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June 16, 2014

President James Sandman
Mr. Reginald Haley
Office of Program Performance
Legal Services Corporation
3333 K Street NW
Washington, D.C. 20007

VIA Email to *LSCGrantAssurances@lsc.gov*

Re: Comments on Proposed Revision to 2015 Grant Assurance Nos. 10 and 11

Dear President Sandman and Mr. Haley:

The Northwest Justice Project (NJP) is the statewide LSC grantee for Washington State, including the Native American and Migrant grants. We submit these comments in regard to the proposed changes to the 2015 Grant Assurances Nos. 10 and 11. The proposed changes appear to compel an LSC grant recipient to waive the opportunity to assert a legitimate claim to non-disclosure of client information under any rule of professional conduct or law applicable in the recipient's service area or risk loss of LSC funding. The proposed revisions create an untenable dilemma for NJP and its attorneys and we urge LSC to maintain the current language of the Grant Assurances.

**Background**

The proposed revisions to the 2015 Grant Assurances change the current exceptions to the case and client records disclosure requirements from those materials that may be properly withheld "due to applicable law or rules", to those protected solely "under Federal law", with specific reference to the "Federal attorney-client privilege."

The stated reason for the change stems from the decisions in *United States of America v. California Rural Legal Assistance, Inc.* 824 F. Supp.2d 31 (D.C.D.C. 2011) and *United States of America v. California Rural Legal Assistance, Inc.,* 722 F.3d 424 (U.S. App. D.C. 2013). Importantly, those cases concern federal court enforcement of a federal subpoena sought by the LSC Office of the Inspector General. In these cases the District Court determined that section 509(h) of the 1996 Appropriations Act, Pub. L 104-134, 110 Stat. 1321m 1321-59, modifies the client protections of the LSC Act, 42 U.S.C. § 2996e(b)(3). The District Court also determined that disclosure of client information did not conflict with

California law as those rules allow lawyers to disclose otherwise protected client information to comply with "other law." Neither court ruled that the LSC Act has no continuing effect or applicability to this issue.

In pertinent part, the LSC Act provides:

> The Corporation shall not, under any provision of this title, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canon of Ethics and the Code of Professional Responsibility of the American Bar Association...*or abrogate as to attorneys in programs assisted under this title the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction.*
>
> 42 U.S.C. § 2996e(b)(3), emphasis added.

This statutory provision generally implements the Statement of Findings and Declaration of Purpose set out by Congress in establishing the Legal Services Corporation in the first instance. See 42 U.S.C. § 2996(6), 88 Stat. 378, Sec. 1001(6) (1977):

> The Congress finds and declares that-
> ...
> (6) attorneys providing legal assistance must have *full freedom to protect the best interests of their clients* in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.
>
> Emphasis added.

As we read the CRLA cases, neither court addressed the above Statement of Findings and Declaration of Purpose and it is impossible to know how the courts deem their decisions to carry out the stated purposes. While the D.C. Circuit Court of Appeals held that a federal subpoena is governed by the federal law on privileges, 722 F.3d at 427, the District Court looked to California law and found no conflict with the federal law, referencing CCPR Discussion paragraph [2] and State Bar Formal Opinions: "Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, *or other law*." 824 F.Supp.2d 42-43.

The District Court and the D.C. Circuit both found that the LSC Act provisions are still applicable to protect LSC recipient attorneys from disclosures that would violate professional obligations, but that nothing in the California rules would prevent enforcement of the federal subpoena against CRLA. 824 F.Supp.2d 42-43; 722 F.3d. at 429. Specifically, the District Court stated:

> "The Court further finds that California state law does not preclude CRLA from disclosing to LSC–OIG any information not covered by Section 509(h). *Respondent and the attorney-intervenors are correct that the LSC Act specifically recognizes the*

> *authority of a state to enforce its own standards of professional responsibility.* However, the Court is not persuaded that California professional responsibility standards *require* non-disclosure of the subpoenaed information in this case. [Citing Rule 3–100 of the California Rules of Professional Conduct and Discussion paragraph [2]] .... Accordingly, the Court finds that disclosing non-privileged confidential client information in response to a duly authorized subpoena is *not inconsistent* with CRLA attorneys' professional responsibilities under state law"
>
> Emphasis added.

Similarly, the D.C. Circuit Court recognized the continuing applicability of the LSC Act protections, but did not "burden" itself with discussing details of differences in state and federal law, finding those differences to be "ultimately irrelevant". 722 F.3d at 427. While the D.C. Circuit upheld the subpoena based on the non-abrogation of states' authority to enforce the standards of professional responsibility, as the District Court noted, the California rules do not provide the protection sought in any event.[1]

**Washington Rules of Professional Conduct**

In substantial contrast, the Washington Rule of Professional Conduct (RPC) 1.6 expressly ***does not*** allow disclosure of client information pursuant to "other law" and ***requires*** non-disclosure absent a court order. See http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc1.06 Washington Rules contain a specific comment that reads:

> [24] Washington has not adopted that portion of Model Rule 1.6(b)(6) permitting a lawyer to reveal information related to the representation to comply with "other law." Washington's omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by "other law," even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court. It is the need for a judicial resolution of such issues that necessitates the omission of "other law" from this Rule.

The Washington Comments further expressly state that in response to a court order compelling disclosure:

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[1] The D.C. Court of Appeals saw some relevance in CRLA's failure to "seek the protection of the ABA Rules"; however, the ABA rules are model rules to be adopted or modified as any state jurisdiction or bar licensing authority sees fit and the ABA has no enforcement authority whatsoever.

> [13] [**Washington revision**] A lawyer may be ordered to reveal information relating to the representation of a client *by a court*. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. *In the event of an adverse ruling, the lawyer must consult with the client* about the possibility of appeal to the extent required by Rule 1.4.[2] Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.
>
> Emphasis added.

At minimum, the Washington rules require a subpoena and court order to reach NJP client information absent a client's informed consent, with the accompanying affirmative obligation of NJP to assert "all non-frivolous claims that the information sought is protected against disclosure by .... other applicable law."

If the appropriations act language in §509(h) bars any and all application of state rules of professional conduct, LSC recipient lawyers are in a no-win situation. This is because subsection (i) of §509 authorizes LSC, monitors, and auditors, including the OIG to disclose client information to "an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation of [a violation] of a rule of professional conduct." Neither the District Court nor the D.C. Circuit Court in the *CRLA* cases discuss subsection (i) or its implications when LSC required disclosures would in fact violate state rules of professional conduct. Even if there would be no violation of federal privilege law when otherwise protected client information is disclosed, direct entanglement occurs should LSC or any monitor, auditor or agent thereof, chooses to report the disclosure violation to the state enforcement authority pursuant to sub-section (i).

LSC has always understood the strictures of the Washington RPCs in this regard, and has consistently accommodated NJP by allowing disclosure of client case information through unique identifiers and staff intermediaries pursuant to established protocols to this effect. LSC has further respected NJP's duty to not disclose client identifying information in the absence of client informed consent. NJP typically obtains client informed consent to disclosure of the §509(h) information through the retainer agreement in extended representation cases. NJP proposes to continue to obtain client informed consent to disclosure through this process, but is constrained from voluntarily waiving the duty of non-disclosure through a Grant Assurance. Should LSC adopt the proposed change and not

[redacted]

**Application of the LSC Grant Assurances to Non-LSC funds**

It is unfair to ask a recipient program in a jurisdiction that is not authorized to do so to waive the requirements of the state Rules of Professional Conduct through a Grant Assurance. A Washington lawyer cannot provide a blanket pre-client consent to disclosure even if such waiver is ultimately required by federal law and may not in good faith waive client protections against disclosure of information absent informed consent. Given that Washington RPC 1.6(b) does allow a Washington lawyer to reveal client information to comply with a court order, the opportunity to assert non-frivolous claims to non-disclosure on behalf of the client is required.

In addition, it is unclear how broad the proposed Grant Assurance change is intended to apply and whether is it intended to be limited to §509(h) required disclosures or to apply more broadly to other client information. Also unclear is the relationship of the waiver of client protections under an LSC Grant Assurance to a recipient's work that is funded by state and other non-LSC funds. A recipient's use of state and other non-federal funds (*e.g.* City, County contracts, State Attorney General Office or private grants), is clearly also subject to state law. See *Linde Thompson Langworthy Kohn & Van Dyke, P.C.,* 5 F.3d 1508 (D.C. Cir. 1993)(as to state claim matters Federal Rule of Evidence 501 mandates the application of state privileges in civil proceedings for which state law applies the rules of decision).[3]

Based on our review of the applicable law, including case decisions, it appears that relevant federal cases only govern the enforcement of a federal subpoena by a federal court to ensure compliance with statutory restrictions on federal funding. The cases do not support compelling a recipient to abrogate state law and rules as a condition of receiving LSC funds absent a federal court subpoena and court order. LSC should not preclude the ability of recipient programs to assert legitimate claims to non-disclosure under applicable state or local law without the opportunity for a judicial determination of what law applies and how.

LSC could accomplish both the general purpose of the Grant Assurances to apply uniform standards to all recipients and avoid the dilemma for any given recipient created by the proposed change by ensuring recipients retain the ability to assert claims to non-disclosure without penalty. One way to do this is by revising Grant Assurance No.10 to provide as follows: "This requirement does not apply to any such materials that may be properly

[3] Fed. Rule of Evidence 501 provides, in pertinent part:
The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

*But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.* Emphasis added.

Similarly, Grant Assurance No. 11 could be revised to read: "Notwithstanding any other Grant Assurance, §1006(b)(3) of the LSC Act, 42 U.S.C. 2996e(b)(3), or any state rule governing professional responsibility, it shall, upon request, provide access to and copies of financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, except for those reports or records that may be properly withheld *under Federal law* governing attorney-client privilege *or other law absent a court order* …. For each record *withheld from disclosure*, it will identify in writing the specific record *or portion thereof* not being provided and the legal justification for not providing the record *or portion thereof*."

We sincerely hope that LSC will consider the significant and untenable implications of the proposed revision to these Grant Assurances. Again, we urge LSC to reconsider this matter in light of these and other comments and to not adopt the changes as proposed. Thank you for the opportunity to comment on the proposed changes to the 2015 LSC Grant Assurances.

Sincerely,

Deborah Perluss

Deborah Perluss
Director of Advocacy/General Counsel

C César E. Torres, Executive Director
Monica Langfeldt, NJP Board President