





OFFICE OF LEGAL AFFAIRS

MEMORANDUM

TO: Operations & Regulations Committee

THROUGH: Helaine M. Barnett 
President

FROM: Victor M. Fortuno 
Vice President and General Counsel

DATE: January 9, 2007

SUBJECT: Staff Report on 45 CFR Part 1621 (Client Grievance Procedures) Draft
Final Rule

Introduction

On October 29, 2005, the Board of Directors directed that the Legal Services Corporation (“LSC”) initiate a rulemaking to consider revisions to LSC’s regulation on client grievance procedures, 45 CFR Part 1621 (hereinafter “Part 1621”). Pursuant to the Board’s direction, Management convened Rulemaking Workshops on January 18, 2006 and March 23, 2006, and LSC staff provided a report to the Committee at its meeting on April 28, 2006. As a result of the Workshops and report to the Committee, the Board directed that a draft Notice of Proposed Rulemaking (“NPRM”) be prepared. The Committee considered the draft at its meeting of July 28, 2006 and the Board approved the NPRM for publication and comment at its meeting of July 29, 2006. LSC published the NPRM on August 21, 2006, and comments were due to LSC on September 20, 2006. LSC received five timely comments on the NPRM.

A Draft Final Rule was prepared by Management for presentation to the Committee at its October 27, 2006, meeting. Prior to that meeting, however, LSC received a request from the National Legal Aid and Defender Association (“NLADA”) that LSC postpone consideration of the Draft Final Rule and reopen the comment period to allow the client community additional time to respond to the proposed changes in the rule. In response to that request, action on the Draft Final Rule was deferred and the NPRM was republished for comment on November 7, 2006 (71 Fed. Reg. 65064). LSC received three timely additional comments, one from the client caucus of an LSC grantee, one from the client committee of a non-LSC grantee legal services provider, and one from the Center for Law and Social Policy (“CLASP”), replacing CLASP/NLADA’s previously submitted comments. LSC also received two late filed comments, one from an individual past client of a recipient and one from the Chairperson of the NLADA Client Policy Group.¹

¹ The comments from the Chairperson of the NLADA Client Policy Group although dated December 21, 2006 (prior to the close of the comment period) were not submitted properly in accordance with the directions set forth in

This memorandum provides a brief summary of the comments on the NPRM and Management's response to the comments. A complete discussion of each of the comments is found in the preamble to the Draft Final Rule. A copy of the Draft Final Rule, along with a redlined version showing Management's proposed changes to the regulation (compared with both the existing rule and the NPRM regulatory text) is appended hereto for the Committee's consideration.

Summary of the Draft Final Rule

Management is proposing only modest changes to the regulation but believes that these changes will improve the utility of the regulation for LSC, its grantees, and their clients and applicants for legal assistance. For your reference, the regulatory text presented in this Draft Final Rule differs from the regulatory text proposed in the Draft Final Rule that was presented to you in October in two respects. First, Management is no longer proposing in this Draft Final Rule to include a provision in the regulation stating that Part 1621 does not create any entitlement to service. Second, Management has included in this Draft Final Rule to add a sentence to the purpose section that Part 1621 is intended to foster mutually satisfactory resolution of complaints. These changes were made in response to the additional comments received after republication of the NPRM and are discussed at greater length below and in the preamble to the Draft Final Rule.

Section 1621.1 – Purpose

The NPRM proposed to amend this section to clarify that the grievance procedures required by this section are intended for the use and benefit of applicants for legal assistance and for clients of recipients and not for the use or benefit of third parties. No commenters opposed this change and Management recommends its adoption. The NPRM also proposed to delete the reference to "an effective remedy" because the grievance process is just that, a process, and not a guarantee of any specific outcome or "remedy" for the complainant. LSC received three comments specifically supporting and three comments specifically opposing this change. The comments opposing the proposed change (all of which are from client representative groups) stated that removal of the reference to an effective remedy undermines the purpose of the rule and suggests that so long as the recipient provides a grievance process, the outcome to the client in cases in which the client has a meritorious complaint is immaterial. Both of those comments suggested that LSC retain the current language of the rule.

Management continues to recommend deleting the reference to an "effective remedy" as proposed. However, Management also recommends adding an additional sentence to this section providing "This part is further intended to help ensure that the grievance procedures adopted by recipients will result, to the extent possible, in the mutually satisfactory resolution of complaints." Management believes that the addition of this language meets the commenters' concerns that grievance procedures should be designed and implemented with the intention of

the NPRM and were, consequently, received late. The late filed comments were nonetheless considered in the development of this Final Rule.

resolving complaints to at least some level of satisfaction of the complainant in as many cases as possible. Adding this clarifying language to the regulation bolsters the notion of accountability to applicants and clients while acknowledging that no specific outcome can be guaranteed in any particular instance.

The NPRM included a discussion in the preamble of whether this section should contain a statement that the client grievance procedure is not intended to and does not create any entitlement on the part of applicants to legal assistance. The NPRM considered addressing this issue in the text of the regulation unnecessary. LSC received comments both supporting and opposing including a non-entitlement to legal assistance statement in the regulation. On balance, Management continues to believe the inclusion of such a statement in the regulation is not necessary. Accordingly, Management has not included a non-entitlement statement in the Draft Final Rule.

Another issue considered in the NPRM was whether this section should address the ancillary use by recipients of the client grievance procedure as a feedback mechanism to help recipients identify issues such as the need for priorities changes, foreign language assistance, staff training, etc. The NPRM considered addressing this issue in the text of the regulation unnecessary. LSC received one comment opposing adding a reference to such ancillary use to the purpose statement of the regulation and management continues to believe that such an action would be inappropriate.

Section 1621.2 - Grievance Committee

The NPRM did not propose any changes to this section. LSC received comments supporting LSC's position on this issue. These commenters did, however, suggest that LSC add a discussion to the preamble to note that although there is a role for each recipient's governing body on the grievance process, it is also important to recognize the limited role of the governing body in the day-to-day operations of the recipient and that governing body members have fiduciary duties to their organization and must be careful, when engaging in any grievance committee activities to safeguard these duties and avoid any potential conflicts of interest. Management has included such a discussion in the Draft Final Rule.

LSC also received one comment suggesting that LSC create a Grievance Committee within LSC to process all client complaints. Management believes that recipient grievance committees are better suited than LSC staff to resolving those few complaints that reach the grievance committees. The Draft Final Rule does not adopt this suggestion.

Section 1621.3 – Complaints by applicants about denial of legal assistance

The NPRM proposed to reorganize the regulation to move the current section dealing with complaints about denial of service to applicants before the section on complaints by clients about the manner or quality of legal assistance provided. LSC received comments supporting the proposed reorganization. Management continues to believe the proposed reorganization will

clarify this matter and make the regulation easier for recipients, their clients and applicants, and LSC to use.

In addition to the proposed reorganization discussed above, the NPRM proposed the following modest substantive changes to the regulation:

- (1) consistent with the proposed change in the purpose section, adding language to the title of this section and the text of the regulation to clarify that this section refers to complaints by applicants about the denial of legal assistance;
- (2) deleting the language which limits complaints about the denial of legal assistance to situations in which the denial was related to the financial ineligibility of the applicant, the fact that legal assistance sought is prohibited by the LSC Act or regulations or lies outside the recipient's priorities;
- (3) clarifying that the phrase "adequate notice" as it is used in this section is adequate notice of the complaint procedures and to add the words "as practicable" after "adequate notice;" and
- (4) adding a statement that the required procedure must be designed to foster effective communications between recipients and complaining applicants.

LSC received comments supporting each of the proposed changes, and Management recommends that these changes be made final. However, several commenters requested additional clarification of the proposed changes relating to "adequate notice." Management believes this section can be clarified and the Draft Final Rule changes the proposed language to provide that the procedure must provide "a method for the recipient to provide applicants with adequate notice of the complaint procedures and how to make a complaint, as practical [. . .]" A similar conforming change of the word "practicable" to practical" is also proposed in the next clause regarding opportunity for applicants to confer with the recipient's governing body's grievance committee.

LSC also received one comment suggesting that the word "should" be substituted for "must" in the proposed statement that the required procedure be designed to foster effective communications. Management believes that a *requirement* that the procedure be designed to foster effective communications is vital and should not be made aspirational and that, as proposed, is not unduly subjective. Accordingly, Management opposed the suggestion to substitute the word "should" for "must." Management does, however, believe a change in this paragraph is warranted. Another commenter suggested the use of the word "shall" for "must" to be consistent with the use of the word "shall" throughout the remainder of the regulation (without implying any substantive change in meaning). Management agrees that "shall" is more appropriate in this context and the Draft Final Rule reflects this change.

Finally, LSC received one comment suggesting that the current language of section 1621.3 is clear and that the changes proposed make the language legalistic. This commenter

suggests retaining the original language. Management believes the language being proposed is clear and that it includes some substantive changes which Management believes improves the utility of the regulation for recipients, applicant and clients. Accordingly, the Draft Final Rule declines to adopt the commenter's suggestion.

Section 1621.4 – Complaints by clients about manner or quality of legal assistance

As noted above, the NPRM proposed to reorganize the regulation to move the current section dealing with complaints about legal assistance provided to clients after the section on complaints by applicants about denial of legal assistance. LSC received comments supporting the proposed reorganization. Management continues to believe the proposed reorganization will clarify this matter and make the regulation easier for recipients, their clients and applicants, and LSC to use.

In addition to the proposed reorganization discussed above, the NPRM proposed the following modest substantive changes to the regulation:

- (1) consistent with the proposed change to the purpose section, adding language to the title of this section and the text of the regulation to clarify that this section refers to complaints by clients about the manner or quality of legal assistance provided;
- (2) amending the time specified in the rule regarding when the client must be informed of the complaint procedures available to clients from “at the time of the initial visit” to “at the time the person is accepted as a client;”
- (3) adding a statement that the required procedure must be designed to foster effective communications between recipients and complaining applicants;
- (4) including an explicit requirement that the grievance procedures provide some method of reviewing complaints by clients about the manner or quality of service provided by private attorneys pursuant to the recipient's private attorney involvement (PAI) program under 45 CFR Part 1614; and
- (5) minor revision of the language which is not intended to create any substantive change to the regulation but, rather, to provide more structural clarity to the regulation.

LSC received comments supporting each of the proposed changes. LSC received two comments suggesting substituting the word “practical” for “possible” as it appears in proposed section 1621.4(b)(1). However, the word “possible” is not used in that subsection. Rather, the NPRM used the word “practicable” in that proposed subsection. While Management believes that the language as proposed already meets the intent of the comments, the use of the word “practical” instead of “practicable” is not likely to cause problems in understanding or applying the rule. Moreover, changing the word “practicable” to “practical” in this section would be consistent with the use of the word “practical” in section 1621.3. Accordingly, the Draft Final Rule reflects this suggested change.

LSC also received one comment suggesting that the word “should” be substituted for “must” in the proposed statement that the required procedure be designed to foster effective communications. Management believes that a *requirement* that the procedure be designed to foster effective communications is vital and should not be made aspirational and that, as proposed, is not unduly subjective. Management is not proposing the adoption of this suggestion.

One commenter urged LSC to adopt a provision requiring recipients to provide a written form setting forth the grievance procedures to clients (either in person, or by mail or fax) at the time the client is accepted for service. Management believes that adopting the commenters suggestion would unnecessarily impinge on recipients’ flexibility to determine exactly how and when notice of the complaint procedures are provided to clients. Accordingly, the Draft Final Rule declines to adopt this suggestion.

One commenter suggested that the provision on PAI attorneys might prove difficult for recipients in private attorney recruitment efforts and urged LSC to refrain from adopting such a provision without first soliciting input from the ABA and state and local bar associations. Management believes that this rulemaking has been going on for more than one year and has been publicly noticed throughout that time. As such, Management sees no reason to delay action on this particular provision. Further, Management is not proposing to require that recipients afford the same procedure as provided to clients being provided service directly by the recipient. Rather, the NPRM explained that it was intended that existing formal and informal methods for review of complaints about PAI attorneys currently meeting recipients’ obligations under Part 1614 continue to be used and would be considered to be sufficient to meet their obligations under this section. After further consideration, however, Management believes that there is a better way to state this requirement. Accordingly, Management proposes that section 1621.4(c) be revised to provide that “[c]omplaints received from clients about the manner or quality of legal assistance that has been rendered by a private attorney pursuant to the recipient’s private attorney involvement program under 45 CFR Part 1614 shall be processed in a manner consistent with its responsibilities under 45 CFR §1614.3(d)(3) and with applicable state or local rules of professional responsibility.” Management believes this language does not create a substantive change in the policy proposed in the NPRM but, instead, states that policy in a clearer, more appropriate manner.

LSC received three other comments addressing proposed section 1621.4. Two of these comments ask LSC to clarify that the requirement in proposed section 1621.4(d) that recipients maintain files of complaints and their disposition applies only to complaints by clients about the manner or quality of legal assistance provided and not to complaints by applicants about the denial of legal assistance. As a matter of basic regulatory interpretation, Management believes that it is clear that a requirement contained in one paragraph of a section applies only to that section and not to any other section in the regulation, absent a statement in the regulation itself to the contrary. The preamble to the Draft Final Rule addresses this issue.

One of these commenters further suggested that either the rule or preamble should make clear that files are required only for complaints that are not resolved informally by staff, the executive director or the executive director's designee and that the requirement should, instead, apply only to complaints that have been considered by the Board's grievance committee. The current requirement found in section 1621.3(c) is not limited in the manner suggested by the commenter. Rather, the current language provides that in cases of complaints by clients about the manner of quality of legal assistance provided "a file containing *every* complaint and a statement of its disposition shall be preserved for examination by the Corporation" (emphasis added). Management does not believe that making such a substantive change in the regulation (as suggested by the commenter) is warranted.

Finally, LSC received one comment suggesting that the current language of section 1621.4 is clear and that the changes proposed make the language legalistic. This commenter suggests retaining the original language. Management believes the language being proposed is clear and that it includes some substantive changes which Management believes improves the utility of the regulation for recipients, applicants and clients. Accordingly, the Draft Final Rule declines to adopt the commenter's suggestion.

Management Recommendation

Management recommends that the Operations and Regulations Committee recommend to the Board of Directors that the Board adopt the attached Draft Final Rule and approve it for publication as final.