REVISED COMMENTS ON PROPOSED REVISIONS TO PART 1621 OF THE LSC REGULATIONS

CLIENT GRIEVANCE PROCEDURES

SUBMITTED BY THE CENTER FOR LAW & SOCIAL POLICY ON BEHALF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

DECEMBER 18, 2006

These comments are submitted to the Legal Services Corporation (LSC) by the Center for Law & Social Policy (CLASP) on behalf of the National Legal Aid and Defender Association (NLADA). They have been considered by NLADA's Civil Policy Group and the Client Policy Group. NLADA is a membership organization that represents civil legal aid programs, including those funded by LSC. CLASP serves as counsel to NLADA and its civil members.

On Monday, August 21, 2006, LSC published a Notice of Proposed Rulemaking (NPRM) to revise Part 1621 of the LSC Regulations, dealing with Client Grievance Procedures. The NPRM sought comments on the proposal to amend the rule. Comments were due on September 20, 2006. The LSC Board was scheduled to consider a draft final rule at its meeting on October 27-28, 2006. Because of concerns expressed by the NLADA Client Policy Group and other client representatives, NLADA requested that LSC defer consideration of the final rule until its January meeting and to reopen the comment period for an additional 45 days to give the client community additional time to respond to the proposed changes in the rule. On November 7, 2007, LSC published a notice reopening the comment period for Part 1621 for an additional 45 days. Comments are due on December 22, 2006. In response to that notice and, consistent with concerns expressed by representatives of the client community over proposed revisions to the Purpose Section of the proposed rule, NLADA submits this revised comment.

The NPRM proposes relatively modest changes to the rule itself, but includes in the preamble (Supplementary Information) some helpful guidance to programs about the purpose of the regulation and how best to implement it, given the changes in the legal services delivery system in the 19 years since the rule was first published. The preamble also includes a history of the rulemaking process and a detailed discussion of the numerous issues that were raised as part of the two Rulemaking Workshops that LSC convened earlier this year to consider concerns that had arisen under the current rule. The preamble seeks comments on several specific issues that were raised during the Rulemaking Workshops or are reflected in the proposed revisions.

This comment addresses the specific changes that are proposed in the NPRM and those that are raised in the preamble, as well as a few overall concerns that we suggest that LSC should address in the preamble to the final rule. We are generally supportive of the proposed revisions. Prior to the publication of the NPRM we had an opportunity to make suggestions to the LSC staff on the language of the draft that was presented to the LSC Operations and Regulations Committee and Board, and we appreciate that the LSC staff adopted a number of those suggestions when it published this NPRM. We will not address those items that LSC has already incorporated into the NPRM. We have a few additional concerns that we address in the comment.

The current version of Part 1621 has been in effect since 1977 and has provided helpful guidance to LSC grantees. Nevertheless, we wish to caution that both the current rule and the NPRM do not address two significant concerns, and we hope that LSC will consider addressing them in the preamble to the final regulation. First, it should be noted that individual case acceptance decisions and staff supervision are not Board functions, and recipient Board members who are members of the client grievance committee required under the rule should not be involved in the recipient's day-to-day operations, nor should they be encouraged or permitted to second guess program management decisions or the professional judgment of staff under the guise of encouraging accountability and good communication between recipients and applicants or clients. Second, when board members try to help individual clients who have disputes with the recipient, there may be potential conflicts between Board members acting as client advocates and their fiduciary obligations to the program on whose Board they sit. This may be particularly true when a client complaint makes substantive allegations of professional misconduct against the recipient that could constitute malpractice, illegal discrimination or other serious substantive allegations.

Section 1621.1—Purpose: The NPRM substantially revises the "Purpose" section of Part 1621, removing the reference in the current rule to "providing an effective remedy" for persons who believe they have been improperly denied legal assistance or who are dissatisfied with the assistance they received. In LSC's view, the rule itself provides no remedy, only a process to address complaints. Representatives of the client community believe that by removing the reference to "remedy," LSC is undermining the purpose of the rule which is to ensure accountability to the client community and to provide applicants and clients with an effective method to resolve their complaints about a recipient's failure to provide legal assistance or the quality of legal assistance provided. While the NPRM maintains the reference to "accountability," the intent of the revision was to clarify that the rule only requires accountability to applicants for service and clients, and not to third parties who may have a complaint against an LSC grantee. Therefore, consistent with the views of the representatives of the client community, NLADA urges LSC to retain the current language of §1621.1 without change.

LSC specifically invited comment on whether the rule should include a clarifying statement indicating that the client grievance procedure is not intended to create any entitlement to legal services for applicants for service. Such a statement was included in a prior NPRM for Part 1621 that was published, but never finalized, in 1994. In September 2005, when LSC revised Part 1611 on Financial Eligibility, it included a provision in the purpose section of that rule that stated "[t]his part is not intended to and does not create any entitlement to services for persons deemed financially eligible." In the NPRM, LSC concluded that such a statement would not be useful to include in Part 1621 because it is unlikely that applicants for service will have read the regulation prior to applying for legal assistance and as such, such a statement would be an unnecessary addition. Nevertheless, in the draft final proposed rule that was distributed prior to the October Board meeting, LSC indicated that, in response to several comments that it had received, LSC Management was changing its view and was including a statement in §1621.1 indicating that Part 1621 was not intended to create any entitlement to legal services.

As we said in our prior version of this comment, we believe that LSC should not include a statement in Part 1621 regarding entitlement to legal services. In Part 1611, LSC has already acknowledged that financial eligibility does not guaranty an entitlement to legal assistance, and representatives of the client do not believe it is necessary or appropriate to repeat this statement in Part 1621. Clients believe that by including this statement in §1621.1, LSC would be undermining efforts that are being made by the ABA and others to create a civil right to counsel and to close the "justice gap" that LSC has documented.

Section 1621.2—Grievance Committee: LSC is not proposing any changes to this section which sets out the composition of a program board grievance committee that is intended to hear client grievances that cannot be resolved by the program staff, executive director or designee. We agree with the decision to leave this section as it is in the current rule, but urge LSC to add discussion in the preamble to the final rule concerning possible conflicts of interest by Board members who serve on the grievance committee and the need to clarify the role of the board members with regard to program operations, as discussed above.

Section 1621.3—Complaints by Applicants About Denial of Legal Assistance: The NPRM has changed the order in which this section and the next section appear in the rule, to present them in a more logical sequence and to emphasize that most of the complaints that programs receive are from applicants for service who are denied assistance, rather than from clients who are complaining about the manner or quality of assistance that they actually receive. The NPRM also makes some minor changes in the title and the text to emphasize that this provision is only intended to apply to complaints by actual applicants who are denied service, and not to complaints by third parties. We

support these changes. We would also suggest that the preamble to the final rule add language that indicates that complaints should be handled promptly and that every effort should be made to resolve routine complaints at the staff level rather than involving the board grievance committee.

The NPRM deletes language which appears in the current rule that limits complaints about denial of assistance to those based on financial eligibility, prohibitions under the LSC Act or regulations or program priorities. The NPRM acknowledges that applicants are denied for other legitimate reasons such as lack of program resources, application of program case acceptance guidelines or determinations about the merits of an applicant's case, and that the complaint procedure should be available to an applicant regardless of the reason that service was denied. We agree with this change, and we believe that most programs now make their complaint procedures available to all applicants who have been denied service.

The NPRM clarifies that the phrase "adequate notice" refers to notice of the complaint procedure. We agree with LSC that the current rule's use of the term "adequate notice" is vague and should be clarified. LSC also proposes to add the phrase "as practicable," but we are concerned that the language in the NPRM is somewhat awkward and might cause additional confusion. We believe that it might be better to say that "The procedure shall provide the applicant with adequate notice, to the extent practicable, of the recipient's complaint procedure…."

The NPRM also adds a statement that the required complaint "… procedure must be designed to foster effective communications between the recipient and the complaining applicants." We agree with the addition of this statement, although we think it would be preferable to use the word "shall" rather than "must" in order to be consistent with the remainder of the rule, which does not use the term "must" anywhere else. By using a "must" in this section, where "shall" is used elsewhere, suggests that there is a different meaning intended.

Section 1621.4—Complaints by Clients About Manner or Quality of Legal Assistance: Consistent with the changes in §1621.3, there are minor revisions in the title and text that are made to emphasize that this provision is only intended to apply to complaints by actual clients, and not to complaints by third parties. Language has been added to require that the "… procedures shall be designed to foster effective communications between the recipient and the complaining client (§1621.4(b)). We agree with these changes.

The NPRM is proposing to revise the time frame for when a client must be informed of the complaint procedure. Under the current rule, the client must be informed of the procedure "at the time of the initial visit." There are more and more instances when a client actually does not physically "visit" the program that is providing assistance, as when assistance is provided over the telephone or

through the internet. In addition, an applicant may not be "accepted" as a client at the initial visit, even when that is in a face-to-face encounter. Therefore, LSC has revised the language to require that the client should be provided with adequate notice of the complaint procedure and how to make a complaint "at the time the person is accepted as a client or as soon thereafter as practicable." We agree that this is preferable to the language of the current rule.

The final change proposed in the NPRM is to include a requirement that the grievance procedures provide some method to review complaints by clients about the manner or quality of service provided by private attorneys pursuant to the recipient's PAI program (§1621.4(c)). This change was originally proposed as part of the 1994 revisions that were never finalized. The preamble makes it clear that the rule does not require that the program use the same procedure for complaints about PAI attorneys as it does for complaints about service provided by program staff, recognizing that to do so could be administratively burdensome for programs and could impede the program's ability to recruit private attorneys. We support this provision. In addition, however, we believe that the preamble to the rule should make it clear that the recipient should be aware of the state bar's grievance procedures and should be familiar with the circumstances under which the client may have a substantive claim against the private attorney and the recipient should refer the client to the bar's grievance process, or possibly to independent counsel, rather than attempting to resolve the situation by itself.

The NPRM does not propose any changes to the final provision of the current rule, §1621.4(d), requiring that the program maintain "a file containing every complaint and a statement of its disposition…for examination by LSC." However, we believe that it is important for the rule to clarify that the file that is required by this provision applies only to complaints about the manner or quality of legal assistance, and does not require the recipient to keep a file regarding every complaint about a denial of legal assistance. Under the organization of the current rule it is clear that this provision only applies to manner and quality complaints because it is at the end of what is currently §1621.3, prior to current §1621.4. With the reversal of §§1621.3 and 4 in the NPRM, this requirement is now placed at the end of the rule, and we are concerned that this placement might cause some confusion. We think that it needs to be made absolutely clear that this requirement only applies to the complaints about manner and quality of assistance and not denial of legal assistance.

There is no requirement in either the current rule or the NPRM for a written record of complaints about denials of legal assistance, most of which are resolved informally at the staff level. In contrast, the section on complaints about manner or quality of legal assistance, §1621.4 (b)(3), provides for a client to submit a written statement or for the program to transcribe a client's oral statement "for inclusion in the recipient's complaint file" and §1621.4(d) says that "the file shall include any written statement submitted by the complainant or transcribed by the recipient from a complainant's oral statement." We believe

that §1621.4(d) of the rule should be revised to make it clear that the section applies only to complaints about manner or quality of legal assistance that have been considered by the Board grievance committee. Either the rule or the preamble should clarify that files are only required for those complaints not resolved informally by the staff, by the executive director or the executive director's designee, and that the rule does not require, as a matter of compliance, recipients to keep a separate file for complaints about denial of service.

If you have any questions about these comments, please feel free to contact our counsel, Linda Perle, at 202-906-8002 or lperle@clasp.org.