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VIA Email to mcohan@lsc.gov

Re: Comments on Notice of Proposed Rulemaking Regarding 45 CFR Parts 1606, 1618 and 1623

Dear Ms. Cohan:

The American Bar Association, through its Standing Committee on Legal Aid and Indigent Defendants, submits these comments on proposed amendments to Legal Services Corporation (LSC) regulations on termination procedures, enforcement and suspension procedures of the Corporation.

The ABA welcomes LSC's response to issues that LSC has identified regarding oversight of recipients of LSC funds. It is clearly of the utmost importance that the Corporation serve as a responsible steward of federal funding, and insure that such funding is used in a manner that fully complies with legal requirements.

In considering a framework for tools to further insure proper use of LSC funds, the Corporation should structure procedures that are fair and balanced. Recipients of LSC funds are local, non-profit public-service institutions that operate with limited and often shrinking resources. Many recipients of LSC funds have developed complex and interdependent funding streams to support their operations. A reduction in funding from one source often may be magnified in an unexpected manner, because other resources may have been provided with LSC matching funds as the required contingency.

General Observations

We submit that in the interest of maintaining a stable, effective and efficient network of legal aid providers, LSC should examine whether the proposed

regulatory changes (1) provide clear guidance to LSC regarding when a limited reduction in funding or lengthy suspension of funding is appropriate, (2) provide sufficient due process (notice of prohibited conduct, opportunity to be heard) before sanctions are imposed, (3) provide clear guidance regarding the magnitude of reductions that are appropriate, to insure consistent application over time and among different recipients, and (4) take into account the impact that a limited reduction in funding or suspension will have on clients, lawyers and program stability.

Guidance on When Sanctions Appropriate

As the background discussion in the notice of proposed rulemaking makes clear, the imposition of sanctions is a significant action, with many repercussions, that should be undertaken only when warranted by serious, non-compliant conduct by a recipient. Therefore, before sanctions are considered, it should be clearly established as a condition precedent that a recipient is acting in knowing and willful disregard of the law or regulations. A recipient should not be subject to sanctions when it is relying, in good faith, on a reasonable interpretation of the law or regulations. Disputes arising from a good faith difference of opinion about the meaning or application of the law should be taken to an objective and neutral external decision-maker, not resolved within an internal process controlled by LSC. In the section providing specific suggestions below, we propose some modifications to the proposals to address this.

Due Process

The Legal Services Corporation itself is emblematic of equal justice in our society, including due process of law. Any imposition of sanctions by LSC should occur only after a recipient receives clear notice of what is required, and has a full opportunity to be heard in a forum that is fair and objective. The imposition of a reduction in funding of up to 5%, or of a lengthy suspension, can have a decisive effect on a recipient's ability to operate; it can require layoffs of lawyers and diminished client services. The proposed amendments provide very little process whereby a recipient can be heard and explain its actions or the impact that sanctions will have; the proposals merely offer an informal meeting with LSC staff of unspecified level and experience. These staff are empowered to impose a reduction in funding or a lengthy suspension, which for some recipients could amount to a financial penalty approaching $1 million. There is no further provision for an appeal. Contrast this with LSC's regulation Part 1630, which provides for an appeal to the LSC President for any questioned cost of $2,500 or greater. The current process provided in Part 1606 for reductions in funding of 5% or greater is not very onerous. That process does not require LSC to comply with most of the protections afforded to recipients of other federal funds. It does not require an independent, outside, hearing officer or use of standard administrative justice procedures. It is merely an internal process with a hearing before an LSC employee, and with a further internal appeal to the LSC President. It is appropriate that, at a minimum, reductions in funding of up to 5% comply with these modest process requirements. We therefore propose below specific modifications to the proposals to assure adequate due process is accorded to recipients.

Guidance on Magnitude of Sanctions and Consideration of Impact

The proposed regulatory changes include no guidance whatsoever regarding when a reduction of

funding under Part 1606 of 1% is appropriate, as compared to a reduction of funding of 5% or greater. Similarly, the proposal for expansion of suspension of funding from 30 days to 90 days under Part 1623 fails to provide any guidance regarding when a shorter or lengthier period is appropriate. The few criteria that are set forth regarding aspects of program culpability are also used in the proposed amended regulations as the only factors to be considered in determining the magnitude of a sanction (or, presumably, the length of a suspension). We propose that the inquiry into whether a substantial violation has occurred should be a separate matter, and that additional, mitigating, factors should be taken into account when making a "penalty" determination. These are detailed below. This will provide LSC with a comprehensive view of the recipient, its actions and its environment before the sanction is determined. For example, LSC may believe that a 4.9% reduction in funding will bring an important mis-step to a recipient's attention and cause it to take prompt remedial action as it continues to provide client service. The recipient may know that such a funding reduction will be so injurious to its fiscal health that it will have to severely diminish client services or cease certain program operations. LSC may believe that a 90 day suspension of funding is required to foster compliance. But the recipient subject to that suspension may know that it cannot obtain bridge funding to weather such a financial storm, and that a suspension of that length will force a permanent cessation of operations. In the section below we propose modifications of the proposed regulations to accommodate these concerns.

Optimally, to insure that similar sanctions are imposed both at different points in time and when different personnel are involved, a more detailed schedule giving guidance on when a 1% sanction is appropriate, etc. (or when a longer vs. shorter suspension is appropriate) should be developed for Board review and approval.

Other General Observations

The proposal to amend Part 1606.13 (d) to give sole discretion to LSC to reallocate funding to other service areas, on its face, appears inconsistent with the LSC Appropriations Act. That Act specifically requires that funding be allocated geographically on a proportional, per capita basis determined by the Census Bureau's findings of the distribution of the poverty population. When Part 1606 was last modified, in 1998, LSC examined then-extant legal authorities and concluded that it had some discretion to "reprogram" recovered funds to different service areas (including sources of policy guidance such as the "Government Accounting Office Redbook"), but suggests that first consideration should be given to returning the funds to the original service area (see Part 1606.13(d), "Funds recovered by the Corporation pursuant to a termination shall be used in the same service area from which they are recovered or will be reallocated by the Corporation for basic field purposes."). Before removing the initial consideration of returning the funds to the original service area so as to honor the Congressional intent of per capita distribution of LSC funds, and significantly broadening LSC's discretion, a reexamination should be undertaken to insure that this expansive view of LSC discretion is consistent with the current state of the law and policy.

Specific Suggested Changes:

The proposed amendments to Part 1606.2 "Definitions" are extremely confusing. The NPRM

states that paragraph (c) [which currently defines "Recipient"] should be revised, and provides that this paragraph will now define "Limited reduction in funding." Does that mean that "Recipient" will now be undefined? The proposal also states that there will be an addition of a new paragraph (e). But the new paragraph (e) is almost identical to the old, and apparently intended-to-continue, paragraph (d), defining "Termination." [The only difference between these two paragraphs is the revision of sub (v)]. The proposed new (e) is also internally inconsistent, in that it starts by stating that "Termination means that recipient's level of financial assistance under its grant or contract with the Corporation will be reduced in whole or in part…" but then goes on to say in sub (2)(v) that "A termination does not include a limited reduction of funding as defined in this paragraph." The confusion about what is meant by "termination" then has an impact on the remainder of the regulation, where that term is used repeatedly. The changes in the "Definitions" section should be clarified.

We propose that Part 1606.2 and 1606.3 should be further amended to insure that a recipient, acting in good faith reliance on its understanding of the law, will not be subject to sanctions. Specifically, we propose that Part 1606.2 (b) should be amended to read "Knowing and willful means that the recipient had actual knowledge of the fact that its action or lack thereof constituted a violation and despite such knowledge, undertook or failed to undertake the action. A recipient will not be considered to have acted in a knowing and willful manner when it has relied in good faith on a reasonable interpretation of state or federal law as a basis for its action of lack thereof." Further, we propose that Part 1606.3 (a) should be amended to read: "A grant or contract may be terminated when, through knowing and willful conduct:…" These two changes, together, will insure that a recipient that has a good faith dispute with LSC regarding the state of the law is not subject to sanctions that could impact its ability to deliver important services to poor clients.

Similarly, there are insufficient grounds for a limited reduction in funding through summary sanctions when a recipient is acting in good faith. We therefore suggest that Part 1606.15 should incorporate this concept. Specifically, we propose that Part 1606.15 (b) should be modified to read: "Grounds for limited reduction in funding. A limited reduction of funding may be imposed when the Corporation determines that termination in whole or in part of the recipient's grant is not warranted, but that there nevertheless has been a substantial, knowing and willful, violation by the recipient of an applicable provision of law, or a rule, regulation, guideline or instruction issued by the Corporation, or a term or condition of the recipient's current grant or contract with the Corporation."

To assure that LSC has a complete understanding of a situation before acting, and takes into account all relevant information in determining the magnitude of a funding reduction, we suggest modification of proposed Part 1606.15. As proposed, that new subsection refers to the set of factors enumerated in Part 1606.3(b) for both the determination of whether a substantial violation has occurred and the determination of the magnitude of the appropriate penalty. These are better treated as two discrete and separate inquiries. Therefore, we propose that the new proposed Part 1606.15(c) be revised to state "A determination whether there has been a substantial violation for the purposes of paragraph (b) of this section~~, and the magnitude of the limited reduction of the limited reduction in funding,~~ will be based on consideration of the criteria set forth in § 1606.3(b). The magnitude of a limited reduction in funding will be based

on consideration of (1) The number of restrictions or requirements violated; (2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement; (3) The extent to which the violation is an isolated event or part of a pattern of noncompliance with LSC requirements or restrictions; (4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; (5) The extent to which the recipient has taken action to cure the violation and remedy any harm caused by its actions; (6) The availability of other funds to the recipient; (7) The impact that a reduction in funding will have on the recipient's ability to fulfill its ethical obligations to service existing clients; (8) The impact that a reduction in funding will have on the fiscal stability of the recipient and on its ability to continue to operate; and (9) The impact that a reduction in LSC funding will have on other funding sources upon which the recipient relies to support its operations."[1]

An opportunity to appeal should be provided, under basic due process precepts, before any significant reduction in funding can be implemented, even if that amount is 4.9% instead of 5.1%. Ideally, the same process (as described in current Parts 1606.6 through 1606.10) would be used for reductions in funding of less than and greater than 5%. To accomplish this, proposed Part 1606.15 could be eliminated, and appropriate references to limited reductions in funding could be inserted in Parts 1606.6 through 1606.10. Alternatively, if there is a need to streamline at least the initial stages of an under-5% reduction, proposed 1606.15 could be retained with slight modifications. Specifically, proposed 1606.15 (g) could be modified so that the last sentence substitutes for the word "decide" the words "issue a preliminary determination," and an additional paragraph could be added stating: "(h) The recipient may request a hearing in accordance with Section 1606.8 of this Part within 30 days of receipt of the preliminary determination, and may pursue further appeals of a limited reduction in funding in accordance with Sections 1606.9 and 1606.10 of this Part. If the recipient does not request a hearing within 30 days of receipt of a preliminary determination, the limited reduction in funding will become effective at the conclusion of that period."

As noted under General Observations above, the proposed amendments permit imposition of a relatively lengthy, and potentially crippling, period of funding suspension without assuring that LSC has obtained a full understanding of the recipient's environment, or the impact that such a suspension may have. The proposed amendments do not assure that such lengthy suspensions are only precipitated by bad faith actions. Therefore, we propose that:

Part 1623.2(a) be modified to read: "Knowing and willful means that the recipient had actual knowledge of the fact that its action or lack thereof constituted a violation and despite such knowledge, undertook or failed to undertake the action. A recipient will not be considered to have acted in a knowing and willful manner when it has relied in good faith on a reasonable interpretation of state or federal law as a basis for its action of lack thereof."

Part 1623.3 (a) be modified to read: "Financial assistance provided to a recipient may be

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1. Alternatively, perhaps it would be more logical to instead add a new § 1606.3(c) containing language similar to this proffered underlined text.

suspended when the Corporation determines that there has been a substantial, knowing and willful violation by the recipient…"

A new subsection should be added to Part 1623.3 to guide the inquiry into the length of suspension that can be imposed. We suggest addition of Part 1623.3(d) to read: "The length of a suspension of funding will be based on consideration of (1) The number of restrictions or requirements violated; (2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement; (3) The extent to which the violation is an isolated event or part of a pattern of noncompliance with LSC requirements or restrictions; (4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; (5) The extent to which the recipient has taken action to cure the violation and remedy any harm caused by its actions; (6) The availability of other funds to the recipient; (7) The impact that a suspension of funding will have on the recipient's ability to fulfill its ethical obligations to service existing clients; (8) The impact that a suspension of funding will have on the fiscal stability of the recipient and on its ability to continue to operate; and (9) The impact that a suspension of LSC funding will have on other funding sources or banking arrangements upon which the recipient relies to support its operations."

Because a suspension of funding that exceeds 30 days could easily prove to be extremely disruptive to client services, and completely crippling for a recipient's operations, the process by which a recipient may challenge such a suspension provided in current Part 1623 is inadequate. We therefore propose that Part 1623, similar to Part 1606, should provide for an appeals process that assures an intermediate level of review beyond the responsible LSC program officer, and a final review by the LSC President, prior to any imposition of funding of greater than 30 days. We do not set forth a detailed proposal in this regard; we suggest that a three-level review/due process procedure similar to that described in Parts 1606.6 through 1606.10 would be appropriate.

Conclusion

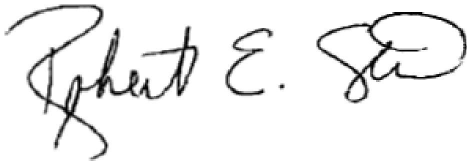
In considering these regulatory changes, we ask the Corporation to be mindful of the difficult environment in which the entire legal aid network is currently operating. Resources to support state and local legal aid providers continue to decline in virtually every category. The population of eligible clients has grown substantially. LSC basic field grants were reduced by 14.8% in FY2012. Many recipients have been forced to significantly reduce staffing and client services. The principal supplementary source of legal aid funding has been state Interest on Lawyers' Trust Account (IOLTA) programs. The most recent statistics show that IOLTA grants for legal services have declined by almost 50% between 2008 and 2010. Compounding matters even further, funding provided by state appropriations and similar sources has declined sharply in many jurisdictions. Given the financial difficulties and uncertainties that legal aid providers already must confront, LSC should avoid creating a structure for additional grantor sanctions that places providers and their clients in unnecessary jeopardy.

The ABA appreciates the opportunity to submit these comments. They are offered with the

intention of collaborating with LSC so that a regulatory framework emerges that provides for accountability for the federal funds that LSC is privileged to administer, and at the same time avoids disruption of the important and fragile national infrastructure of local legal aid programs that stand between those in poverty and injustice.

We would be happy to discuss these comments or other aspects of the rule with you.

Sincerely,



Robert E. Stein, Chair
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