



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

ROBIN MUPRHY¹
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WHAT CAN BE DONE

The LSC restrictions imposed by the FY96 appropriations legislation, modified slightly by the FY98 appropriations legislation, and incorporated in the FY99 and subsequent appropriations legislation, resulted in federal statutory and regulatory restrictions on LSC-funded entities' ability to represent low-income persons in the courts and before other forums that affect their rights and responsibilities. However, there continue to be many critically important representational activities that can still be done by LSC-funded entities, and the U.S. Supreme Court decision in *Velazquez v. LSC* restored recipients' ability to more fully represent individual clients in welfare cases.

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

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 and paternity establishment;
- foster care, termination of parental rights and child welfare cases;
- elderly and disability advocacy;

¹ Update of Previous Guide by Alan Houseman and Linda Perle issues in 2012

- migrant and Native American cases;
- employment discrimination, wage claims and unemployment insurance;
- income maintenance and benefits cases including Medicaid, food stamps, TANF, SSI, SSA and Veterans Benefits;
- education;
- health care, including Medicare;
- juvenile cases;
- individual rights, including mental health; and
- cases for non-citizens who fall into a number of categories, for example:
 1. Lawful permanent resident aliens.
 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, assuming such alien has filed an application for adjustment of status to permanent residency and such application has not been denied.
 3. Aliens granted asylum.
 4. Aliens granted refugee status.
 5. Aliens granted conditional entrant status.
 6. Aliens granted withholding of deportation.
 7. H-2A nonimmigrant temporary agricultural workers, concerning the worker's employment contract.
 8. H-2B nonimmigrant forestry workers, concerning the worker's employment contract. (Added by the Bingaman Amendment).
 9. Victims of human trafficking (Added by the Trafficking Act).
 10. Aliens who are victims (or parents of victims) of domestic violence, victims of sexual assault or certain other sexual or violent crimes, when legal assistance is directly related to the prevention of, or obtaining relief from, the violence, assault or criminal activity. (Added by VAWA reauthorization).

Note: The above list of categories of non-citizens who can be represented by LSC programs provides many examples, but is not exhaustive. When determining whether a non-citizen is eligible for representation, the regulation, 45 C.F.R. 1626, that sets out categories of noncitizens who can be represented by LSC-funded programs revised in 2014 as well as guidance from LSC should be reviewed.²

Economic development work and group representation can continue.

Subject to the provisions of the LSC regulations on group eligibility, LSC funds may be

² LSC Advisory Opinion, 2016-002, <http://www.lsc.gov/advisory-opinion-2016-002>; Program Letter 14-3, http://www.lsc.gov/sites/default/files/Grants/RIN/Grantee_Guidance/Program-Letters/ProgramLetter14-3.pdf; Program Letter 14-2, http://www.lsc.gov/sites/default/files/Grants/RIN/Grantee_Guidance/Program-Letters/Progltr14-2.pdf and 1626 Eligibility Chart, http://www.lsc.gov/sites/default/files/Grants/RIN/Grantee_Guidance/Program-Letters/1626eligibilitychart.pdf provide detailed and comprehensive information (as of July 2016) on when LSC funded programs can represent non-citizens.

used for group representation, and non-LSC funds can be used to represent any group, non-profit corporation or community development entity that does not fit within the LSC eligibility standards. 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. LSC-funded programs can represent public benefit recipients in administrative proceedings to vindicate their individual rights. As a result of the *Velazquez* decision, programs can challenge welfare statutes and agency policies and procedures in court in cases on behalf of individual welfare recipients.

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 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, so long as they do not engage in lobbying or rulemaking.

Recipients can undertake community legal education (CLE) programs. CLE programs can be run in various community settings such as community centers, nursing homes, housing projects, welfare offices, and hospitals. 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. 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. Recipients can also train clients to handle their own cases pro se and train

lay advocates to assist them.

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.

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

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 agency, body or committee, so long as the response is made only to the parties that made the request and the recipient does not arrange for the request to be made. 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 certain circumstances. LSC recipients may represent individual clients seeking to obtain the benefit of court-ordered class relief, or seeking to withdraw from or opt out of a class identified in a class action.

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 March 15, 2010, LSC 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. 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.

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 of these restrictions and requirements based on interpretations by the Legal Services Corporation in their final regulations.

Non-LSC funds: All of a recipient's funds from whatever source (except tribal funds) **are restricted.** Recipients cannot use funds from non-LSC sources to

undertake activities that are subject to the restrictions and that cannot be done with LSC funds. However, recipients may transfer non-LSC funds to affiliated or entirely separate entities to use for representation in restricted cases.

Legislative Advocacy: Recipients are precluded from engaging in **advocacy and representation before legislative bodies on pending or proposed legislation**. However, recipients can use **non-LSC** funds to respond to a written request for information or testimony from a legislative body or committee, or a member of such body or committee, so long as the response is made only to the parties that made the request and the recipient does not arrange for the request to be made.

Administrative Advocacy: Recipients cannot represent clients or client interests before administrative agencies engaged in **rulemaking** and cannot use LSC funds to respond to requests of administrative officials with regard to rules directly affecting clients. However, recipients can use **non-LSC** funds to: (1) participate in public comment in a rulemaking proceeding, or (2) respond to a written request for information or testimony from a government agency, so long as the response is made only to the parties that made the request and the recipient does not arrange for the request to be made.

Self-help lobbying: Recipients are precluded from **all self-help lobbying before agencies or legislative bodies**, with two exceptions. 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. Recipients can use **non-LSC** funds respond to requests of **federal, State or local** legislative or administrative officials with regard to pending or proposed legislation or agency proposals to fund the recipient, so long as the response is made only to the parties that made the request and the recipient does not arrange for the request to be made.

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

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

Welfare Reform: Recipients **cannot engage in litigation on behalf of groups or participate in lobbying or rulemaking involving State or Federal welfare reform initiatives, laws or regulations (unless they fall within the exceptions for lobbying and rulemaking outlined above)**. However, recipients can 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*, legal services programs representing such individuals in

cases seeking relief from welfare agencies can now raise all relevant legal issues and can challenge existing statutory law or regulations.

Redistricting: Representation in **redistricting cases is prohibited**. However, representation in voting rights issues not involving redistricting is permitted.

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

Aliens: Recipients are limited in the **categories of non-citizens they can represent with any funds**. However, certain legal aliens, including lawful permanent resident aliens and, in employment related cases, H-2A, H-2B forestry workers, nonimmigrant temporary agricultural workers can be represented using both LSC and non-LSC funds. In addition, as a result of the Trafficking Act and the reauthorization of the Violence Against Women Act, recipients are now permitted to use LSC and non-LSC funds to provide legal assistance to aliens who are victims of domestic violence, trafficking or sexual assault or a variety of other violent crimes, although the legal assistance must be intended to help the victim to escape from the domestic violence, sexual assault, or other crime, to ameliorate their effects or to protect against future victimization. Note: victims that fall within the above categories do not need to provide documentation of immigration status.

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**. However, there are many instances when LSC restrictions do not prevent providing representation in court debt matters and reentry services. (See NLADA Memos: GUIDANCE FOR LSC PROGRAMS RE: REENTRY GRANTS, April 2015; Guidance for LSC Programs Re: Court Debt, July 2016.)

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.

Solicitation: **Recipients are prohibited from representing clients as a result of in-person solicitation**. However, recipients can operate community legal education programs and engage in outreach activities to client groups, and may represent clients who seek assistance as a result of those activities, but 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 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 45 C, F.R. § 1638.

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

ADMINISTRATIVE REQUIREMENTS

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

Priorities: Recipient boards have to set **priorities** including **procedures for emergency cases**. 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. Recipients are required to report annually to LSC on emergency cases or matters that were not within the recipient's priorities.

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.**

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. 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.

Case Disclosure: Upon request, recipients must disclose to the public and must report semi-annually to LSC 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, (2) the cause of action of the case, and (3) the name and address of the court in which the case was filed and the case number assigned to the case. 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 law or when revealing such information would put the client of the recipient at risk of physical harm. This requirement applies only where a recipient

represents a plaintiff in an action; cases where the recipients represent defendants or third parties need not be reported.

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

Recipient 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.

Recipient staff may **coordinate services** with other entities so that LSC recipients perform only permitted services and non-LSC providers and other organizations provide restricted services.

Recipient staff may **train clients, human service organizations and community organizations** about existing laws and regulations and about pending or proposed laws or regulations.

Recipient staff may participate in associations, federations, coalitions, networks, alliances or similar entities.

Recipient staff may **participate on local governmental or private sector task forces** and collaborative initiatives.

Recipient staff may **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. For example:

- Providers who are restricted in the services they can provide can work with providers who are not restricted in order to ensure the availability of the full range of legal services to low-income persons.
- Legal services providers can work collaboratively with one another and the broader community to use and integrate all individuals and organizations providing civil legal assistance to low-income persons.
- Providers throughout the state can coordinate their activities to make the highest and best use of all available resources, minimize duplication of capacities and administration, and maintain organizational relationships and structures that maximize economies of scale and ensure the effective use of existing and emerging technologies.