



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

Advisory Opinion # AO-2016-001

Subject: Applicability of the Restriction on Solicitation (45 C.F.R. Part 1638) to Mailings Sent by LSC Recipients

Date: February 11, 2016

QUESTION

Does 45 C.F.R. Part 1638 prohibit an LSC recipient from representing individuals to whom the recipient has mailed information regarding their rights and identifying the types of legal services provided by the recipient?

BRIEF ANSWER

Section 504(a)(18) of LSC's FY 1996 appropriations act and 45 C.F.R. Part 1638 prohibit recipients from accepting as clients anyone to whom they have provided "in person, unsolicited advice to . . . obtain counsel or take legal action." A mailing from an LSC funding recipient to an individual triggers the prohibition if it *both* (1) provides "unsolicited advice" *and* (2) constitutes a "personal letter." A mailing does not provide "unsolicited advice" if it contains solely "information regarding legal rights and responsibilities or . . . information regarding the recipient's services and intake procedures." *Id.* A mailing does not constitute a "personal letter" if the substance of the letter provides only generic, form material that is not tailored to the individual receiving it and the specific facts relating to the individual's legal issues.

BACKGROUND

A law professor recently contacted LSC regarding his research to evaluate methods of increasing the likelihood that people living in poverty will engage with the legal system when sued, including by seeking the assistance of available free legal services. As part of his research, the professor hopes to collaborate with free legal services providers, including LSC funding recipients, to develop a set of

mailers for defendants in debt collection cases encouraging them to acquire information about their legal rights and responsibilities, to contest the lawsuits against them (if the facts and law warrant), and to make use of available free legal services. The research will test the effectiveness of a variety of mailers in order to identify packages that best further the goals of inducing conscious and informed choices by 100% of debt collection defendants and of persuading such defendants to make use of available services. Recipients would send the letters themselves, or someone else would send the letters on their behalf using the recipients' letterheads. Defendants would not have requested the letters. Some of the mailings may begin "Dear [name of defendant]:".

The substance of the mailings would contain only form language provided to all similarly situated defendants and would not be tailored to the named defendant's individual situation. In testing different form letters, the language of the mailings might vary, but most, if not all, of the mailings would provide information about legal rights and responsibilities as well as the availability of free legal services from the LSC recipient sending the mailing. Some letters might also provide advice that the defendant should consult with a lawyer or instructions for answering the complaint or otherwise representing oneself.

AUTHORITY

Section 504(a)(18) of LSC's FY 1996 appropriation act, incorporated by reference in LSC's annual appropriations thereafter, provides that recipients of LSC funds

will not accept employment resulting from *in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action*, and will not refer such nonattorney to another person or entity or an employee of the person or entity, that is receiving financial assistance provided by the Corporation[.]

Pub. L. 104-134, Title V, 110 Stat. 1321, 1321-51 (1996) (emphasis added).

LSC implemented this statutory restriction in 45 C.F.R. Part 1638. Section 1638.3(a) provides that "recipients and their employees are prohibited from representing a client as a result of *in-person unsolicited advice*." 45 C.F.R. § 1638.3(a) (emphasis added). The regulation defines "in-person" as "a face-to-face

encounter or a personal encounter via other means of communication such as a *personal letter* or telephone call.” 45 C.F.R. § 1638.2(a) (emphasis added). The regulation defines “unsolicited advice” as “*advice* to obtain counsel or take legal action given by a recipient or its employees to an individual who did not seek the advice and with whom the recipient does not have an attorney–client relationship.” 45 C.F.R. § 1638.2(b) (emphasis added).

Part 1638 also expressly permits recipients to provide information regarding legal rights and responsibilities or recipients’ legal services and intake procedures:

(a) This part does not prohibit recipients or their employees from *providing information regarding legal rights and responsibilities or providing information regarding the recipient's services* and intake procedures through community legal education activities such as outreach, public service announcements, maintaining an ongoing presence in a courthouse to provide advice at the invitation of the court, disseminating community legal education publications, and giving presentations to groups that request them.

(b) A recipient may represent an otherwise eligible individual seeking legal assistance from the recipient as a result of information provided as described in § 1638.4(a), provided that the request has not resulted from in-person unsolicited advice.

45 C.F.R. § 1638.4 (emphasis added).

In 2003, LSC issued Advisory Opinion EX-2003-1011 regarding Part 1638 and addressing some of the issues raised in this opinion.

ANALYSIS

Under Part 1638, recipients and their employees cannot represent an individual after sending the individual a mailing that *both* (1) provides “unsolicited advice” *and* (2) constitutes a “personal letter.”

A. “Advice” versus “Information”

Part 1638 distinguishes between providing *unsolicited advice*, which triggers the prohibition, and providing unsolicited “*information* regarding legal rights and responsibilities or . . . *information* regarding the recipient’s services,” which does **not** trigger the prohibition. 45 C.F.R. § 1638.4(a) (emphasis added). Thus, the

prohibition does not apply when recipients provide *this type of information* through mailings, including mailings to individuals who are defendants in debt collection cases and who may need legal services.

Whether and to what extent providing information about legal rights or information about recipients' services in mailings constitutes unsolicited advice to obtain counsel or take legal action depends on the substance of the mailing. For example, an unsolicited mailing advising an individual that "lawyers are available" to assist with particular types of cases would constitute "information," not "unsolicited advice to obtain counsel." By contrast, an unsolicited mailing that states "you should get a lawyer for this type of proceeding" would constitute the provision of unsolicited "advice to obtain counsel," which would trigger Part 1638 if provided in-person.

B. "Personal Letter"

The restriction on solicitation in § 1638.3(a) applies to the provision of *in-person* unsolicited advice, which includes not only face-to-face encounters, but also "personal encounter[s] via other means of communication such as a *personal letter* or telephone call." 45 C.F.R. § 1638.2(a) (emphasis added). *See also* 62 Fed. Reg. 19423 (Apr. 21, 1997) (final rule and preamble upon adoption). The term "personal letter" first occurs in the definition of "in-person" in § 1638.2(a). The statutory restriction refers only to "in-person" advice. None of the relevant laws or regulations or their legislative or drafting histories discuss the meaning of "personal letter." When LSC added personal letters as examples of "in-person" activities, it did so with the understanding that Congress did not want LSC recipients "going out and *appearing to someone [who] is not a client of theirs*, has established no relationship with them, and volunteering advice to them, 'You should see a lawyer,' and 'We'll be your lawyer.'" *See Transcript of LSC Operations and Regulations Committee Meeting*, 186 (July 8, 1996) (John Tull, Director of Office of Program Operations) (emphasis added).

The legislative history of LSC's restriction on solicitation as well as the rulemaking history of Part 1638 include references to professional ethics rules regarding client solicitation.¹ When Congress enacted § 504(a)(18) and LSC

¹ *See Reauthorization of the Legal Services Corporation: Hearing before the H. Subcomm. on Comm. & Admin. Law of the Comm. on the Judiciary*, 104th Cong. 78 (May 16, 1995)

adopted Part 1638, the American Bar Association's (ABA) model rule 7.3 prohibited lawyers from soliciting clients primarily for profit through "in-person or live telephone contact." ABA Model Rules of Prof'l Conduct R. 7.3(a)(1989).² By contrast, solicitation through "written or recorded communication" is prohibited only when abusive. *Id.* at R. 7.3(b) (1989). The ABA recognized that *written* communications from those providing legal services are less likely than "in-person" contacts to "overwhelm a [prospective] client's judgment" and result in the "undue influence, intimidation, and overreaching." *Id.* Comments 1-2 (1989).

The ABA based the 1989 version of model rule 7.3, in part, on the Supreme Court's 1988 ruling that "in assessing the potential for overreaching and undue influence, *the mode of communication makes all the difference.*" *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988) (holding that Kentucky's blanket ban on client solicitation by mail, in-person, or otherwise, when a significant motive for the lawyer's doing so is pecuniary gain, violates the First Amendment) (emphasis added).³ In analyzing the effects of different types of client-solicitation mailings, the Court stated that "targeted direct-mail solicitation generally poses much less risk of 'overreaching or undue influence' than does in-person solicitation." *Id.* "Evaluating a targeted letter does not require specific information about the recipient's identity and legal problems any more than evaluating a newspaper advertisement requires like information about all readers." *Id.* at 477 (discussing potential regulatory burdens involved with written solicitation). By contrast, a "letter that is personalized (not merely targeted) to the recipient [of the letter] presents an increased risk of deception" primarily because these letters may "lead the recipient to overestimate the lawyer's familiarity with the case." *Id.* at 476.

(remarks of Rep. McCollum: "We would recommend prohibiting the solicitation of clients. There is an American Bar Association standard with regard to this. We would encourage this be applied to the Legal Services Corporation."). *See also Transcript of LSC Operations and Regulations Committee Meeting*, 208 (July 8, 1996) (remarks of Ms. Suzanne Glasow, Office of General Counsel: "I think most attorneys have a general idea of what solicitation of a client is. I mean, we've had professional rules on it historically.").

² In 2013 the ABA revised model rule 7.3 without changes relevant to this analysis. ABA Model Rules of Prof'l Conduct R. 7.3 and Comments 1–3 (2013) (changing "in-person" to "direct interpersonal encounters" and adding references to "electronic communications").

³ *See* Ronald D. Rotunda, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, 42 Hofstra L. Rev. 175, 181 (2013).

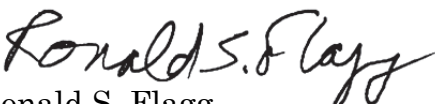
We believe the Supreme Court's distinction between "targeted letters" and "personalized letters" provides useful guidance in interpreting Part 1638 and, in particular, its application to mailings sent by LSC recipients. The Court issued the *Shapiro* decision eight years before Congress enacted the § 504(a)(18) restriction and LSC adopted Part 1638. Thus, we interpret the phrase a "personal letter," as used in § 1638.2(a), to mean a letter tailored to the individual receiving it.


A mailing is not a "personal letter" merely because it is addressed or generally distributed to individuals in need of legal services (such as defendants in debt-collection actions) or individuals who may have use for the information it contains. To constitute a "personal letter" under Part 1638, the mailing must contain unsolicited advice that is tailored to the individual, meaning that the advice in the letter changes based upon the individual's identity and the specific facts relating to the individual's legal issues.

CONCLUSION

Part 1638 prohibits recipients and their employees from representing an individual after sending the individual a mailing that *both* provides "unsolicited advice" *and* constitutes a "personal letter." If the mailing provides *only* "information" about legal rights and responsibilities or information about the recipient's services, the mailing is permissible under § 1638.4(a). 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" under § 1638.2(a).

Advisory Opinion EX-2003-1011 is hereby withdrawn.


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