

issue of the **Federal Register**, LSC proposes to add to part 1603 a regulation governing requests for testimony and subpoenas for documents in cases to which LSC is not a party.

#### List of Subjects in 45 CFR Part 1603

Advisory committees; Legal services.

■ For the reasons discussed in the preamble and under the authority of 42 U.S.C. 2996g(e), LSC proposes to remove 45 CFR part 1603.

#### PART 1603—[REMOVED AND RESERVED]

Dated: January 25, 2018.

Stefanie K. Davis,

Assistant General Counsel.

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### LEGAL SERVICES CORPORATION

#### 45 CFR Part 1603

#### Requests for Documents and Testimony

**AGENCY:** Legal Services Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Legal Services Corporation (LSC) proposes to create a rule governing subpoenas and requests for LSC documents and testimony by non-federal litigants in cases in which LSC is not a party. Currently, LSC has no internal or external procedures in place to process such requests. This rule provides the public with guidance on where to send requests and establishes procedures by which those requests will be processed.

**DATES:** Comments must be received by March 5, 2018.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal Rulemaking Portal:* Follow the instructions for submitting comments.

- *Email:* [lscrulemaking@lsc.gov](mailto:lscrulemaking@lsc.gov).

Include "Touhy Rulemaking" in the subject line of the message.

- *Fax:* (202) 337-6519.

- *Mail:* Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Touhy Rulemaking.

- *Hand Delivery/Courier:* Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Touhy Rulemaking.

- *Instructions:* LSC prefers electronic submissions via email with attachments in Acrobat PDF format. LSC will not

consider written comments sent to any other address or received after the end of the comment period.

**FOR FURTHER INFORMATION CONTACT:**

Stefanie K. Davis, Assistant General Counsel, 202-295-1563, [sdavis@lsc.gov](mailto:sdavis@lsc.gov).

**SUPPLEMENTARY INFORMATION:**

#### I. Background

LSC proposes to create a new regulation, known as a *Touhy* regulation, that will establish a process by which litigants in cases where LSC is not a party may obtain documents or testimony from LSC and its employees. Arising from the Supreme Court's decision in *U.S. ex rel Touhy v. Ragen*, 340 U.S. 462 (1951), *Touhy* regulations define agencies' procedures for responding to document or testimony requests, as well as individual agency employees' obligation to follow such procedures.

Between 2013 and 2017, LSC and its Office of the Inspector General (OIG) received several subpoenas and requests for testimony or documents, but did not have internal or external guidance in place regarding such requests. At the OIG's recommendation, LSC added rulemaking on requests for documents and testimony to its rulemaking agenda in 2015. On October 15, 2017, the Operations and Regulations Committee (Committee) of LSC's Board of Directors (Board) voted to recommend that the Board authorize rulemaking on part 1603. On October 17, 2017, the Board authorized LSC to begin rulemaking.

Regulatory action is justified for four reasons. First, a *Touhy* regulation will promote efficiency and timeliness by identifying those LSC officials with the authority to respond to requests or subpoenas for documents or testimony and establishing a procedure for LSC's consideration of such requests. Second, it will minimize the possibility of involving LSC in controversies not related to its functions. Third, it will prevent the misuse of LSC's employees as involuntary expert witnesses for private interests or as inappropriate expert witnesses as to the state of the law. Fourth, it will maintain LSC's impartiality toward private litigants.

On January 21, 2018, the Committee voted to recommend that the Board approve this notice of proposed rulemaking (NPRM) for publication. On January 23, 2018, the Board accepted the Committee's recommendation and voted to approve publication of this NPRM with a 30-day comment period.

#### II. Discussion of Proposed Rule

In an NPRM published elsewhere in this issue of the **Federal Register**, LSC

proposes to remove the existing version of part 1603 pertaining to state advisory councils. In its place, LSC proposes to add this regulation.

#### 1603.1 Scope, Purpose, and Applicability

LSC proposes to prescribe which proceedings and employees will be governed by the rule. All LSC employees, including former employees, members of the Board of Directors, and employees of the OIG, are governed by this rule concerning information acquired during the performance of official duties or because of such person's official capacity with LSC. This rule applies to all non-federal litigants in civil, criminal, or administrative proceedings to which LSC is not a party.

Congress created LSC through the Legal Services Corporation Act, 42 U.S.C. 2996 *et seq.* and appropriates funds for LSC annually. *See, e.g.,* Consolidated Appropriations Act, 2017, Public Law 115-31, 131 Stat. 135 (2017). These funds are appropriated for LSC to fulfill its congressionally-mandated mission. Therefore, it is appropriate to mirror traditional federal entities in creating LSC's *Touhy* regulation.

#### 1603.2 Definitions

LSC proposes to define the following terms.

*Certify:* LSC proposes to define this term to mean that it will authenticate copies of any document produced by affixing its seal to the document.

*Employee:* LSC proposes to define this term to include current and former employees of LSC and the OIG, as well as members of its Board of Directors.

*LSC:* Consistent with the § 1602.2 definition, *LSC* refers to both the Legal Services Corporation and the LSC Office of the Inspector General, unless otherwise specified.

*Testify and testimony:* LSC proposes to define these terms to mean written or oral statements made under oath before any tribunal or official body.

#### 1603.3 What is LSC's policy on presentation of testimony and production of documents?

LSC proposes to prohibit current and former employees from providing documents or testimony in response to requests covered by this rule without prior authorization from the General Counsel or OIG Legal Counsel.

#### 1603.4 How does a person request voluntary testimony from an employee?

LSC proposes to require parties to submit requests for testimony from LSC employees to its General Counsel as

LSC's chief legal officer. LSC proposes to direct parties to submit requests for OIG employees' testimony to the OIG Legal Counsel.

Requests must state the nature of the requested testimony, why the information sought is unavailable by any other means, and the reasons why providing the testimony would further LSC's interests. This information will assist the General Counsel and the OIG Legal Counsel in their decision making.

**1603.5** *How will LSC respond to a request for expert testimony from an employee?*

LSC proposes to prohibit its employees from serving as expert witnesses without authorization from the General Counsel or OIG Legal Counsel, as appropriate. This section prevents public resources from being used for private litigation. Even if employees and LSC are compensated, time spent preparing and delivering testimony is time diverted from support of LSC's mission.

**1603.6** *How will LSC respond to a subpoena for documents?*

LSC proposes procedures for its employees to follow if they are personally served with subpoenas requesting information acquired in the course of performing official duties or because of their official capacity. This provision has the dual benefits of providing guidance for subpoenaed employees and instructing members of the public how to request the information they seek.

Consistent with Federal agencies' *Touhy* regulations, LSC proposes to treat legally insufficient subpoenas as FOIA requests. Thus, LSC may work toward honoring the spirit of the subpoena without violating its obligations and privileges. Furthermore, LSC's interests in remaining transparent and in conserving the public's trust are best served by providing public information when requested. LSC also proposes to direct employees to appear before the court and state that they cannot, consistent with these rules, provide the required documents when the General Counsel or OIG Legal Counsel has not made a decision about the legal sufficiency of a subpoena by the date on which an LSC or OIG employee is commanded to appear. Without this provision, such individuals would be faced with violating a court order or violating LSC rules and policies when responding to a subpoena. LSC proposes that the General Counsel or OIG Legal Counsel may determine that responding to the subpoena is not appropriate and direct an employee not to respond.

Examples of when responding may be inappropriate include instances where the subpoena was not validly issued or served, where the subpoena has been withdrawn, or where discovery has been stayed.

**1603.7** *When will LSC certify the authenticity of records?*

LSC proposes to certify, upon request, the authenticity of records to be disclosed. Such a service does not generally use significant resources.

**1603.8** *Does this part give individuals any rights?*

LSC proposes this section to make clear that no private rights arise from this rule.

**List of Subjects in 45 CFR Part 1603**

Administrative practice and procedure; Archives and records; Courts.

■ For the reasons discussed in the preamble, the Legal Services Corporation proposes to add 45 CFR part 1603 to read as follows:

**PART 1603—TESTIMONY BY EMPLOYEES AND PRODUCTION OF DOCUMENTS IN PROCEEDINGS WHERE THE UNITED STATES IS NOT A PARTY**

Sec.

1603.1 Scope, purpose, and applicability.

1603.2 Definitions.

1603.3 What is LSC's policy on presentation of testimony and production of documents?

1603.4 How does a person request voluntary testimony from an employee?

1603.5 How will LSC respond to a request for expert testimony from an employee?

1603.6 How will LSC respond to a subpoena for documents?

1603.7 When will LSC certify the authenticity of records?

1603.8 Does this part give individuals any rights?

**Authority:** 42 U.S.C. 2996g(e).

**§ 1603.1** **Scope, purpose, and applicability.**

(a) This part sets forth rules to be followed when a litigant requests an employee of the Legal Services Corporation (LSC), including LSC's Office of the Inspector General (OIG), to provide testimony in a deposition, trial, or other similar proceeding concerning information acquired in the course of performing official duties or because of such person's official capacity with LSC. This part also sets forth procedures for the handling of subpoenas for documents and other requests for documents in the possession of LSC or the OIG, and for the processing of requests for certification of copies of documents.

(b) It is LSC's policy to provide information, data, and records to non-federal litigants to the same extent and in the same manner that they are made available to the public. When subject to the jurisdiction of a court or other tribunal presiding over litigation between non-federal parties, LSC will follow all applicable procedural and substantive rules relating to the production of information, data, and records by a non-party. The availability of LSC employees to testify in litigation not involving federal parties is governed by LSC's policy to maintain strict impartiality with respect to private litigants and to minimize the disruption of official duties.

(c) This part applies to state, local, and tribal judicial, administrative, and legislative proceedings, and to federal judicial and administrative proceedings.

(d) This part does not apply to:

(1) Any civil or criminal proceedings to which LSC is a party.

(2) Congressional requests or subpoenas for testimony or documents.

(3) Consultative services and technical assistance provided by LSC in carrying out its normal program activities.

(4) Employees serving as expert witnesses in connection with professional and consultative services as approved outside activities. In cases where employees are providing such outside services, they must state for the record that the testimony represents their own views and does not necessarily represent the official position of LSC.

(5) Employees making appearances in their private capacity in legal or administrative proceedings that do not relate to LSC, such as cases arising out of traffic accidents, crimes, domestic relations, etc., and not involving professional and consultative services.

(6) Any civil or criminal proceedings in State court brought on behalf of LSC.

(7) Any criminal proceeding brought as a result of a referral for prosecution by the OIG or by any other Inspector General in connection with a case worked jointly with the OIG.

**§ 1603.2** **Definitions.**

(a) *Certify* means to authenticate official LSC documents.

(b) *Employee* means current and former LSC employees, including temporary employees, OIG employees, and members of the Board of Directors.

(c) *LSC* means the Legal Services Corporation. Unless explicitly stated otherwise, LSC includes the OIG.

(d) *Testify* and *testimony* include in-person, oral statements before a court, legislative or administrative body and

statements made pursuant to depositions, interrogatories, declarations, affidavits, or other formal participation.

**§ 1603.3 What is LSC's policy on presentation of testimony and production of documents?**

In any proceedings to which this part applies, no employee may provide testimony or produce documents concerning information acquired in the course of performing official duties or because of the person's official relationship with LSC unless authorized by the General Counsel or the OIG Legal Counsel pursuant to this part based on his determination that compliance with the request would promote LSC's objectives.

**§ 1603.4 How does a person request voluntary testimony from an employee?**

(a) All requests for testimony by an employee in his or her official capacity and not subject to the exceptions set forth in § 1603.1(d) of this part must be in writing and addressed to the General Counsel.

(b) All requests for testimony by an employee of the OIG must be in writing and addressed to the OIG Legal Counsel.

(c) Requests must state the nature of the requested testimony, why the information sought is unavailable by any other means, and the reasons why the testimony would be in the interest of LSC.

**§ 1603.5 How will LSC respond to a request for expert testimony from an employee?**

No employee shall serve as an expert witness in any proceeding described in § 1603.1(c) or before a court or agency of the United States unless the General Counsel or the OIG Legal Counsel authorizes the employee's participation.

**§ 1603.6 How will LSC respond to a subpoena for documents?**

(a) Whenever a subpoena commanding the production of any LSC record has been served upon an employee, the employee shall refer the subpoena to the General Counsel or the OIG Legal Counsel, as appropriate. The General Counsel or the OIG Legal Counsel shall determine whether the subpoena is legally sufficient, whether the subpoena was properly served, and whether the issuing court or other tribunal has jurisdiction over LSC. If the General Counsel or the OIG Legal Counsel determines that the subpoena satisfies all three factors, LSC shall comply with the terms of the subpoena unless LSC takes affirmative action to modify or quash the subpoena in accordance with Fed. R. Civ. P. 45 (c).

(b) If a subpoena commanding the production of any record served upon an employee is determined by the General Counsel or the OIG Legal Counsel to be legally insufficient, improperly served, or from a tribunal not having jurisdiction, LSC shall deem the subpoena a request for records under the Freedom of Information Act. LSC shall handle the subpoena pursuant

to the rules governing public disclosure established in 45 CFR part 1602.

(c) If the General Counsel or the OIG Legal Counsel denies approval to comply with a subpoena for testimony or has not acted by the return date, the employee will be directed to appear at the stated time and place, unless advised by the General Counsel or the OIG Legal Counsel that responding to the subpoena would be inappropriate. The employee will be directed to produce a copy of these regulations and respectfully decline to testify or produce any documents on the basis of these regulations.

**§ 1603.7 When will LSC certify the authenticity of records?**

Upon request, LSC will certify the authenticity of copies of records that are to be disclosed. The requesting party will be responsible for reasonable fees for copying and certification.

**§ 1603.8 Does this part give individuals any rights?**

This part is intended only to provide a process for receipt and processing of private litigants' requests for LSC documents and testimony. It does not, and may not be relied upon, to create a right or benefit, substantive or procedural, enforceable at law by a party against LSC.

Dated: January 25, 2018.

**Stefanie K. Davis,**  
*Assistant General Counsel.*

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