistance to aliens, or to improve access to interpreter services in family court.¹⁴

Prisoners. LSC-funded attorneys may not participate in civil litigation on behalf of a person incarcerated in a federal, state, or local prison or participate in administrative proceedings challenging the conditions of incarceration. This policy does not apply to persons who are detained in mental health facilities, juvenile facilities, or other detention facilities that are not penal facilities.¹⁵ LSC-funded attorneys may provide administrative representation to prisoners on issues such as social security and public benefits.¹⁶ If an attorney learns during the course of representation that the client has become incarcerated, the attorney must use best efforts to withdraw from the litigation, unless the period of incarceration is anticipated to be brief and the litigation is like-

ly to continue beyond the period of incarceration.

Despite these restrictions, most of the work that needs to be done to address the individual and systemic problems that poor people face can still be done.

Other Prohibited Representation.

LSC-funded attorneys may not represent clients in the following cases:

- Evictions from public housing for persons convicted of or charged with drug crimes.¹⁷
- Welfare reform lobbying, rule making, or litigation on behalf of groups.¹⁸
- Redistricting cases.¹⁹
- Abortion litigation.²⁰
- School desegregation cases using LSC or private funds.²¹
- Certain selective service and military cases using LSC or private funds.²²

¹⁴ See Letter from Suzanne Glasow, *supra* note 12.

¹⁵ 45 C.F.R. § 1637 (2001).

¹⁶ *Id.*

¹⁷ LSC-funded attorneys may not represent in public housing evictions persons convicted of or charged with drug crimes when the evictions are based on threats to health or safety of public housing residents or employees. *Id.* § 1633. However, such attorneys may represent a person facing eviction because a family member was convicted of or charged with drug crimes.

¹⁸ Recipients may not engage in litigation on behalf of groups or participate in lobbying or rule making involving state or federal welfare reform initiatives, laws, or regulations (unless the activity falls within the lobbying and rule-making exceptions outlined below). However, recipients may represent an individual client who seeks relief from a welfare agency because of threatened adverse action based on a welfare reform law, regulation, or policy. As a result of the Supreme Court decision in *LSC v. Velazquez*, legal services programs representing such individuals now can raise all relevant legal issues and challenge existing statutes or regulations. *LSC v. Velazquez*, 531 U.S. 533 (2001) (Clearinghouse No. 51,556); 45 C.F.R. § 1639 (2001), *as amended by* 67 Fed. Reg. 19342 (Apr. 19, 2002).

¹⁹ 45 C.F.R. § 1632 (2001). Representation in voting rights issues not involving redistricting is permitted.

²⁰ Omnibus Continuing Resolution § 504(a)(14). The narrower restriction in the LSC Act prohibits the use of LSC and private funds for litigation involving nontherapeutic abortion. 42 U.S.C. § 2996f(b)(8) (2001).

²¹ 42 U.S.C. § 2996f(b)(9).

²² *Id.* § 2996e(b)(10).

Education and Outreach

Providing people with information regarding their legal rights and responsibilities and the program's services and intake procedures through community legal education, outreach, public service announcements, courthouse clinics, group presentations, and other similar activities is explicitly permitted under the LSC regulation that implements the solicitation restriction.²³ The restriction on solicitation prohibits representation of a client only when that representation results from a legal services program's unsolicited advice to the potential client (through a face-to-face or personal communication) to obtain counsel or take legal action.²⁴ In practice, the restriction applies only to the unusual situation where a staff member makes a personal appeal to a specific individual urging that individual to become a client of the program.

Representing Community Groups and the Ban on Organizing

Subject to the provisions of the LSC regulations on group eligibility, LSC funds may be used for group representation including welfare-rights and tenant groups.²⁵ Non-LSC funds can be used to represent any group, nonprofit corporation, or community development entity that does not fit within the LSC financial eligibility standards.²⁶

The LSC Act prohibits the use of LSC and private funds, but not public or IOLTA (Interest on Lawyers Trust Account) funds, to initiate the formation or act as an organizer of any association, federation, labor union, coalition, network,

alliance, or similar entity.²⁷ Although the language of the restriction is broad, both the statute and the LSC regulation make clear that LSC-funded programs may provide legal advice and assistance to eligible individuals and groups who desire to plan, establish, or operate organizations.²⁸ While a legal services attorney may not use LSC or private funds to organize a labor union for factory workers or a tenants' association in a low-income housing project, the attorney is permitted to advise and represent such an existing group that wishes to incorporate, apply for a tax exemption, obtain a loan or a grant, or seek other legal assistance.

Policy Advocacy

LSC-funded programs may not affirmatively lobby on most legislative matters or engage in any grass-roots lobbying.²⁹ They are prohibited also from participating in and influencing certain rule-making proceedings. However, many advocacy activities that relate to legislation or rule making are not prohibited, and many others are specifically exempted.

Lobbying and Rule Making. The lobbying restriction prohibits attempts to influence the passage or defeat of any legislation or constitutional amendment. However, a program may litigate the validity of a statute or ordinance once it is enacted.

Programs are explicitly permitted to use non-LSC funds to respond to a request from a legislator or other government official to testify or give information, analysis, or comments on a bill.³⁰ Programs should be careful to require that all re-

²³ 45 C.F.R. § 1638 (2001).

²⁴ Omnibus Continuing Resolution § 504(a)(18).

²⁵ 45 C.F.R. § 1611.5(c) permits legal assistance "to a group, corporation or association if it is primarily composed of persons eligible for legal assistance under the Act and if it provides information showing that it lacks, and has no practical means of obtaining, funds to retain private counsel."

²⁶ 45 C.F.R. § 1611.3(e) (2001).

²⁷ 42 U.S.C. § 2996f(b)(7) (2001). Because this restriction is derived solely from the LSC Act, rather than the 1996 appropriations act, it is applicable only to LSC and private funds and does not apply to public or IOLTA funds.

²⁸ 45 C.F.R. § 1612.9 (2001).

²⁹ Omnibus Continuing Resolution § 504(a)(2)–(6); 45 C.F.R. § 1612.

³⁰ Omnibus Continuing Resolution § 504(e); 45 C.F.R. § 1612.6.

quests be made in writing. The rules also specifically permit an LSC-funded attorney to advise a client of the client's right to communicate directly with an elected official.³¹

The rule-making restriction applies only to efforts to influence the formal process for the adoption of generally applicable rules, regulations, or guidelines, including formal notice and comment rule making. An exception to the restriction permits LSC-funded programs to use non-LSC funds to prepare and submit written or oral comments in a rule-making proceeding.³² LSC-funded programs may work to influence agency policies or procedures that are not adopted through a formal procedure and may advocate to change the practices of institutions or agencies so that they are more responsive to the needs of the poor. Thus an LSC-funded program may use non-LSC funds to submit written comments or testify on a proposed regulation in a public hearing before a state agency and use any funds to work with agency officials to develop procedures to ensure that the regulation is implemented appropriately once it is promulgated.

Media and Grass-Roots Lobbying.

LSC-funded programs may use print and broadcast media to help represent the interests of their clients and the low-income community that they serve. However, programs receiving LSC funding are prohibited from using any funds to engage in grass-roots lobbying.³³ Grass-roots lobbying includes oral and written communications, advertising, letter writing, or telephone or e-mail campaigns, which make a specific call to action designed to influence members of the public to contact legislators or public officials to support or oppose pending or proposed legislation, regulations, executive decisions, or ballot measures.³⁴ In order for a communication to be consid-

ered grass-roots lobbying, it must either explicitly urge the recipient to contact a legislator or agency about the measure or include some other information or device that is designed to encourage the recipient to make the contact, such as the address, telephone number, or e-mail of a legislator, or a petition, postcard, or other means, for the reader to communicate support or opposition for the measure to the decision maker.

The grass-roots lobbying restriction by no means prohibits programs from communicating with the public about pending legislation or regulations. The regulation explicitly permits programs to explain or report on pending or proposed legislation or regulations.³⁵ The rules explicitly allow LSC-funded programs to advise clients about their rights to communicate directly with an elected official.³⁶ LSC funded attorneys may also analyze legislation or regulations and explain the problems or issues addressed by the measure and the impact of the measure on the low-income community. Programs may publish and disseminate newsletters, reports, or other written materials that track and analyze legislative developments, talk to reporters about the impact of legislation or regulations on their clients, or write letters to the editor or op-ed pieces about problems in the low-income communities that can be addressed by changes in the law. However, these communications must not include explicit calls to action or materials that would reasonably be interpreted as such.

Coordination, Collaboration, and Partnerships

LSC-funded legal aid programs may coordinate their activities and collaborate with non-LSC-funded entities and develop partnerships with a variety of community-based organizations. LSC-funded legal aid staff may train clients, human service orga-

³¹ 45 C.F.R. § 1612.5(c)(6).

³² *Id.* § 1612.6(e).

³³ *Id.* § 1612.4.

³⁴ *Id.* § 1612.2(a)(1).

³⁵ *Id.* § 1612.2(a)(2).

³⁶ *Id.* § 1612.5(c)(3), (6).

nizations, and community organizations about existing or proposed laws and regulations. Staff may participate in associations, federations, coalitions, networks, alliances, or similar entities and may participate on local governmental or private-sector task forces. In joint advocacy efforts, LSC-funded program staff may communicate about clients' problems with the non-LSC-funded entities. Staff may share with the non-LSC-funded entity analysis of the impact on their clients of existing policies or proposed legislation or regulations, or how legislative or regulatory change can address important issues that their clients face.

Restrictions on Personal Activities of Staff Attorneys

Staff attorneys may not run for partisan elective office. If they decide to run, they must resign from the program. Staff attorneys and other staff may not engage in

any political activity during working hours. Staff may not engage in voter registration or transporting voters to the polls during working hours.³⁷ Program personnel may not engage in any illegal demonstrations, boycotts, strikes, or other illegal activity at any time.³⁸

Resources

The Center for Law and Social Policy (CLASP) serves as counsel to legal aid programs that are members of the National Legal Aid and Defender Association. CLASP provides advice and assistance regarding what legal aid staff may and may not do, prepares guides and manuals on key areas of legal aid advocacy, and provides project directors with compliance checklists and sample program policies. More detailed analyses of the issues discussed in this article can be found at www.nlada.org. The primary CLASP contact for staff inquiries is Linda E. Perle.

³⁷ *Id.* § 1608.

³⁸ *Id.*