

Colorado Legal Services

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September 19, 2006

Mattie Cohan
Senior Assistant General Counsel
Office of Legal Affairs
Legal Services Corporation
3333 K St., NW
Washington, DC 20007
VIA EMAIL AND MAIL

Re: Comments on Proposed Revisions to
Rule 45 CFR Part 1621
Client Grievance Procedure

Dear Ms. Cohan:

Colorado Legal Services (CLS) submits the following comments on the proposed revisions to the Rule on Client Grievance Procedure published in the Federal Register on August 21, 2006. Colorado Legal Services is generally supportive of the proposed changes to the Rule and the helpful guidance to programs provided in the significantly revised Preamble (Supplementary Information) to the Notice of Proposed Rulemaking, (NPRM).

As Chair of the Board of Directors of Colorado Legal Services for a number of years, it is my belief and that of the Board that it should adopt program policies and directions and should not become involved in the day to day operations of the program, specific case acceptance decisions or in the daily supervision of staff. The Board is also aware of its fiduciary duties and duties of loyalty and care and, therefore, the Board members need, when serving on a Client Grievance Committee, to be careful not to put the interests of any individual applicant for services or client, who may have a dispute with the program, in conflict with the duties of the Board and its members. This, of course, is particularly true if a client alleges serious issues of program performance in its provision of legal representation. It is submitted that these overriding and important issues should be addressed clearly in the Preamble to the Rule.

Colorado Legal Services supports the revisions to the Purpose Section, 1621.1, which removes the reference in the current Rule to "providing an effective remedy" for those who believe they have been improperly denied legal assistance or who are dissatisfied with the assistance provided since the Rule provides only for a process to address complaints and implies

no specific remedy. It is also helpful that the proposed Rule clarifies that the process only applies to applicants for services and clients and not to third parties who may have a complaint against an LSC funded program. Colorado Legal Services supports these proposed revisions.

The NPRM invites comments on whether the Rule should include a statement specifically stating that the Client Grievance Procedure is not intended to create any entitlement to legal services for applicants of service. Colorado Legal Services believes strongly that such a statement should be included in the Rule. It is unfortunate that such a statement is necessary. Colorado Legal Services, its Board and staff, wishes that a clear statement was not necessary. CLS supports the American Bar Association's recent Resolution adopted by the House of Delegates providing that "...states, territories and federal jurisdictions should provide counsel as a matter of right at public expense to all low income persons in adversarial proceedings where basic human needs are at stake." Access to competent legal assistance, when necessary in civil matters, should be an entitlement. We are far from that goal, however. The Legal Services Corporation itself, in its Report *Documenting the Justice Gap in America*, found that for every individual helped by a Legal Services Corporation grantee that at least one person in need of assistance is turned away. Thus, we are far from providing a lawyer for everyone in need. As a matter of fact, it is the experience of Colorado Legal Services that few complaints about the denial of service are based on questions of financial eligibility or even whether the requested assistance is within the program's priorities. Most often, applicants for service are denied assistance and raise issues and complaints because program staff have found that the applicant's case lacks merit, or even more frequently because the program simply lacks the resources necessary to provide the requested assistance. It would be most helpful in explaining and handling complaints and grievances related to the denial of assistance for the Rule to recognize, reflect and state the reality that, despite our aspirations, access to representation is not an entitlement or a matter of right, and that difficult and unfortunate decisions to deny service must be made and are acknowledged and contemplated in the LSC Rule on the Client Grievance Process itself. The addition of language specifying that there is no entitlement to legal services would be very helpful and is appropriate.

The proposed Rule does not change the current language concerning the composition of the Client Grievance Committee. While there should be discussion in the Preamble cautioning Committees and Boards of Directors of the need to be clear about their roles and to avoid potential conflicts and possible breach of Board member's fiduciary duties and duties of loyalty and care, Colorado Legal Services supports the language of the Rule as proposed.

Colorado Legal Services supports the change in the order and sequence in which the Sections of the Rule appear and supports addressing complaints from applicants for service who are denied assistance before addressing the process for clients who may have a complaint about the manner or quality of assistance (reversing the order of the current Rule). Colorado Legal Services also supports the changes in the title and the text emphasizing that the grievance process is intended to apply only to complaints by actual applicants who are denied service and not to complaints by third parties. Colorado Legal Services also supports the addition of the language to revise the current Rule that by its language has limited complaints concerning the denial of assistance to those based on financial eligibility, prohibitions under the Legal Services

Corporation Act or regulations or program priorities. As stated above, the Rule as proposed would acknowledge the reality that applicants are denied for other reasons, in fact, more frequently including the application of program case acceptance guidelines, determinations about the merits of an applicant's case or the program's lack of resources necessary to provide assistance. This proposed change is appropriate and helpful.

The proposed clarification of the phrase "adequate notice" in Section 1621.3 does not sufficiently clarify that the notice to applicants for services refers to the complaint procedure itself, and care should be taken that the actual language of the revision actually clarifies that to which "adequate notice" applies and conforms to the intended purpose of the provision of the Rule.

Colorado Legal Services is concerned, not with the intent, but with the mandatory and proscriptive requirement that the "...procedure must be designed to foster effective communications between the recipient and the complaining applicants." While we fully support the intent to foster effective communications with clients and CLS makes serious effort to do so, it is nonetheless a subjective requirement that the procedure be "designed to foster effective communications..." CLS believes, therefore, in that because we will be unable to determine whether the process we adopt meets or falls short of the standard that the proposed Rule be modified to state the program "should" rather than "must" design its process to foster effective communication. Laudatory goals do not obviate the need that mandates in Rules allow programs to know what will or will not comply with the required standard. The Rule as proposed does not meet that test. Even were LSC to disagree with this recommendation and maintain the mandatory standard that is ill defined and subjective, the use of the word "must," when all other provisions in the Rule use the word "shall," is not helpful. Use of a different term in this one provision might erroneously imply some different meaning and, for consistency within the Rule, the word "must" should be changed to "shall."

Similarly, CLS believes that the language in 1621.4 requiring that "the procedure shall be designed to foster effective communication between the recipient and the complaining client" be changed to "should" for the same reason detailed above. Despite its unassailable intent, a change to "should", given the provision's ambiguity and aspirational nature, is appropriate.

The proposed revision requiring that the applicant for service and then client be provided adequate notice of the complaint procedure "at the time the person is accepted as a client or as soon thereafter as possible" is a helpful and an appropriate change to the current Rule, although as soon thereafter as "practical" is somewhat more realistic than as "soon thereafter as possible" and that change in the single word is recommended.

The requirement for some procedure for reviewing complaints by clients concerning the performance of a Private Attorney Involvement (PAI) attorney, although possibly different or even abbreviated process, should be adopted only with great care. Such a requirement may prove difficult and even counterproductive to a program's efforts to recruit and retain private attorneys to help with the important work of providing legal assistance to the poor. There are certainly adequate remedies within each State's grievance procedures to address substandard performance


and deviations from the accepted standards of practice. The program has determined the client's eligibility and need for services. Putting the program between the client and the private attorney may prove difficult at best and a source of great controversy at worst. Therefore, Colorado Legal Services requests that LSC seriously reconsider this provision and take great care and solicit specific input from the Pro Bono Committee of the American Bar Association and state and local bar committees on the possible impact of this proposed provision on PAI efforts prior to its adoption.

Finally, while the NPRM does not propose changes to the provision of the current Rule, Section 1621.4 (d) requiring that the program maintain "a file containing every complaint and a statement of its disposition" given the change in sequence of the provisions on the grievance process concerning denials of assistance and complaints as to the quality of the assistance provided, the Rule should be clarified to make absolutely clear that the file requirement applies only to complaints about the manner or quality of legal assistance and does not require the recipient to keep a file concerning every complaint about a denial of legal assistance. This is probably implied by the provisions inclusion only in Section 1621.4 but it should be made clear. A requirement to keep a full record of all questions raised about the denial of assistance would be unwieldy and unnecessary. The current Rule makes this clear, but given the change in sequence, the Rule should be modified to clarify that the requirement applies only to complaints about the manner or quality of legal assistance and not to the far more voluminous and almost always informally resolved complaints about denials of legal assistance.

Colorado Legal Services appreciates the Legal Services Corporation's serious consideration of these comments and looks forward to the adoption of a revised and improved Rule consistent with these comments.

If I or Colorado Legal Services can be of any further assistance in the consideration of the Rule, I and the Board and staff of Colorado Legal Services would be pleased to be available to you.

Sincerely,



Daniel A. Vigil
Chair, Board of Directors

DAV/ccg