WSBA
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Mr. Reginald J. Haley
Office of Program Performance
Legal Services Corporation
3333 K Street NW
Washington, D.C. 20007

Re: Comments on Proposed Revisions to 2015 Grant Assurances 10 and 11

Dear Mr. Haley:

The proposed revisions to Grant Assurances 10 and 11 put Legal Services Corporation (LSC) grant recipients who employ lawyers in Washington State in the untenable position of having to assume disclosure obligations to LSC that appear to violate state law ethical obligations to clients. For this reason, I urge the LSC to reconsider the language of those assurances in a way that will accommodate these grant recipients.

I serve as the Chief Disciplinary Counsel for the Washington State Bar Association (WSBA). The WSBA is the mandatory licensing and disciplinary authority for lawyers in Washington State. The Washington Rules of Professional Conduct (RPC), as adopted by the Washington Supreme Court, constitute the code of ethical conduct applicable in Washington.[1] The rules are enforced by the WSBA Office of Disciplinary Counsel acting under the authority of the Washington Supreme Court in accordance with the state Rules for Enforcement of Lawyer Conduct (ELC).

As the WSBA Chief Disciplinary Counsel, I frequently interpret and apply Washington's RPC in the course of evaluating lawyer conduct. I have reviewed the proposed changes to the Legal Service Corporation's 2015 Grant Assurances.[2] It is my opinion that the proposed revisions to Grant Assurances 10 and 11, as applied to LSC grant recipients who employ lawyers in Washington, would create a conflict with obligations imposed upon these lawyers under Washington's RPC.

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[1] The Washington RPC are available at http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC

[2] 79 Fed. Reg. 24,454 (Apr. 30, 2014).

In my view, the proposed changes appear to create an untenable and unfair dilemma for lawyers employed by our statewide LSC-funded provider of civil legal aid, the Northwest Justice Project (NJP). If the proposed changes are adopted, NJP and its lawyers would potentially have to choose between receiving LSC funding by agreeing to comply with the disclosure provisions of Grant Assurances 10 and 11, or abiding by the Washington Rules of Professional Conduct. This is because NJP lawyers may be ethically prohibited from revealing information designated as confidential in Washington's RPC 1.6 in some situations where the Washington rule makes the information confidential but federal law and/or the federal attorney-client privilege does not protect the information from disclosure.

Like most U.S. jurisdictions, Washington's RPC are modeled on the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules). This includes RPC 1.6, which, in short, ethically prohibits lawyers from revealing any "information relating to the representation," subject to narrow and specific exceptions contained in the rule. Unlike the ABA Model Rules, and unlike Rule 1.6 as adopted in most U.S. jurisdictions, Washington's rule *does not* include an exception permitting a lawyer to disclose information "to comply with other law." *Compare* ABA Model Rule 1.6(b)(6)[3] *with* Washington RPC 1.6(b)(6).[4]

As I understand it, the proposed revisions to Grant Assurances 10 and 11 reflect a position about how current federal law affectds disclosures by LSC funding recipients, i.e., that the only permissible grounds for nondisclosure are those available under federal law. It is for this specific reason that the proposed changes to the Grant Assurances are problematic. Again, based on an interpretation of federal law, it appears that the changes would require NJP lawyers to agree to unethically disclose certain client information (if not otherwise protected by federal law or federal attorney-client privilege) or risk loss of LSC funding.

[3] Model Rules of Prof'l Conduct R. 1.6 (2013 ed.), *available at*

l conduct.html

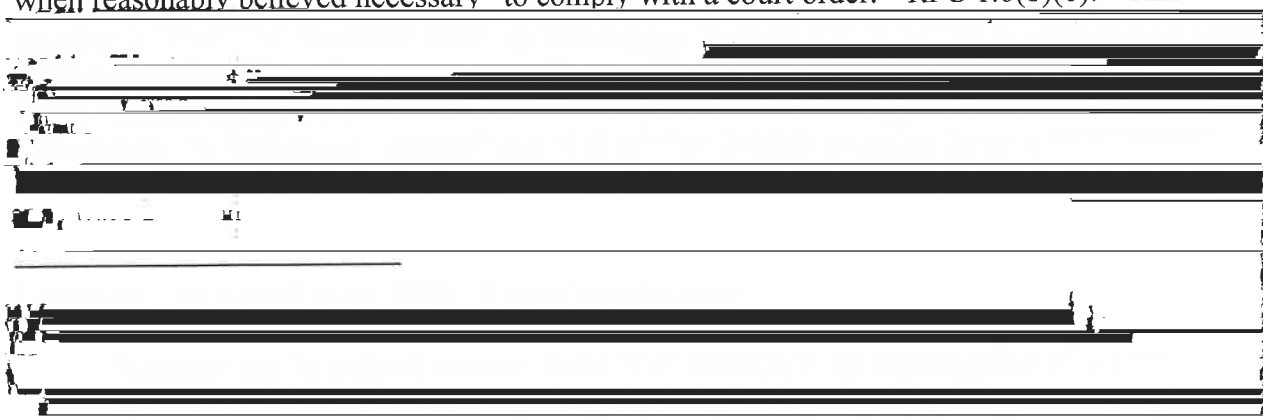
[4] When Washington's rules were amended in 2006, the Washington Supreme Court expressly declined to adopt the "other law" exception, which had been added to the ABA Model Rules in 2001. The reason is stated in the Comment to Washington's Rule 1.6, as follows:

> [24] Washington has not adopted that portion of Model Rule 1.6(b)(6) permitting a lawyer to reveal information related to the representation to comply with "other law." Washington's omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by "other law," even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court. It is the need for a judicial resolution of such issues that necessitates the omission of "other law" from this Rule.

This view of Washington's RPC not only is evident in the plain language of Rule 1.6 itself, but also is consistent with a long line of Washington state ethics advisory opinions interpreting a lawyer's ethical obligations under RPC 1.6. For example, in 2008, the Washington State Bar Association's Rules of Professional Conduct Committee issued an ethics opinion that evaluated whether not-for-profit public defender agencies may disclose to a county funding authority information relating to individual client cases, including client names, cause numbers and outcomes. The opinion concluded that when information is subject to Rule 1.6, it may not ethically be disclosed under such circumstances. WSBA Ethics Advisory Opinion 2185 (2008). That opinion was in part based on an earlier advisory opinion in which the Committee concluded that RPC 1.6 prohibits legal services lawyers from disclosing original records or any other information relating to the representation of a client to the Legal Services Corporation without first obtaining the informed consent of the client to disclose it. *See* WSBA Ethics Advisory Opinion 183 (1990). Also of significance is Opinion 195, which opined that a lawyer cannot reveal to a third-party insurer confidential information relating to the representation without the client's informed consent. In that opinion, the Committee observed that a lawyer cannot be contractually obligated to seek and obtain informed consent to such a disclosure, because the arrangement would create a conflict of interest with the interests of the client and place the lawyer in an "impossible situation." The Committee explained that "a 'requirement' to seek or obtain the client's consent to disclosure would put defense counsel in an ethical dilemma requiring withdrawal from the representation." WSBA Ethics Advisory Opinion 195 (1999).

NJP lawyers will be cornered by this same ethical dilemma if NJP is required to agree to disclose client information under proposed Grant Assurances 10 and 11 as a condition of receiving its LSC funding in 2015.

Finally, I note that there may be a way for the LSC Grant Assurances to accommodate the special circumstances faced by Washington State lawyers endeavoring to comply with their ethical obligations. Notwithstanding the absence of an "other law" exception, Washington's RPC 1.6 does permit a lawyer to reveal information relating to the representation of a client when reasonably believed necessary "to comply with a court order." RPC 1.6(b)(6).[5] This



the filing of IRS Form 8300 or otherwise, any information pertinent to the client's identity when the client has not given informed consent to the disclosure. The opinion continues as follows:

> If a summons is served upon a lawyer, the lawyer must continue to decline to disclose confidential client information except in compliance with RPC 1.6. If the government then seeks enforcement of the summons through the federal courts, the lawyer must respond properly and litigate fully the issue of disclosure, and raise all nonfrivolous claims that the information is protected from disclosure by lawyer-client privilege or other applicable law. . . . If ordered to disclose by a judge, a lawyer may then do so in compliance with RPC 1.6(b)(6), which permits a lawyer to reveal client confidential information to the extent the lawyer reasonably believes necessary "to comply with a court order."

WSBA Ethics Advisory Opinion 194 (1997) (citations omitted).

Thus, an NJP lawyer could ethically agree to disclose client-specific information in response to a federal subpoena and a directive to comply by court order, after asserting any non-frivolous protections against disclosure. I suggest the LSC consider crafting the Grant Assurances to authorize use of this procedure by Washington grant recipients and others similarly situated.

Thank you for the opportunity to comment on the proposed changes to the 2015 LSC Grant Assurances.

Sincerely,

Douglas Ende
Chief Disciplinary Counsel
Washington State Bar Association

cc: Patrick A. Palace, President, Washington State Bar Association
Paula C. Littlewood, Executive Director, Washington State Bar Association
Deborah Perluss, Northwest Justice Project