Legal Services Corporation
America's Partner For Equal Justice

Program Letter 13-5

TO: All Executive Directors

FROM: Ronald S. Flagg
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DATE: December 3, 2013

SUBJ: Restrictions on Lobbying and Other Activities

Introduction

On September 13, 2013, LSC issued Program Letter 13-3 providing guidance regarding lobbying and other activities by LSC recipients related to legislative, executive, and administrative decision-making. In light of questions and comments from recipients and the National Legal Aid and Defender Association, we have clarified several points addressed by Program Letter 13-3. In order to provide guidance on these topics in a single program letter, this program letter restates, elaborates on, and supersedes Program Letter 13-3. This letter supplements the March 21, 2012 Program Letter on this subject, which provided a general description of several of the restrictions discussed below.

The LSC restrictions on lobbying are set forth in the LSC Act, in LSC's fiscal year 1996 appropriations act as reauthorized annually by Congress, and in the LSC regulations at 45 C.F.R. Part 1612. For purposes of brevity, these statutes and regulations will be collectively referred to as "LSC restrictions." Except as otherwise noted, quotations in this letter are from the regulations. We encourage you to review the complete regulatory and statutory provisions. The full text of Part 1612 can be found at: http://www.lsc.gov/about/regulations-rules/lsc-regulations-cfr-45-part-1600-et-seq. The LSC Act can be found at: http://www.lsc.gov/about/lsc-act-other-laws/lsc-act, and the FY 1996 appropriations act can be found at: http://www.lsc.gov/laws-regulations/lsc-act-other-laws/lsc-appropriations-acts-committee-reports#FY1996. In addition, 45 C.F.R. Part 1610 specifically prohibits the use of non-LSC funds for restricted lobbying activities, except as otherwise expressly permitted.

The LSC restrictions apply to four categories of activities:

1) ***Grassroots lobbying***, codified in the regulations at 45 C.F.R §§ 1612.2 and 1612.4.

2) ***Attempts to influence legislative, executive and administrative activity***, codified in the LSC Act, 42 U.S.C. § 2996f(a)(5); in the appropriations legislation, Pub. L. 104-134, 110 Stat. 1321, §§ 504(a)(2), (3), and (4); and in the regulations, 45 C.F.R. § 1612.3.

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3) ***Support or conduct of training programs on public policies***, codified in the LSC Act, 42 U.S.C. § 2996f(b)(6); in the appropriations legislation, 104-134, 110 Stat. 1321, § 504(a)(12); and in the regulations, 45 C.F.R. § 1612.8.

4) ***Organizing***, codified in the LSC Act, 42 U.S.C. § 2996f(b)(7) and in the regulations, 45 C.F.R. § 1612.9.

These restrictions apply to activities of your program's employees and board members in their official capacities on behalf of your program. Activities undertaken by employees or board members in their personal capacity, or in a non-program related professional capacity (i.e., a board member acting on behalf of his/her employer in the scope of his/her employment), are not covered by the restrictions. The restrictions include exclusions and exceptions that permit recipients to engage in certain activity related to public policy making. The exclusions and exceptions apply to the four categories of restrictions and are discussed in this letter in connection to the category to which they apply.

Application of the restrictions, exclusions and exceptions is generally fact-intensive. There are four main categories of restrictions, and over a dozen exclusions and exceptions. Whether or not an activity is prohibited or permitted under these restrictions calls for careful consideration, on a case-by-case basis, of the facts involved in the activity. This letter does not substitute for such an analysis and is not intended to be read as approval or disapproval of any specific activity. Rather, the letter sets out guidelines for you to consider in deciding whether activities related to policy-making are permitted under the LSC restrictions. We encourage you to contact LSC's Office of Legal Affairs if you have any questions as to whether a specific activity would be permitted under the restrictions.

The Four Categories of Restricted Activity

Restriction One—Grassroots Lobbying

What is prohibited by the grassroots lobbying provision?

The grassroots lobbying restriction in the LSC regulations prohibits two types of activities. 45 C.F.R. § 1612.4. The first type is communication "which *contains a direct suggestion to the public to contact public officials* in support of or opposition to pending or proposed legislation, regulations, executive decisions or any decision by the electorate on a measure submitted to it for a vote." 45 C.F.R. § 1612.2(a)(1) (emphasis added). The language in italics has been central in applying this restriction. Any communication calling for a direct contact with officials would violate the grassroots lobbying rule.

The second type of activity that is prohibited under the grassroots lobbying restriction is "*financial contributions* by recipients to, or *participation* by recipients in, any demonstration, march, rally fundraising drive, lobbying campaign, letter writing or telephone campaign for the purpose of influencing the course of [any proposed] legislation, rulemaking, decisions by

executive bodies, or any decision by the electorate on a measure submitted to it for a vote." 45 C.F.R. § 1612.2(a)(1) (emphasis added). These restrictions extend beyond the rule against suggesting direct contact with policy-making officials, as they prohibit financial support or direct participation by recipients in efforts to influence legislation or executive action.

What is permitted by the grassroots lobbying restriction?

Grassroots lobbying "does not include communications which are *limited solely* to reporting on the content or status of, or explaining, pending legislation or regulations." 45 C.F.R. § 1612.2(a)(2) (emphasis added). This exclusion permits communications on the content or status of legislation, and also allows an explanation of what the consequences of pending legislation or regulations may be, but recipients may not encourage the public to support or oppose proposed or pending legislation. Recipients may engage in communications falling within this exclusion with LSC or non-LSC funds.

However, as the language in italics reflects, in order for a communication to be allowed under this rule, it must be "limited solely" to this type of factual discussion of the legislation's or regulation's content, an explanation of the consequences of the legislation or regulation, or the status of the legislation or regulation. *A communication that is not limited solely to this type of statement of fact, and that goes beyond factual reporting to take a position on whether legislation or regulations should be passed or defeated, is not covered by this exclusion.* Unless otherwise expressly permitted, a communication taking a position on whether legislation or regulations should be enacted or defeated would fall within the prohibition of "attempts to influence" legislation, executive order, or administrative action, which is discussed next.

Restriction Two—Attempts to Influence Legislative, Executive, or Administrative Activities.

What is prohibited by the attempt to influence provisions?

The rules against attempts-to-influence in the LSC restrictions prohibit recipients from any:

- "attempt to influence the passage or defeat of any legislation or constitutional amendment";
- "attempt to influence any initiative, or any referendum or any similar procedure of the Congress, any State legislature, any local council, or any similar governing body acting in any legislative capacity";
- "attempt to influence any provision in a legislative measure appropriating funds to, or defining or limiting the functions or authority of, [a] recipient of the Corporation";
- "attempt to influence the conduct of oversight proceedings concerning the recipient or the Corporation";

- "participat[ion] in or attempt to influence any rulemaking, or attempt to influence the issuance, amendment or revocation of any executive order";
- "use [of] any funds to pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, administrative expense, or related expense associated with an activity prohibited [by the law or regulations]."

45 C.F.R. § 1612.3.

The language of the LSC Act, the legislative history underlying the FY 1996 appropriations act, and pertinent judicial decisions all support the conclusion that the attempt-to-influence restrictions should be interpreted broadly. First, the LSC Act provides that LSC shall "insure that no funds made available to recipients by the Corporation shall be used at any time, *directly or indirectly*, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State, or local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies, or State proposals by initiative petition[.]" 42 U.S.C. § 2996f(a)(5)(emphasis added). The Act's prohibition of influence "directly or indirectly" means that the prohibition is not limited to direct contacts with policy makers.

Second, the legislative history underlying the FY 1996 appropriations act shows that Congress intended the attempt to influence restrictions to broadly limit recipients from participating in policy advocacy:

> The Committee understands that advocacy on behalf of poor individuals for social and political change is an important function in a democratic society. However, the Committee does not believe such advocacy is an appropriate use of Federal funds. The Committee notes that there are hundreds of private organizations which can and do fulfill this advocacy role. The Committee notes that any funding devoted to advocacy is funding taken away from basic legal assistance.

H.R. Rep. No. 104-196, at 119-121 (1996).

Third, judicial decisions confirm the breadth of the attempt-to-influence restriction. As the Second Circuit stated:

> *The restrictions here placed on grantees are not narrow; they are extremely broad*. Grantees are prohibited outright from engaging in attempts to influence government's adoption of laws.

Velazquez v. Legal Services Corporation, 164 F.3d 757, 766 (2d Cir. 1999), *aff'd,* 531 U.S. 533 (2001)(emphasis added). The Second Circuit described the attempt-to-influence provisions as "broad restrictions" and acknowledged that the "*language imposes a sweeping restriction on grantee activity*." *Id*. at 767-68 (emphasis added).

What is permitted by the attempt-to-influence provisions?

There are two categories of activities that are permitted under the attempt-to-influence restrictions. One category includes activities that recipients may engage in with any funds. The second category includes activities that recipients may undertake only if they use non-LSC funds.

The activities that recipients may undertake with <u>any</u> funds are to:

- "provide administrative representation for an eligible client in a proceeding that adjudicates the particular rights or interests of such eligible client or in negotiations directly involving that client's legal rights or responsibilities, including pre-litigation negotiation and negotiation in the course of litigation";
- "initiate or participate in litigation challenging agency rules, regulations, guidelines or policies, unless such litigation is otherwise prohibited by law or Corporation regulations";
- "apply[ ] for a governmental grant or contract";
- "*communicat[e] with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies";*
- *"inform[ ] clients, other recipients, or attorneys representing eligible clients about new or proposed statutes, executive orders, or administrative regulations*";
- "communicat[e] directly or indirectly with the Corporation for any purpose including commenting upon existing or proposed LSC rules, regulations, guidelines, instructions and policies";
- "permit[ ] your employees to participate in bar association activities, provided that your resources are not used to support, and your program is not identified with, activities of bar associations that are devoted to activities prohibited [by 45 C.F.R. Part 1612]";
- "advis[e] a client of the client's right to communicate directly with an elected official"; and
- "participat[e] in activity related to the judiciary, such as the promulgation of court rules, rules of professional responsibility and disciplinary rules."

45 C.F.R. § 1612.5. This is not an exhaustive list of activities that are permissible under section 1612.5. Rather, these are examples of "activities that are not prohibited by the rule." 62 Fed. Reg. 19400, 19401 (Apr. 21, 1997) (preamble to the final rule).

The italicized activities bear further elaboration concerning their scope. The activity of communicating with government agencies is limited to efforts to obtain information, clarification, or interpretation; it does not extend to communications for the purpose of influencing agency decisions.

The activity of informing clients, recipients, and attorneys representing eligible clients about new or proposed statutes, executive orders, or administrative regulations is limited to informing and educating on legal developments and does not extend to advocacy in favor of or against specific legislative, executive, or administrative outcomes. Recipients may discuss pending legislation but may not call for a specific outcome or propose action to achieve one.

Additionally, the audience for such information and education may extend to community groups and other stakeholders. The attempt to influence limitation focuses not on the audience, but the information conveyed – permitting communications of facts about new or proposed legislative or executive actions and their outcomes, but not a request for action or advocacy for a particular outcome.

Another example of a permissible activity is educating government officials or the officials' staff about the work of the recipient and the types of problems and challenges experienced by the recipient itself and the recipients' client community. Given the breadth of the attempt to influence restrictions, the recipient should make clear that it is not attempting to influence the passage or defeat of any measure and should carefully consider the Part 1612 requirements when planning such communications.

The activities recipients may undertake only with non-LSC funds are to:

- "respond to a written request from a governmental agency or official thereof, elected official, legislative body, committee, or member thereof made to [your program] to:
  - "testify orally or in writing";
  - "provide information which may include analysis of or comments upon existing or proposed rules, regulations or legislation, or drafts of proposed rules, regulations or legislation"; or
  - "participate in negotiated rulemaking . . . ."
- "provide oral or written comments to an agency and its staff in a public rulemaking proceeding" as defined in 45 C.F.R. § 1612.2(e); or
- "contact or communicate with, or respond to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for [your program], including a pending or proposed legislative or agency proposal to fund [your program]."

45 C.F.R. § 1612.6.

Once a request is made, the "response to request" exception permits a recipient to offer views and recommend action on pending or proposed policy if such communications fall within the parameters of the information requested. There are two important limitations on this exception. First, a recipient may not solicit or arrange for a request to be made. Second, a recipient may

make communications in response to a request only to the party or parties that made the request and to other persons or entities to the extent necessary to comply with the request.

Restriction Three—Support or Conduct of Training

What is prohibited by the training provisions?

A "recipient may not support or conduct training programs that:

(1) "[a]dvocate particular public policies";

(2) "[e]ncourage or facilitate political activities, labor or anti-labor activities, boycotts, picketing, strikes or demonstrations, or the development of strategies to influence legislation or rulemaking";

(3) "[d]isseminate information about such policies or activities"; or

(4) "[t]rain participants to engage in activities prohibited by the [LSC] Act, other applicable law, or Corporation regulations, guidelines or instructions."

45 C.F.R. § 1612.8(a).

The training restrictions prohibit recipients from conducting training on the four subjects listed above and from participating in such training conducted by other organizations when the topic of the training is limited to one of the prohibited topics. The restrictions do not apply to recipient participation in trainings at which a prohibited topic is presented along with permissible topics. The restrictions also bar "support" of training programs on the four subjects listed above, a limitation that prohibits recipients from providing assistance for other organizations' training on these subjects.

What is permitted by the training provisions?

The training provisions allow "training of any attorneys or paralegals, clients, lay advocates or others involved in the representation of eligible clients necessary for preparing them: (1) [t]o provide adequate legal assistance to eligible clients; or (2) [t]o provide advice to any eligible clients as to the legal rights of the client." 45 C.F.R. § 1612.8(b). This provision allows recipients to disseminate information to limited audiences about public policies.

Restriction Four--Organizing

What is prohibited by the organizing provisions?

The restrictions prohibit the use of LSC funds or private funding "to initiate the formation, or to act as an organizer, of any association, federation, labor union, coalition, network, alliance, or any similar entity." 45 C.F.R. § 1612.9(a).

What is permitted by the organizing provisions?

Unlike the other restrictions, the prohibition of organizing is fund-based. Organizing supported with non-LSC, non-private funds is permitted, so long as the organizing does not violate other the restrictions. Organizing that would include activity that violates the prohibitions on grassroots lobbying, attempts to influence, or training is not permitted regardless of the funding source.

Further, the restriction against organizing does not apply to (1) informational meetings attended by persons engaged in the delivery of legal services at which information about new developments in the law and pending cases or matters are discussed; (2) organizations composed exclusively of eligible clients formed for the purpose of advising a legal services program about the delivery of legal services; or (3) legal advice or assistance by recipients to eligible clients who desire to plan, establish or operate organizations. 45 C.F.R. § 1612.9(b).

The third provision, permitting advice or assistance to eligible clients, allows recipients to work with eligible clients on planning, establishing, and operating organizations. This provision does not permit recipients to engage in grassroots lobbying, attempts to influence, or training through such client organizations.

Conclusion

The applicability of the LSC restrictions on lobbying and other activities related to influencing executive, administrative, and legislative decision making requires a close analysis of the facts in each situation. This letter is intended to provide general guidance regarding the restrictions. If you have any specific questions related to particular activities, please do not hesitate to contact LSC's Office of Legal Affairs.