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LSC

May 26, 2014

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

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

Dear Mr. Haley:

I am writing to comment on proposed revisions to grant assurances 10 and 11 resulting from the litigation involving *United States of America v. California Rural Legal Assistance, Inc.*, hereinafter referred to as *USA v. CRLA*.

As was acknowledged by the court, the LSC Act (in section 1006(b)(3)) provides that LSC shall not "interfere with any attorney in carrying out his professional responsibilities . . . or abrogate . . . the authority of a state or other jurisdiction to enforce the standards of professional responsibility generally applicable to the attorneys in such jurisdiction." Also acknowledged was the modification in 1996 that provides that notwithstanding that language, "financial records, time records, retainer agreements, client trust fund and eligibility records and client names, for each recipient shall be made available to any auditor or monitor of the recipient . . . except for reports or records subject to the attorney-client privilege."

This modification has been the subject of considerable interpretation over the years through both internal/external opinions of LSC and through development of protocols intended to balance the competing interests of the principles delineated in the two sections of the law referenced above. Those competing interests are based on long-established protections afforded to clients to ensure they can and will confide freely in their legal representatives. The rules of professional responsibility apply to the lawyer's conduct while attorney-client privilege attaches to proceedings in which a claim of evidentiary privilege may be made. Such was the case in *USA v. CRLA* where the OIG requested information in response to a complaint against CRLA, found substantial evidence that CRLA violated federal law, and could not make final determinations about the allegations without additional information (which CRLA refused to provide), leading to service of a subpoena. In the context of this proceeding, the application of attorney-client privilege was appropriate, requiring information that may otherwise be protected by professional rules of responsibility to be made available with court oversight on whether certain documents were protected by privilege or not. However, in cases in which there is no suspicion that the program is operating in substantial violation of the law, the rules of professional responsibility should control (unless and until a reasonable suspicion is identified). Such an approach would honor the Congressional finding in section 1001(6) that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the code of Professional

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Responsibility, the Canons of Ethics, and the high standards of the legal profession." (The fact that the 1996 amendments specifically require client names to be disclosed suggests a recognition that the other records could be provided unconnected to the names—otherwise there would be no need to specifically reference those.)

Engaging in this approach allows an appropriate balance of confidential protections afforded to clients and assurance that funds are spent for their intended purpose. It also prevents or reduces the use of precious resources, that are grossly insufficient, to address the overall purpose of providing equal access to the courts, through high quality representation, to vulnerable indigent people. To require programs, as part of regularly scheduled monitoring visits, to review all documents requested in hundreds, and often thousands, of cases to identify purported privileged information would waste an incredible amount of resources in preparation for each visit. It is clear from an examination of the case law necessary to determine the common law "requirements" to establish privilege, that the requisite determination of what constitutes whether a communication is make in confidence for the purposes of obtaining legal help, as was the standard laid out in *Linde v. Thomson*, 5F.3d 1508 and other cases, is murky at best. And, unless a legal action is triggered in each monitoring visit, there is no third party tribunal to resolve disputes regarding what is privileged and what is not. For example, analysis has been undertaken regarding retainer agreements. To the extent the retainer describes general services, there appears to be opinion that no privilege attaches. But LSC requires that retainers "shall clearly identify the matter in which representation is sought and the nature of the legal services to be provided" and the courts have recognized that the combination of a client's name with a description of legal services sought may be privileged. To compound the problem, a recipient attorney who makes the wrong judgment and discloses privileged information is subject to disciplinary action.

In addition to preventing waste of resources, a balanced approach does not place lawyers' licenses at risk nor apply different rules to people who are poor than to people with means. It continues to allow reasonable investigations into alleged improprieties of programs who are fortunate to receive federal tax dollars. In short, all of these interests can be accommodated by following the protocols that LSC has developed to engage in monitoring visits while requiring additional information (protected by privilege) in cases where the OIG has reason to believe improprieties exist. As such, grant assurances 10 and 11 should remain unchanged.

Sincerely,

Kristine E. Knab
Executive Director