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Via e-mail at: [SubgrantRulemaking@lsc.gov](mailto:SubgrantRulemaking@lsc.gov)

Re: Comments on Proposed Revisions to Part 1627 – Subgrants

Dear Ms. Davis,

The American Bar Association, through its Standing Committee on Legal Aid and Indigent Defendants (SCLAID) submits these comments regarding LSC's proposed revisions to Part 1627 addressing subgrants.<sup>1</sup>

### **I. Subgrant Threshold for Private Attorney Agreements**

In the preamble to the proposed revisions at 80 Fed. Reg. 21695 (April 20, 2015), LSC specifically requests comments regarding whether it should amend Part 1627.2(d)(2) regarding the \$25,000 threshold over which a private attorney involvement (PAI) contract supported with LSC funds is considered a subgrant, thereby triggering the various requirements of Part 1627. LSC also requested that if an amendment is suggested, a specific amount be recommended, as well as the justification for that amount.

The threshold described above has been in effect since 1983. It is presumed that those who promulgated this threshold amount believed it to be a reasonable amount at that time. To determine what would be a reasonable threshold in today's dollars, the best approach is to apply the U.S. Bureau of Labor Statistics Inflation Calculator to the 1983 figure. Doing so provides an amount of \$59,387.30.<sup>2</sup> Given this dollar amount and the likelihood that LSC will not be updating this figure every year, the ABA recommends that the threshold be revised to a minimum of \$60,000.

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<sup>1</sup> Neither these comments nor the decision to file them should be interpreted to reflect the views of any judicial member of the American Bar Association. No judicial member has participated in the adoption of or endorsement of the positions set forth in these comments.

<sup>2</sup> Go to [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) to view and apply the calculator.

## **II. Subgrants and the Use of Recipients' Facilities and Other Resources**

An area of concern for the ABA, given its likely impact on bar sponsored pro bono programs, is proposed Part 1627.3(c). Specifically, that provision would have the effect of preventing a recipient from permitting another entity, such as a bar sponsored pro bono program, to use the recipient's facilities or other resources at no charge in exchange for carrying out PAI activities. LSC explained in the preamble to the revisions its rationale for this change in policy:

LSC has learned that some recipients have entered into agreements with other entities in which the recipients provided goods, including office space and office supplies, in exchange for the other entities' carrying out PAI activities on behalf of the recipient. The recipients in question did not seek prior approval of these agreements because they were exchanges of goods and services, rather than funds; therefore, the recipients did not consider the arrangements to be subgrants subject to the requirements of part 1627.

As an organization responsible for disbursing and ensuring accountability for the use of appropriated public funds, LSC must be able to determine that any funds it awards are spent consistent with the terms of its governing statutes and regulations. It is difficult to ensure that goods and services, which may be purchased in whole or in part with LSC funds, transferred to a third party are used in a manner consistent with LSC's governing statutes. Ensuring the accountability of LSC-supported resources is particularly crucial when the resources are provided to a third party that conducts restricted activities in addition to the activities that it is carrying out on behalf of an LSC recipient. In order to ensure the proper use of LSC funds by any entity receiving those funds or resources supported by those funds, LSC believes that any arrangement qualifying as a subgrant under § 1627.3(b) must be paid for with actual funds and not with goods or services.<sup>3</sup>

In new proposed Part 1627.3(b), LSC has provided factors that recipients should consider in determining whether a potential arrangement is a subgrant and thus requires the recipient to support the arrangement with funds. This new regulation also makes clear that not all the factors need to be present in all cases and that the recipient must exercise its judgment in determining whether a subgrant contract is required. The specific factors to be considered in determining if a subgrant is required include whether the non-LSC entity: determines who is eligible to receive legal assistance; has responsibility for programmatic decisionmaking; and will be carrying out a program for a public purpose specified in LSC's governing statutes and regulations rather than providing goods or services for the benefit of the recipient.<sup>4</sup>

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<sup>3</sup> 80 Fed. Reg. 21696 (April 20, 2015)

<sup>4</sup> 45 CFR Part 1416(b)

Based on these proposed factors, it is apparent that a bar sponsored pro bono program will no longer be able use a recipient's facilities unless it enters into a subgrant and then pays funds back to the recipient as rent. This is the case because as an independent pro bono program, it would determine eligibility, have responsibility for programmatic decision making and would not be providing goods or services to the LSC recipient.

This proposed approach is inconsistent with the PAI Regulation at 45 CFR 1614.4(b), which expressly authorizes recipients to allocate costs for support of allowable PAI activities to their PAI obligation, including.... "*use of recipient facilities, libraries, computer assisted legal research systems or other resources.*" This provision has been in effect for many years and was not changed when the entire PAI regulatory scheme was subject to revision and enhancement just last year.

In the *Report of the Pro Bono Task Force*, LSC recognized the important role of the organized bar in encouraging, supporting and celebrating pro bono efforts.<sup>5</sup> LSC has encouraged its recipients to collaborate and coordinate with the organized bar in these efforts to engage the private bar. The ABA is concerned that these collaborative relationships that have been established with bar associations whose pro bono programs have been housed at a recipient's office for years could be greatly harmed by requiring that the pro bono program now enter into a subgrant arrangement. However, the ABA does recognize that LSC must ensure that its funds are being used consistent with its governing statutes and regulations. As a result, we suggest an alternative to address the problem that LSC has identified.

The ABA recommends that consistent with Part 1614.4(b), LSC permit the use of a recipient's facilities and other resources by another entity, but that the Corporation develop a new form agreement crafted for use by the recipient and the entity when these arrangements exist. Specifically, the entity would agree in writing to those terms in the current subgrant agreement that address the applicability of the LSC statutes, regulations and priorities to the entity's activities conducted while using the recipient's facilities and other resources. The recipient would be responsible for ensuring that the terms of the agreement are met, just as they are for other agreements that they enter into.

To require a bar sponsored pro bono program or other entity to enter into a subgrant and then return some of the subgrant funds to the recipient for rent would be an overly burdensome and unnecessary process, and could harm long established relationships between recipients and their local bar associations. By adopting the ABA's suggested approach instead, LSC can avoid these problems yet still obtain assurance that only LSC eligible individuals will be assisted regarding permissible matters and activities while the recipient's facilities or other resources are in use.

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<sup>5</sup> See Executive Summary of the Task Force Report at <http://www.lsc.gov/executive-summary>

*Ms. Stephanie Davis*

*June 8, 2015*

*Page 4*

The ABA appreciates the opportunity to present these comments.

Sincerely,



Lisa C. Wood

cc: William C. Hubbard, ABA President