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By regular and electronic mail – [Rhaley@lsc.gov](mailto:Rhaley@lsc.gov)

June 20, 2014

Mr. Reginald J. Haley  
Office of Program Performance  
Legal Services Corporation  
3333 K St. N.W.  
Washington, D.C. 20007

**Re: Comments Concerning Proposed Revisions to LSC 2015 Grant Assurances, Paragraphs 10 & 11 (79 Fed. Reg. 24454-24455) (April 30, 2014))**

Dear Mr. Haley:

Legal Services of New Jersey (“LSNJ”), not an LSC recipient, coordinates the statewide Legal Services system for New Jersey, including the six regional Legal Services offices which are LSC recipients. LSNJ is the conduit for the majority of the system’s funding, subgranting state, IOLTA, Campaign for Justice and some foundation dollars, most to the regional programs. On behalf of the statewide system and its constituents we submit these comments in regard to the proposed changes to the 2015 LSC 2015 Grant Assurances, Paragraphs 10 and 11 published on April 20, 2014 in the Federal Register at 79 FR 24454.

The proposed revisions would change the current exceptions to the case and client records disclosure requirements, from those materials that may be properly withheld “due to applicable law or rules,” to those protected solely “under Federal law.”

**Legal Framework**

Two statutory provisions frame this issue. The LSC Act, made applicable to the LSC each year through the appropriation process notwithstanding its lack of express authorization since 1978, references the ABA Model Code of Professional Responsibility, stating that the LSC will not interfere with recipient’s professional responsibilities under the ABA Code:

**Coordinating New Jersey’s Legal Services System**

“The Corporation shall not...interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canon of Ethics and 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.”

42 U. S.C. 2996e(b)(3) (Emphasis supplied.)

Riders to annual LSC appropriations, however, have since 1995 recognized an exception to this privilege in section 509(h):

Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

See, for example, Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-234 § 509 (h) (carried forward in successive LSC appropriations).

Under fundamental canons of statutory construction, two potentially conflicting statutory provisions are, to the extent possible, to be read together in order to be harmonized, *in pari materia*, to the extent possible. While 509(h) unquestionably constitutes a more specific exception to the LSC Act section, in particular situations the federal law pertaining to privilege may suggest or require referring to ABA or state rules or law. The “applicable law” verbiage in past grant assurances poses no threat to this statutory construction. The proposed “federal law” wording seriously clouds the landscape.

*U.S. v. LSNY*, 249 F. 3d 1077 (D.C. Cir. 2001) presented the issue of whether the production of client files, specifically client names, for an LSC Inspector General investigation of a Legal Services program. The D.C. Court of Appeals found that the federal subpoena to provide information was valid and not unduly burdensome to fulfill the requirements of an OIG’s audit. Specifically, it recognized that the ABA Code exempts disclosures required by court order, and that because the subpoena was within the OIG’s power, the disclosure is consistent with LSNY’s ethical obligations to its clients.

Recognizing the *LSNY* ruling, and the need to read together the LSC Act and 509 (h), the LSC Protocol Regarding Access to Information in Grant Recipients’ Files was issued on April 25, 2002. Harmonizing the LSC Act and the exception delineated in the Omnibus Consolidated Appropriations Act 509 (h), the LSC Protocol appropriately balances the LSC’s access to records in a manner consistent with

the attorney-client privilege. In its General Principles, the Protocol explicitly states that "Recipients and LSC will work together in good faith regarding issues of access to records that may contain information protected by rules of professional responsibility or the law on attorney-client privilege." The LSC recognized its statutory responsibility to comply with the LSC Act and 509 (h) of the Omnibus Consolidated Appropriations Act by asserting a commitment to seek and accommodate reasonable approaches, acknowledge the uniqueness of state ethics rules, and in effect work collaboratively through ongoing communication and meetings with LSC recipients to come to acceptable resolutions.

The proposed revisions open the door to overriding the spirit and mandate of the 2002 LSC Protocol. While the proposed changes may be seen as more expeditious, in fact they only obfuscate the issue. The proposed grant changes are premised expressly upon the decision in *United States of America v. California Rural Legal Assistance, Inc.*, 722 F. 3d 4242 (U.S. App. D.C. 2013). *CRLA* broadly held the supremacy of federal law over state law when a federal administrative subpoena was involved, but did not address, let alone delineate guidelines for, the underlying substantive issue of how federal law on privilege should apply to *CRLA* or other grantee situations. The proposed changes can be read to compel an LSC grantee to waive the right to assert a colorable claim regarding professional conduct and attorney-client privilege. Such a waiver is not required under *CRLA*.

In the *CRLA* decision, the Court of Appeals accepted the District Court conclusions that it was compelled to enforce an administrative subpoena where it had been issued for a lawful purpose, the documents requested were relevant to that purpose, and the demand was reasonable and not unduly burdensome, merely affirming that federal attorney-client privilege governs LSC grantees where a federal subpoena is issued. In contrast, the LSC's proposed revision simply references federal law, without the *CRLA* context and predicate of a subpoena and court order, and, more importantly, without any reference to the particulars of applicable precedent, the LSC Act provision, the LSC Protocol, or the potential for colorable claims concerning the applicability of state law to the determination of need for the subject records and the reasonableness and burdensomeness of the demand.

In the past, LSC grantees have asserted colorable claims regarding privilege. In *LSNY*, a LSC grantee asserted a claim of privilege concerning individual clients, contending that the subpoenas were unduly burdensome. Similarly, in *Bronx Legal Svcs and Queens Legal Svcs v. LSC*, LSC grantees brought forth a claim regarding the disclosure of client names. 2003 U.S. Dist. LEXIS 695. While neither case involved a favorable outcome for the grantees, a claim was still able to be raised.

### **New Jersey Law Concerning Professional Responsibility**

In New Jersey, client names and other identifiable information are protected and confidential under New Jersey's RPC 1.6. The New Jersey Supreme Court has observed that *RPC 1.6* "expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client." *In re Advisory Opinion No. 544 of N.J. Sup. Court*, 103 N.J. 399, 406 (1986). The range of information protected by the confidentiality requirement is broad:

it extends from substantive information relating to representation to information that merely identifies the client, such as the client's name and address. *Id.*

### Comments

**1. The proposed grant assurance, in effect if not intent, may be interpreted as narrowing current client and recipient rights under current precedent.**

By its unqualified reference to federal law, by failing to admit and acknowledge the two applicable statutory provisions and the current practice under the LSC Protocol, and by its sole reference to the *CRLA* case, which addressed only the principles attending enforcement of a subpoena, the proposed assurance threatens the narrowing of recipient rights, on behalf of client and attorneys, to raise colorable claims. Currently, state statutory law, rules and precedent unquestionably would be points of reference in the balancing effort called for by the LSC Protocol, and supported by the language of the LSC Act.

**2. The proposed change is unnecessary.**

The current "applicable law" formulation amply protects the LSC's full powers and duties under 509 (h) and other law. The LSC view consistently has prevailed in reported precedent. At the same time, to LSNJ's knowledge the record access procedures under the current protocol also work effectively, resolving initial disagreements to the mutual satisfaction of the parties. The proposed language is unnecessary.

**3. The assurance arguably creates a new contractual requirement for disclosure, which ultimately could be deemed to exist independent of the statutory grounds for record and name access, with the foreseeable consequence of waiving colorable recipient claims, defenses and protections, producing several adverse consequences.**

- A. This coerced waiver in effect could be adjudged to bar assertion of any colorable claims and defenses. The LSC is not required to take such a step, and as a matter of policy it should not do so.
- B. Entering into such an agreement would put recipients, and their professional staff, at risk of subsequent disciplinary proceedings initiated by disaffected clients or state licensing authorities, for failure to protect confidants (a grant assurance is unlikely to constitute an "other law" exception to RPC 1.6).
- C. Clients who proceed to be represented by a recipient that has signed such an assurance may, under applicable state law, be deemed to have waived their rights of confidentiality and privilege for all other purposes, an unintended, undesirable, unnecessary and major consequence of this proposed Assurance. Our research suggests most states have expansive and aggressive implied waiver rules. This result, in turn, could thus open such previously protected information to the grasp and eyes of other public and private funders, and eventually

the public as a whole. Conversely, depending upon their political and philosophical viewpoints, other potential or current public and private funders might be appalled by the implied waiver of confidentiality, and decline to provide future funding.

- D. Ensuing lack of confidentiality and privacy, as it becomes more widely known, would be likely to undermine client trust in, and utilization of, Legal Services programs

**Insertion of Additional Language**

If the LSC nonetheless proceeds to adopt the proposed revisions, the following additional language should be included to ensure the protection of client interests without jeopardizing program funding:

“Nothing in these Grant Assurances is intended to limit a grantee’s right or duty to assert any colorable ground under applicable Federal law to withhold or prevent disclosure of any document or information, and present any such ground to court for adjudication.”

In conclusion, LSNJ does not want regional Legal Services programs in its system to be compelled to waive client protections simply by signing the grant assurances.

We urge the Board of the LSC to reject this proposed change, or, in the alternative, to add the proposed language.

Very truly yours,

**Legal Services of New Jersey**



Melville D. Miller, Jr.  
President and General Counsel

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