



WHAT CAN AND CANNOT BE DONE: REPRESENTATION OF CLIENTS BY LSC-FUNDED PROGRAMS

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WHAT CAN BE DONE

The LSC restrictions imposed by the FY96 appropriations legislation, modified slightly and incorporated in the subsequent appropriations legislation, resulted in federal statutory and regulatory restrictions on LSC-funded entities. Nevertheless, there continue to be many critically important representational activities that can still be done by LSC-funded entities, and in the years since these additional restrictions were first introduced, some of them have been modified to allow recipients greater flexibility or outright repealed. To list just a few examples: the U.S. Supreme Court decision in *LSC v. Velazquez* restored recipients' ability to more fully represent individual clients in welfare cases; the Kennedy Amendment and others revisions expanded the categories of eligibility for clients who are neither U.S. citizens or U.S. nationals; and the prohibition of LSC recipients collecting attorneys' fees was repealed in its entirety in 2010.

Recipients of LSC funding can continue to address many systemic problems faced by low-income people in virtually all substantive areas. Even more critical to low-income populations, legal services can undertake advocacy in a variety of forums to expand opportunities and promote progressive social policy.

¹ Update of Previous Guides by Alan Houseman, Linda Perle, and Robin Murphy issued in 2012 and 2016.

Over 95% of the work done in legal services in 1995 can continue today and over 98% of the cases brought to court in 1995 can still be brought, including:

- most evictions and federal housing cases;
- bankruptcy, collections and repossession, consumer debt, consumer fraud, warranty, and utility cases;
- family law cases such as child support, domestic violence, custody, visitation, divorce/separation, paternity establishment, foster care, termination of parental rights, and child welfare cases;
- elderly and disability advocacy;
- migrant and Native American cases;
- employment discrimination, wage claims, and unemployment insurance cases;
- income maintenance and benefits cases, including Medicaid, food stamps, TANF, SSI, SSA and Veterans Benefits;
- education matters;
- health care cases, including Medicare;
- juvenile cases;
- individual rights cases, including mental health; and
- cases for aliens who fall into a number of categories.

Aliens who are eligible for LSC services include:

1. Lawful permanent resident aliens.²
2. Any alien who is either married to a U.S. citizen, the parent of a U.S. citizen, or an unmarried child under the age of 21 of a U.S. citizen.^{3*}
** In these case, the individual is only eligible if he/she has filed an application for adjustment of status to permanent residency and such application has not been denied.*
3. Aliens granted asylum,⁴ refugee status,⁵ conditional entrant status,⁶ or a withholding of deportation or exclusion status.⁷
4. Aliens who are in the united states pursuant to an H-2A nonimmigrant temporary agricultural worker visa,⁸ H-2B nonimmigrant forestry worker visa.⁹⁺
+ In these cases, representation is limited to matters concerning the worker's

² 1626.5(a).

³ 1626.5(b).

⁴ 1626.5(c).

⁵ *Id.*

⁶ 1625.5(d).

⁷ 1625.5(e).

⁸ 1626.11(a).

⁹ 1626.11(b).

employment contract.

5. Aliens who are victims of or, through no participation of their own, have children who are victims of: battering or extreme cruelty, sexual assault or trafficking in the United States, OR any other crime or abuse which allows them to qualify for a “U visa” under 101(a)(15)(U) of the INA.^{10±}

±In these cases, legal assistance is limited to assistance directly related to the prevention of, or obtaining relief from, the abuse, crimes, or mistreatment that was suffered.

6. Aliens who are victims of severe forms of trafficking of persons in the United States¹¹ OR classified as a non-immigrant under the T-Visa provisions in 101(a)(15)(T) of the INA.^{12Ψ}

Ψ In these cases, legal assistance may include, but IS NOT limited to assistance directly related to the prevention of, or obtaining relief from, the abuse, crimes, or mistreatment that was suffered.

Economic development work and group representation can continue. Subject to the provisions of the LSC regulations on group eligibility,¹³ LSC funds may be used for group representation. Specifically, non-LSC funds can be used to represent groups, non-profit corporations or community development entities who has a “principal activity” of delivering services to persons in the community who would be LSC eligible, even if the members of the group itself do not fit within the LSC eligibility standards.¹⁴ Transactional activities involved in economic development are permissible.

LSC recipients can represent clients before administrative agencies in administrative proceedings that adjudicate the client’s rights. LSC funded programs can provide representation to clients receiving public benefits such as TANF, Food Stamps, General Assistance, Social Security, SSI, Veterans Benefits, Unemployment Insurance, Medicaid and Medicare.¹⁵ LSC-funded programs can represent public benefit recipients in administrative proceedings to vindicate their individual rights.¹⁶ As a result of the *Velazquez* decision, programs can also challenge welfare statutes and agency policies and procedures in court during such cases.¹⁷

LSC-funded recipients can sue governmental entities. There is no prohibition on suing the government. Suits representing individual clients can be brought either directly or through procedures for judicial review of agency decisions. On behalf of those clients, LSC funded programs can seek injunctive and declaratory relief and sue to overturn state laws that violate federal law or the Constitution, overturn state agency regulations and policies that violate state or

¹⁰ 1626.4(a)(1)(i) and 1626.4(a)(1)(ii).

¹¹ 1626.4(a)(2)(i)(A).

¹² 1626.4(a)(2)(i)(B).

¹³ See 1611.6.

¹⁴ 1611.6(b).

¹⁵ See 1612.5(a). See Also 1639.4(a).

¹⁶ 1639.4(a).

¹⁷ See 1639.4(a). See Also LSC v. Velazquez, 531 U.S. 533 (2000).

federal law or the Federal or State Constitution or overturn local policies on statutory or constitutional grounds.

Recipients can also work to change agency practices. Recipients can advocate with administrative officials and represent clients in efforts to change the practices of institutions and agencies so that they are more responsive to the needs of the poor, so long as such advocacy and representation is not part of a lobbying or rulemaking process. For example, recipients may seek to improve access to services for disabled persons or persons residing in isolated rural areas or institutions. Recipients can work on school reform or advocate to ensure that a job training program provides effective training to participants.

Recipients can participate in efforts to enforce laws. Recipients can participate in cooperative efforts to enforce the housing code, the Community Reinvestment Act, fair housing laws, civil rights laws, and other laws enacted to protect individuals. When doing so, however, recipients must be careful not to engage in lobbying, grassroots organizing, or other attempts to influence legislative actions, executive orders, or other general policy.¹⁸

Recipients can undertake community legal education (CLE) programs. CLE programs can be run in various community settings. This includes community centers, nursing homes, housing projects, welfare offices, hospitals, and many other locations.¹⁹ LSC funded programs can answer questions regarding individual participants' legal situations and can represent people who seek assistance from the program as a result of those activities.²⁰ However, trainers/presenters may not affirmatively seek to identify particular individual participants who have specific problems on which they need assistance and advise those particular participants to seek such assistance from the recipient or another recipient.²¹ Recipients can also train clients to handle their own cases pro se and train lay advocates to assist them.²²

Recipients can use non-LSC funds to lobby State or local legislative and administrative bodies with regard to state or local funding for recipients. Using non-LSC funds, recipients can affirmatively contact or communicate with, as well as respond to requests of, State or local legislative officials with regard to pending or proposed legislation affecting the funding of the recipient.²³

Recipients can use non-LSC funds to prepare oral or written comments in a public rulemaking proceeding, which includes most formal rulemaking proceedings.²⁴

Recipients can use non-LSC funds to respond to a written request for information or testimony from a government agency, legislative body or committee, or a member of such

¹⁸ See Generally 1612 (defining and outlining the prohibitions on lobbying, grassroots organizing, and attempts to influence).

¹⁹ 1638.4(a).

²⁰ 1638.4(b).

²¹ 1638.3.

²² 1612.8(b).

²³ 1612.6(f).

²⁴ 1612.6(e); See Also LSC Appropriations Law FY96 § 504(e).

agency, body or committee.²⁵ This allowance is, however, subject to two important restrictions: (1) the response must be made only to the parties that made the request and to others only to the extent that it would be required in order to comply with the original requestor²⁶ AND (2) the recipient cannot have arranged or asked for the request to be made.²⁷ Recipients may use non-LSC funds to respond to requests relating to federal funding for legal services as well as state and local funding.

Individual clients who are members of a class may be represented under limited circumstances. LSC recipients may represent individual clients who are seeking to withdraw from or opt out of a class identified in a class action.²⁸ LSC recipients may also represent and assist an individual client who is seeking to obtain the benefit of a court order that resulted from class action litigation.²⁹

Attorneys' Fees: The 2010 consolidated appropriations bill, signed into law by President Obama on December 16, 2009, eliminated the statutory restriction on claiming, collecting and retaining attorneys' fees. Effective April 26, 2010, LSC issued a final rule that eliminated the attorneys' fee regulation (45 CFR 1642) and recipients are now permitted to make claims for attorneys' fees in any case in which they are otherwise legally permitted to make such a claim.³⁰ Recipients are also permitted to collect and retain attorneys' fees whenever such fees are awarded to them. With the repeal of the restriction, recipients are permitted to claim, collect and retain attorneys' fees with respect to any work they have performed for which fees are available to them, without regard to when the legal work for which fees are claimed or awarded was performed.³¹

WHAT CANNOT BE DONE

As a result of the 1996 restrictions, programs receiving LSC funds are subject to numerous restrictions on the types of clients they can represent and the nature of the representation that can be provided, and they are subject to certain administrative requirements. This is a summary, but not an exhaustive list, of these restrictions and requirements based on interpretations by the Legal Services Corporation in their final regulations.

There are some activities that are prohibited under any circumstances for any entity who receives LSC funding. These "Entity Restrictions" apply to a recipient regardless of which funds they might use to carry out the task. There are also "Fund Restrictions," which prohibit the use of LSC funds for certain activities, but allow for a program to engage in certain activities with non-LSC funds. There are also some restrictions that prohibit the use of LSC funds and private funds, but allow for the activities to be carried with other non-LSC public funds.

²⁵ 1612.6(a). *See Also* LSC Appropriations Law FY96 § 504(b).

²⁶ 1612.6(b).

²⁷ 1612.6(c).

²⁸ 1617.2(b)(2).

²⁹ *Id.*

³⁰ 75 Fed. Reg. 79, 21506 (April 26, 2010).

³¹ *Id.* at 21508.

ENTITY RESTRICTIONS: PROHIBITED REGARDLESS OF WHICH FUNDS ARE USED

Grass roots lobbying: Recipients are prohibited from participating in any grass roots lobbying.³²

Class Actions: Recipients **cannot initiate, participate or engage in class actions,**³³ but can perform certain limited non-adversarial activities and can represent individuals who are members of a class in certain limited circumstances.³⁴

Welfare Reform: Recipients cannot engage in litigation challenging laws or regulations that were enacted as part of State or Federal welfare reform initiatives, laws or regulations.³⁵ Recipients are also generally prohibited from engaging in rulemaking or lobbying related to welfare reform³⁶ with exceptions for participating in public rulemaking or responding to requests from government officials or entities.³⁷ Recipients are also permitted to represent an individual client who is seeking 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*, LSC recipients, when litigating such cases, can now raise all relevant legal issues and challenge existing statutory laws and regulations.³⁸

Redistricting and Voter Registration: Representation in redistricting cases is prohibited,³⁹ but litigation related to a claim under the 1965 Voting Rights Act is expressly permitted, provided that it does not involve redistricting.⁴⁰ Voter registration activity (i.e. registering voters) is also prohibited,⁴¹ though this prohibition is not meant to bar any litigation on behalf of individual clients.⁴²

Political Activity and Partisan Elections: Grantee attorneys are prohibited from running for any partisan elected office.⁴³ No employee of a recipient shall intentionally identify the LSC or the recipient with, or contribute to, any partisan or even non-partisan political activity or campaign of any candidate for public or political office.⁴⁴

Abortion Litigation: Recipients cannot participate in any litigation with regard to abortion.

³² 1612.

³³ 1617.1; 1617.2(a).

³⁴ 1617.2(b)(2)

³⁵ 1639.3(a).

³⁶ 1639.3(b); 1639.3(c).

³⁷ LSC Appropriations Law FY96 § 504(b), § 504(e).

³⁸ *LSC v. Velazquez*, 531 U.S. 533 (2000).

³⁹ 1632.3(a).

⁴⁰ 1632.3(b).

⁴¹ 1608.6(c).

⁴² 1608.7.

⁴³ 1608.5(c).

⁴⁴ 1608.4.

Aliens: Recipients are limited in the categories of non-citizens they can represent with any funds. If an alien does not qualify for an exception as outlined in the above section, recipients cannot represent that individual, regardless of funding source.⁴⁵

Prisoners: Recipients cannot 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.⁴⁶ However, there are many instances when LSC restrictions do not prevent providing representation in court debt matters and reentry services. There is narrow exception to this prohibition; if a recipient has a separately funded public defender program, this restriction does not apply to that program (though it will still apply to both LSC and non-LSC funds to the rest of the recipients work).⁴⁷

Drug evictions from public housing: Recipients cannot represent persons convicted of, or charged with, drug crimes in public housing evictions when the evictions are based on threats to health or safety of public housing residents or employees.⁴⁸

Solicitation: Recipients are prohibited from representing clients as a result of in-person solicitation. Recipients can operate community legal education programs and engage in outreach activities to client groups. They may also represent clients who seek assistance as a result of those activities, but recipients may not affirmatively seek to identify particular individual participants who have specific problems on which they need assistance and advise those particular participants to seek such assistance from the recipient or another recipient. LSC Funded programs may also mail “information” about legal rights and responsibilities or information about the recipient’s services. If the mailing contains unsolicited advice, but the advice is not tailored to the individual receiving the mailing, then it is not a “personal letter” and is not considered solicitation under LSC regulations.

Training: Recipients cannot conduct training programs to advocate particular public policies or political activities or to train people to engage in restricted activities.⁴⁹

Legislative or Administrative Advocacy: Recipients are prohibited from lobbying in relation to or attempting to influence any legislation,⁵⁰ executive action or rulemaking,⁵¹ initiative or referendum,⁵² or appropriation of funds to itself or to the LSC.⁵³ Nevertheless, there are certain activities, if supported entirely by non-LSC funds, which are allowed.⁵⁴ Those are discussed below.

⁴⁵ See *Generally* 1626 (“Restrictions on Legal Assistance to Aliens”). See *Also* the discussion above on pages 2 – 3 on this document.

⁴⁶ 1637.3.

⁴⁷ 1610.6(a).

⁴⁸ 1633.3.

⁴⁹ 1612.8(a).

⁵⁰ 1612.3(a)(1).

⁵¹ 1612.3(b).

⁵² 1612.3(a)(2).

⁵³ 1612.3(a)(3).

⁵⁴ See *Generally* 1612.6.

FUND RESTRICTIONS: PROHIBITED (OR NOT) BASED ON THE FUNDS A RECIPIENT USES

Legislative or Administrative Advocacy: Recipients can use non-LSC funds to respond to a written request for information or testimony from a government agency or official thereof, elected official, legislative body or committee, or a member of such body or committee.⁵⁵ This is only allowed, however, if the response is made only to the parties that made the request⁵⁶ and the recipient does not arrange for the request to be made.⁵⁷ Recipients can also use non-LSC funds to participate in public rulemaking or negotiated rulemaking.⁵⁸

Self-help lobbying: Recipients can use non-LSC funds to affirmatively contact or communicate with State or local legislative or administrative officials with regard to pending or proposed agency proposals or legislation to fund the recipient.⁵⁹

Criminal Cases: Recipients are not permitted to use LSC funds to provide legal assistance with respect to criminal proceedings,⁶⁰ but programs may receive public funds for the purpose of handling criminal matters if such public funds were granted for that purpose. For example, this restriction, the restriction in representing prisoners, and the restriction on collateral attacking convictions do not apply to a program's separately funded public defender program.⁶¹ Further, minor violations or crimes that may be "nominally" criminal are not included in the prohibition if the only possible punishment is a fine.⁶² The LSC act similarly prohibits recipients from using LSC funds to provide legal assistance in actions which seek to collaterally attack a criminal conviction.⁶³

ADMINISTRATIVE REQUIREMENTS

Timekeeping: Attorneys and paralegals must keep contemporaneous time records on all cases and matters.⁶⁴

Priorities: Recipient boards have to set priorities including procedures for emergency cases.⁶⁵ Staff members are required to sign an agreement not to enter into cases or matters that are not within the priorities or covered by the emergency procedures.⁶⁶ Recipients are required to report annually to LSC on emergency cases or matters that were not within the recipient's

⁵⁵ 1612.6(a).

⁵⁶ 1612.6(b).

⁵⁷ 1612.6(c).

⁵⁸ 1612.6(e).

⁵⁹ 1612.6(f).

⁶⁰ 1613.3.

⁶¹ 1610.6(a).

⁶² See AO-2006-1002. See Also 41 Fed. Reg. 177, 38506 (September 10, 1976).

⁶³ 1615.2.

⁶⁴ 1635.3.

⁶⁵ 1620.3; 1620.4.

⁶⁶ 1620.6.

priorities.⁶⁷

Federal laws relating to funds: LSC funds are subject to all federal laws affecting the expenditure of federal funds, including criminal laws on fraud and embezzlement.⁶⁸

Access to records: LSC recipients are required to give LSC monitors and auditors access to financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, unless they contain information that is protected by the federal attorney client privilege. Whenever possible, programs should maintain these documents in a manner that will protect client confidentiality.

Client identification: Except in emergency situations, recipients are required to identify by name to the defendant any client who is a plaintiff and obtain a signed statement of facts from such plaintiff before the recipient can file suit or engage in pre-complaint settlement negotiations on the client's behalf.⁶⁹ Access by adverse parties to the written statement of facts is governed by the law and discovery rules of the court in which the action is brought.⁷⁰

Case Disclosure: Upon request, recipients must disclose to the public⁷¹ and must report semi-annually to LSC⁷² certain information about each case that is filed by recipient attorneys in any court (not administrative agencies). The information includes (1) the name and address of each party to the legal action,⁷³ (2) the cause of action of the case,⁷⁴ and (3) the name and address of the court in which the case was filed,⁷⁵ and the case number assigned to the case.⁷⁶ Recipients do not need to file name and address information when such information is protected by an order or rule of a court or by a State or Federal law⁷⁷ or when revealing such information would put the client of the recipient at risk of physical harm.⁷⁸ This requirement applies only where a recipient represents a plaintiff in an action;⁷⁹ cases where the recipients represent defendants or third parties need not be reported.

⁶⁷ 1620.7(a); 1620.7(b).

⁶⁸ 1640.

⁶⁹ 1636.2(a).

⁷⁰ 1636.3(b).

⁷¹ 1644.4(c).

⁷² 1644.4(b).

⁷³ 1644.4(a)(1).

⁷⁴ 1644.4(a)(2).

⁷⁵ 1644.4(a)(3).

⁷⁶ 1644.4(a)(4).

⁷⁷ 1644.4(a)(1)(i).

⁷⁸ 1644.4(a)(1)(ii).

⁷⁹ 1644.3(a)(1).

***COLLABORATION WITH OTHERS:
WHAT CAN BE DONE TO ENHANCE COLLABORATION AND DEVELOP
PARTNERSHIPS AND EFFECTIVE COORDINATION***

Recipients and their staff may

- participate in joint task forces operated by other recipients or by non-LSC funded entities that include advocates from non-LSC funded programs, pro bono programs or private attorneys.
- coordinate services with other entities so that LSC recipients perform only permitted services and non-LSC providers and other organizations provide restricted services.
- train clients, human service organizations and community organizations about existing laws and regulations and about pending or proposed laws or regulations.
- participate in associations, federations, coalitions, networks, alliances or similar entities.
- participate on local governmental or private sector task forces and collaborative initiatives.
- work together with other providers in a coordinated and collaborative manner to ensure a full range of legal assistance is available to low-income persons in all civil justice forums.