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June 20, 2014

Reginald J. Haley
Office of Program Performance
Legal Services Corporation
3333 K Street NW.
Washington, DC 20007
via email: LSCGrantAssurances@lsc.gov

Re: Proposed Changes to LSC Grant Assurances for FY2015

Dear Mr. Haley:

I write to submit comments on behalf of the American Bar Association (ABA) in response to the request by the Legal Services Corporation (LSC) for comments on proposed changes to the Grant Assurances to be used by LSC in entering into grant agreements with LSC recipients in FY2015. The ABA appreciates the opportunity afforded by the LSC to submit these comments and express our views on this important topic. Because the proposal implicates the professional responsibilities of lawyers across the nation and a variety of ABA policies/models, we write to suggest several changes in the proposed grant assurances. These include suggested modifications of grant assurances #10 and addition of a clause protecting a recipient and its clients during the pendency of any dispute.

Policy and Legal Considerations Argue Against Modifying Grant Assurance #10 to Specify that Access Must be Provided to All Materials Not Protected from Disclosure by Federal Law or the Federal Attorney-Client Privilege

LSC has historically been very respectful of the professional responsibilities of attorneys who are employed by LSC grant recipients. It has always recognized the value of attorney-client relationships where legal aid clients can have complete confidence that their attorneys will fully protect their clients' interests. LSC has recognized that undue government interference in such relationships has the potential to transform legal aid clients into second-class citizens, who are no longer afforded the same protections that are available to clients of private lawyers. LSC has therefore consistently respected the right of states to regulate the practice of law in state courts, including those legal services provided to the clients of LSC grant recipients. Thus, even though it may arguably have the power under some circumstances to require information that is otherwise protected as confidential under the rules of professional conduct, LSC has adopted appropriate protocols to assure that improper intrusions into confidential information do not occur.

It is not necessary for LSC to incorporate language into its Grant Assurances that may be read to signal a desire to reverse those longstanding accommodations, including the proposed changes in language in grant assurance #10. The current Grant Assurance language is sufficiently broad to permit LSC access to materials subject to protections of “applicable” law. In circumstances where LSC has cause to conduct a more in-depth investigation, it has adequate authority already in place to enforce its full array of rights to access relevant materials.

The essence of the lawyer’s duty of confidentiality is a proscription on a lawyer’s voluntary disclosure of confidential client information, as set forth in ABA Model Rule of Professional Conduct 1.6 dealing with “Confidentiality of Information” and the many binding state rules of professional conduct that closely track the ABA Model Rule.

In this respect, an advance, voluntary waiver of a lawyer’s future obligation to protect client confidences through entry into a contract with a funding source (a “Grant Assurance”), without any context or consideration of the particular circumstances that may be involved in a disclosure, is a very different situation than a lawyer’s compliance with a subpoena or court order. We have consulted disciplinary counsel in several states in considering this matter, and have been told that at least in some states the lawyer may be required to test the validity of a demand for disclosure to avoid a disciplinary infraction. These lawyers would, arguably, be unable to sign an advance waiver of their duty of confidentiality.

An Argument Can be Made That the Law Governing Disclosure of Materials Remains Unsettled

Some may argue that *United States v. California Rural Legal Assistance*, 722 F.3d 424 (D.C. Cir. 2013) (*US v CRLA*) is fully dispositive of the issue whether state law is in any way implicated where disclosure of grantee materials is involved. Unfortunately, the decision in that case did not explicate its reasoning fully in holding that:

...[T]he general issue submitted to the district court by the parties...is, “whether, and if so, which California state privileges and protections apply.” Because the district court determined that the answer to the “whether” issue is “no,” and because we affirm that holding, the “if so, which” half of the issue is no longer germane. Federal law exclusively governs.

The opinion by the court in *U.S. v CRLA* does not provide details regarding how it factored several relevant provisions of federal law into its decision. The opinion does not discuss the extent to which its holding is based upon the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-234 §509(h), 110 Stat. 1321 (Section 509(h)), which dictates that certain enumerated materials must be disclosed to LSC. By the terms of Section 509(h), such specified materials are explicitly exempted from any protection provided by lawyers’ professional responsibility codes or canons. Clearer guidance would have been provided if the court had articulated whether its decision was based in whole or in part on that federal law. Presumably the holding reaches beyond the materials enumerated in Section 509(h), but that is not absolutely clear.

There are a number of materials that LSC might request that are not among those enumerated in Section 509(h). If the holding of *US v. CRLA* means that these, too, are subject only to the provisions of federal law, not state law, that still does not fully resolve whether in some manner, at least in some states, the state ethics rules are relevant. An important applicable federal law is the LSC Act, which continues to provide protection for materials protected by professional responsibility codes. The Act is less than a model of clarity, stating, at §2996e(b)(3):

The Corporation shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association (referred to collectively in this subchapter as "professional responsibilities") or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

The Act does not make clear how the ABA Canons and Code are to be applied, since they are merely models to be adopted as each state sees fit and do not prescribe lawyer behavior. Rather, the practice of law in state courts is regulated by each state, usually by the state supreme court, through rules of lawyer conduct that are enforced by state disciplinary authorities. Even if the ABA models are somehow relevant, those referenced in the LSC Act have long since been superseded, having been replaced by the 1983 ABA Model Rules of Professional Conduct.

The court in *U.S. v CRLA* notes that the LSC grantee was not seeking the protection of the ABA Canons or Code (indeed, as noted above, how could it?), but instead was seeking protections of California law. The court states that only federal law applies, but it does not discuss the fact that the most relevant federal law, the LSC Act quoted above, specifies that LSC "shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities." Thus, that federal law seems to turn to the state professional responsibility rules for its content, since only the states dictate "attorneys' professional responsibilities" (at least for practice in state courts, where much of an LSC grantee's work is performed).

Many states, including California where the CRLA case arises, have adopted a version of ABA Model Rule of Professional Conduct 1.6(b) that states, in relevant part, that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted, among other situations, *where the lawyer reasonably believes it to be necessary to comply with other law or a court order*. In those states, reference to the state professional responsibility rules would not yield a result different than achieved in the *U.S. v CRLA* decision. The state rules of professional responsibility specifically permit the lawyer to make the disclosure. The same is true in a large majority of states, though a number of states do not include the exemption in the black letter of their rules, but instead – like California – include a statement in the commentary to the same effect.

The situation is different in the professional responsibility rules of other states. Some states include language permitting lawyers to divulge confidential information if required by other law, but not if required by a court order. *See, e.g.*, NJ RULES OF PROF'L CONDUCT R. 1.6(d)(4). Some other states require lawyers to divulge confidential information if required by a court order, but not if required by "other law." *See, e.g.*, WA. RULES OF PROF'L CONDUCT R. 1.6(b)(6). And at least two other states omit the exemption entirely, but include a statement in their commentary that "Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession." FLA. RULES OF PROF'L CONDUCT R. 4-1.6; ALA. RULES OF PROF'L CONDUCT R. 1.6. Pennsylvania takes a similar approach: "Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4" PENN. RULES OF PROF'L CONDUCT R. 1.6 CMT. [18].

In some of these states that did not adopt the ABA Model Rule verbatim, if a case were to arise where LSC sought confidential materials, an argument could be made that the federal law (*i.e.*, the LSC Act) prohibits LSC from interfering with attorneys in carrying out their professional responsibilities to their clients as established by their state professional responsibility rules, and the state rules do not permit the lawyer to disclose the material sought by LSC. Whether a subsequent case presenting this different set of facts would be decided in the same manner as *U.S. v CRLA* is arguably an open question.

Even if the decision in *U.S. v CRLA* means that only federal professional responsibility law applies, such an approach is not sufficient to provide clarity regarding what rules apply and what materials are protected. The court in *U.S. v CRLA* did not discuss the meaning of the terms in the LSC Act "standards of professional responsibility" and "attorneys' professional responsibilities." The LSC Act itself seems to define them as rooted only in the model ABA Canons and Code, but those (now superseded) model documents are not binding on any attorney, anywhere. For the Act to have meaning, it must refer to some ethical rules that are actually binding on attorneys. If the court did not interpret those terms in the LSC Act to refer to state rules of professional responsibility, then did it assume that they refer to a federal code of lawyer conduct? What is the relevant federal law that governs the conduct of lawyers employed in LSC-funded programs, and what constraints does the applicable federal code of federal conduct impose upon lawyers with regard to divulging client confidences? There are no national, federal rules of professional responsibility. Each federal court uses its own code of lawyer conduct, with some courts using the state versions of the rules in which they sit, and others using their own written or unwritten rules. Given this ambiguity, a reference in the proposed LSC Grant Assurances to "federal law" is no more illuminating to those concerned than the reference in the current version to "applicable law."

Though we have limited our comments above to Grant Assurance #10, it is worth noting that Grant Assurance #11 may suffer from exactly the same type of circularity as described above regarding the rules of professional conduct. In many federal districts, the court adopts as applicable federal law the state laws of attorney-client privilege in effect in the jurisdiction where the court sits.

Some Form of “Savings Clause” is Essential in the Grant Assurances

Given the ambiguities of the law, we urge that the Grant Assurances should include language to state explicitly that they are not intended to prevent or penalize good-faith objections to disclosure and presentation of any dispute to an appropriate adjudicator.

In addition to the legal analysis above, there are other important considerations that support addition of such a clause in the Grant Assurances. LSC’s mission to provide representation to clients in poverty obligates it to avoid any unnecessary interruptions in service to such clients. Where a recipient of LSC funds is using those funds to provide legal services to clients, it would be inconsistent with its mission for LSC to place in jeopardy the ongoing representation of such clients while a legitimate dispute over grantee compliance is pending – either based in the ambiguities respecting attorneys’ professional responsibilities or uncertainty regarding the extent of protection provided by federal attorney-client privilege. It would be most appropriate for LSC to include within the Grant Assurances a clause stating that it will not be considered a violation of the agreement for a recipient to assert a colorable claim to withhold certain confidential client information under provisions of applicable law.

The concept that financial sanctions, with the unavoidable harm they will cause to clients, should not be imposed on a recipient for certain types of good faith non-compliance is reflected in LSC’s own regulations. Part 1606 addresses situations where reductions in funding are appropriate and requires that such reductions only occur when there has been a “substantial violation.”

The requirement in the proposed (and existing) Grant Assurances that a grantee wishing to withhold materials must identify in writing the bases for withholding seems to presume that there will be some due process accorded to the grantee prior to LSC’s withholding of funding. It would be inappropriate for LSC to preemptorily suspend or discontinue the objecting program’s funding, conceivably before the objection was even heard or ruled on by an appropriate adjudicator. This is especially true in those states where the applicable rules of professional responsibility may obligate the grantees’ attorneys to assert and test their good faith objection to an information request that calls for privileged or confidential client information as defined by the applicable state court’s rules. Nothing in the LSC Act authorizes LSC to condition its monetary grants to legal aid programs on the programs’ waiver of this right and their attorneys’ duty to object and submit to adjudication.

For these reasons, we urge that the Grant Assurances include specific language permitting a grantee to assert and test in good faith any colorable objection to any aspect of LSC’s request for documents or information. Such a process seems implicit in the language of the existing and proposed Assurances, and is explicit in the regulations. The proposed savings clause simply removes any doubt in this regard.

Summary and Conclusion

We urge that LSC adopt language for Grant Assurances #10 that is sufficiently broad so as not to rely upon unsettled law or principles. Further, we urge LSC to include a clause stating that a violation will not be presumed to have automatically occurred if a recipient withholds certain documents under a colorable claim that they are protected under applicable law.

Suggested further edits to proposed Grant Assurance #10 (with further changes highlighted for clarity) are:

During normal business hours and upon request, it will give any authorized representative of LSC, including the OIG, or the Comptroller General of the United States (which includes the Government Accountability Office (GAO)) access to and copies of all records that they are entitled to under the provisions of the LSC Act and other applicable laws. This requirement does not apply to any such materials that may be properly withheld ~~due to applicable under Federal applicable law or rules or rules.~~ It agrees to provide LSC with ~~the requested~~ materials ~~(excluding those which may be properly withheld)~~ in a form determined by LSC while, to the extent ~~possible~~ consistent with this requirement, preserving ~~the confidentiality of client information applicable client secrets and confidences~~ and respecting the privacy ~~rights interests~~ of the Applicant's staff members. For ~~those records each record~~ ~~subject to the Federal attorney-client privilege that is withheld,~~ ~~the Applicant~~ will identify in writing the specific record(s) ~~or portion thereof~~ not being provided and the legal justification for not providing the record(s) ~~or portion thereof.~~

The above proposed edits return the assurance to use of the term "applicable" instead of "Federal" law. They also clarify that an Applicant does not agree to provide all "requested" materials, but may exclude some in certain circumstances. Another change substitutes the current ABA model and widely adopted state rules' language of "confidentiality of client information" for the now-superseded Code language of "client secrets and confidences."

We do not offer specific edits or language to ensure that grant recipients can continue to receive funding and provide representation to clients during the pendency of a dispute regarding production of records, but leave it to LSC to properly express that concept in the Grant Assurances.

Thank you for the opportunity to comment on the proposed Grant Assurances for FY2015.

Sincerely,



Thomas M. Susman
Director, ABA Governmental Affairs Office

cc: James R. Silkenat, President, American Bar Association
Lisa Wood, Chair, ABA Standing Committee on Legal Aid & Indigent Defendants