



**FINAL REPORT**  
**LEGAL SERVICES CORPORATION**  
**Office of Compliance and Enforcement**

**Dakota Plains Legal Services, Inc.**  
Case Service Report/Case Management System Review

September 14-18, 2009

Recipient No. 742018

## **I. EXECUTIVE SUMMARY**

**Finding 1: Sampled cases evidenced that DPLS' automated case management system (ACMS) is sufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded.**

**Finding 2: DPLS' intake procedures and case management system are in non-compliance with compliance related requirements; additionally, the program is utilizing an outdated income eligibility policy.**

**Finding 3: Sampled cases evidenced that DPLS maintains the income eligibility documentation required by 45 CFR § 1611.4, CSR Handbook (2001 Ed.), ¶ 5.3, CSR Handbook (2008 Ed.), § 5.3, however DPLS' income policy fails to comply with LSC instructions for clients whose income exceed 125% of the Federal Poverty Guidelines (FPG).**

**Finding 4: Sampled cases evidenced that DPLS maintains asset eligibility documentation as required by 45 CFR §§ 1611.3(c) and (d), CSR Handbook (2001 Ed.), ¶ 5.4, and CSR Handbook (2008 Ed.), § 5.4.**

**Finding 5: Sampled cases evidenced compliance with 45 CFR Part 1626 (Restrictions on legal assistance to aliens).**

**Finding 6: Sampled cases evidenced non-compliance with the requirements of 45 CFR § 1611.9 (Retainer agreements).**

**Finding 7: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1636 (Client identity and statement of facts).**

**Finding 8: Sampled cases evidenced compliance with the requirements of 45 CFR § 1620.4 and § 1620.6(c) (Priorities in use of resources).**

**Finding 9: Sampled cases evidenced compliance with CSR Handbook (2001 Ed.), ¶ 5.1 and CSR Handbook (2008 Ed.), § 5.6 (Description of legal assistance provided).**

**Finding 10: Sampled cases evidenced that DPLS' application of the CSR case closure categories are inconsistent with Section VIII, CSR Handbook (2001 Ed.) and Chapters VIII and IX, CSR Handbook (2008 Ed.).**

**Finding 11: Sampled cases evidenced substantial compliance with the requirements of CSR Handbook (2001 Ed.), ¶ 3.3 and CSR Handbook (2008 Ed.), § 3.3 as all case files reviewed were closed in a timely manner.**

**Finding 12: Sampled cases evidenced substantial compliance with the requirements of CSR Handbook (2001 Ed.), ¶ 3.2 and CSR Handbook (2008 Ed.), § 3.2 regarding duplicate cases.**

**Finding 13: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1608 (Prohibited political activities).**

**Finding 14: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1609 (Fee-generating cases).**

**Finding 15: DPLS is in compliance with 45 CFR Part 1610 (Use of non-LSC funds, transfer of LSC funds, program integrity).**

**Finding 16: DPLS' PAI plan does not comply with 45 CFR Part 1614 which is designed to ensure that recipients of LSC funds involve private attorneys in the delivery of legal assistance to eligible clients.**

**Finding 17: DPLS is in compliance with 45 CFR § 1627.4(a) which prohibits programs from utilizing LSC funds to pay membership fees or dues to any private or nonprofit organization.**

**Finding 18: DPLS' internal control policies and procedures compare favorably to LSC's Internal Control/Fundamental Criteria of an Accounting and Financial Reporting System.**

**Finding 19: DPLS is in compliance with 45 CFR Part 1635 (Timekeeping requirements).**

**Finding 20: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1642 (Attorneys' fees).**

**Finding 21: Sampled cases reviewed and documents reviewed evidenced compliance with the requirements of 45 CFR Part 1612 (Restrictions on lobbying and certain other activities).**

**Finding 22: Sampled cases evidenced non-compliance with the requirements of 45 CFR Parts 1613 and 1615 (Restrictions on legal assistance with respect to criminal proceedings, and actions collaterally attacking criminal convictions).**

**Finding 23: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1617 (Class actions).**

**Finding 24: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1632 (Redistricting).**

**Finding 25: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1633 (Restriction on representation in certain eviction proceedings).**

**Finding 26: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1637 (Representation of prisoners).**

**Finding 27: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1638 (Restriction on solicitation).**

**Finding 28: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1643 (Restriction on assisted suicide, euthanasia, and mercy killing).**

**Finding 29: Sampled cases evidenced compliance with the requirements of certain other LSC statutory prohibitions (42 USC 2996f § 1007 (a) (8) (Abortion), 42 USC 2996f § 1007 (a) (9) (School desegregation litigation), and 42 USC 2996f § 1007 (a) (10) (Military selective service act or desertion)).**

## II. BACKGROUND OF REVIEW

On September 14-18, 2009, the Legal Services Corporation's (LSC) Office of Compliance and Enforcement (OCE) conducted a Case Service Report/Case Management System (CSR/CMS) review on-site visit at Dakota Plains Legal Services, Inc. (DPLS). The purpose of the visit was to assess the program's compliance with the LSC Act, regulations, and other applicable laws. The visit was conducted by a team of two LSC attorneys, four LSC consultants, and one LSC fiscal analyst.

The on-site review was designed and executed to assess the program's compliance with basic client eligibility, intake, case management, regulatory and statutory requirements, and to ensure that DPLS has correctly implemented the 2008 CSR Handbook. Specifically, the review team assessed DPLS for compliance with regulatory requirements of: 45 CFR Part 1611 (Financial Eligibility); 45 CFR Part 1626 (Restrictions on legal assistance to aliens); 45 CFR §§ 1620.4 and 1620.6 (Priorities in use of resources); 45 CFR § 1611.9 (Retainer agreements); 45 CFR Part 1636 (Client identity and statement of facts); 45 CFR Part 1608 (Prohibited political activities); 45 CFR Part 1609 (Fee-generating cases); 45 CFR Part 1610 (Use of non-LSC funds, transfers of LSC funds, program integrity); 45 CFR Part 1614 (Private attorney involvement);<sup>1</sup> 45 CFR Part 1627 (Subgrants and membership fees or dues); 45 CFR Part 1635 (Timekeeping requirement); 45 CFR Part 1642 (Attorneys' fees); 45 CFR Part 1630 (Cost standards and procedures); 45 CFR Part 1612 (Restrictions on lobbying and certain other activities); 45 CFR Parts 1613 and 1615 (Restrictions on legal assistance with respect to criminal proceedings and Restrictions on actions collaterally attacking criminal convictions); 45 CFR Part 1617 (Class actions); 45 CFR Part 1632 (Redistricting); 45 CFR Part 1633 (Restriction on representation in certain eviction proceedings); 45 CFR Part 1637 (Representation of prisoners); 45 CFR Part 1638 (Restriction on solicitation); 45 CFR Part 1643 (Restriction on assisted suicide, euthanasia, or mercy killing); and 42 USC 2996f § 1007 (Abortion, school desegregation litigation and military selective service act or desertion).

The OCE team interviewed members of DPLS' upper and middle management, staff attorneys and support staff. DPLS' case intake, case acceptance, case management, and case closure practices and policies in all substantive units were assessed. In addition to interviews, a case file review was conducted. The sample case review period was from January 1, 2007 through July 31, 2009. Case file review relied upon randomly selected files as well as targeted files identified to test for compliance with LSC requirements, including eligibility, potential duplication, timely closing, and proper application of case closure categories. In the course of the on-site review, the OCE team reviewed approximately 383 case files which included 53 targeted files.

DPLS is an LSC recipient that operates nine offices. The main office is located in Mission, SD with the branch offices located in Rapid City, Pine Ridge, Eagle Butte, Ft. Yates, Ft. Thompson, Sisseton, Pierre, and Sioux Falls. DPLS' executive staff consists of an Executive Director and an Office Administrator. DPLS received a total grant award from LSC in the amount of \$1,367,804 for 2007; \$1,374,543 for 2008; and a basic field grant of \$510,703 and a Native American grant of \$997,769 for 2009.

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<sup>1</sup> In addition, when reviewing files with pleadings and court decisions, compliance with other regulatory restrictions was reviewed as more fully reported *infra*.

For 2007, DPLS reported 1,872 closed cases in its CSR data. DPLS' 2007 self-inspection report indicated a 0.6% error rate with exceptions noted in one file out of 157 reviewed. For 2008, DPLS reported 1,667 closed cases in its CSR data. DPLS' 2008 self-inspection report indicated a 4.6% error rate with exceptions noted in seven files out of the 152 cases reviewed.

By letter dated July 13, 2009, OCE requested that DPLS provide a list of all cases reported to LSC in its 2007 CSR data submission ("closed 2007 cases"), a list of all cases reported in its 2008 CSR data submission ("closed 2008 cases"), a list of all cases closed between January 1, 2009 and July 31, 2009 ("closed 2009 cases"), and a list of all cases which remained open as of August 1, 2009 ("open cases"). OCE requested that the lists contain the client name, the file identification number, the name of the advocate assigned to the case, the opening and closing dates, the CSR case closing category assigned to the case and the funding code assigned to the case. OCE requested that two sets of lists be compiled - one for cases handled by DPLS staff and the other for cases handled through DPLS' PAI component. DPLS was advised that OCE would seek access to such cases consistent with Section 509(h), Pub.L. 104-134, 110 Stat. 1321 (1996), LSC Grant Assurance Nos. 10 and 11, and the LSC *Access to Records* (January 5, 2004) protocol. DPLS was requested to promptly notify OCE, in writing, if it believed that providing the requested material, in the specified format, would violate the attorney-client privilege or would be otherwise protected from disclosure.

Thereafter, an effort was made to create a representative sample of cases which the team would review during the on-site visit. The sample was created proportionately among 2007, 2008, and 2009 closed cases and open cases, as well as a proportionate distribution of cases from DPLS' offices. The sample consisted largely of randomly selected cases, but also included targeted cases selected to test for compliance with the CSR instructions relative to timely closings, proper application of the CSR case closing categories, duplicate reporting, etc.

During the visit, access to case-related information was provided through staff intermediaries. Pursuant to the OCE and DPLS agreement of July 30, 2009, DPLS staff maintained possession of the file and discussed with the team the nature of the client's legal problem and the nature of the legal assistance rendered. In order to maintain confidentiality, such discussion, in some instances, was limited to a general discussion of the nature of the problem and the nature of the assistance provided.<sup>2</sup> DPLS' management and staff cooperated fully in the course of the review process. As discussed more fully below, DPLS was made aware of any compliance issues during the on-site visit. This was accomplished by informing intermediaries of any compliance issues during case review; as well as Managing Attorneys in the branch offices and the Executive Director in the main office.

On September 22, 2009, OCE conducted an exit teleconference during which DPLS was provided recommendations and corrective actions in order to avoid future compliance issues. DPLS was advised that they would receive a Draft Report that would include all of OCE's findings and they would have 30 days to submit comments.

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<sup>2</sup> In those instances where it was evident that the nature of the problem and/or the nature of the assistance provided had been disclosed to an unprivileged third party, such discussion was more detailed, as necessary to assess compliance.

By letter dated November 12, 2009, OCE issued a Draft Report (DR) detailing its findings, recommendations, and required corrective actions regarding the September 14-18, 2009 CSR/CMS visit. DPLS was asked to review the DR and provide written comments. By letter dated December 9, 2009, DPLS submitted its comments to the DR. Additional comments were submitted via email on December 17, 2009. OCE has carefully considered DPLS' comments and made such revisions as it deems warranted. DPLS' comments are reflected in this Final Report and have been attached as an appendix hereto.

### III. FINDINGS

**Finding 1: Sampled cases evidenced that DPLS' automated case management system (ACMS) is sufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded.**

Recipients are required to utilize automated case management system (ACMS) and procedures which will ensure that information necessary for the effective management of cases is accurately and timely recorded in a case management system. At a minimum, such systems and procedures must ensure that management has timely access to accurate information on cases and the capacity to meet funding source reporting requirements. *See* CSR Handbook (2001 Ed.), ¶ 3.1 and CSR Handbook (2008 Ed.), § 3.1.

Based on a comparison of the information yielded by the ACMS to information contained in the case files sampled, DPLS' ACMS is insufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded

DPLS has implemented procedures to deselect cases from CSRs, consistent with the CSR Handbook (2008 Ed.). When entering an Application/Intake Form into the ACMS, staff is instructed to check the LSC-Eligible box on the CSR screen if the case is eligible for inclusion in the LSC CSRs. If a case should be deselected from CSRs, the box is left blank. Staff interviewed demonstrated a solid understanding of the proper use of this field.

Several protocols were identified that support compliance requirements. The current version of the ACMS includes a Case Look-Up feature which prompts the user to enter the applicant's name. This is the first step in the case data entry process and identifies previous cases for the applicant. Depending upon the type of case, the user may also enter the name of the applicant's spouse or other individuals in the household. Staff is then able to retrieve any previous applicant cases. Interviews reveal that staff is well trained on the circumstances appropriate to reopen cases as opposed to opening a new case which reduces the potential for duplication. All staff follows the same procedures in reopening cases. Interviews also reveal that staff may transfer cases from one office to another. In such circumstances, staff enters the case into the ACMS with originating office coding, and closes the case with a closing code of "T," for Transfer. Details regarding reasons for the transfer are entered into the ACMS Notes screen and the LSC Eligible box is not checked. An e-mail is sent to the receiving office advising them of the transfer. Further, the written intake documents are mailed to the receiving office and, upon receipt; the receiving office enters the case into the ACMS with its office's coding. The original case is deselected from CSRs and only one case is reported in CSRs.

The ACMS complies with LSC's Program Letter 02-6, Limitation of Defaults in Case Management Software. There are no defaults in critical compliance fields.

No written policies regarding ACMS data entry protocols were identified. It is recommended that DPLS develop such procedures and integrate them into the Intake Procedure and Practice Desk Manual.<sup>3</sup> The protocols should include the appropriate procedures for the use of compliance critical fields, such as the LSC-Eligible box and asset categories.

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<sup>3</sup> The Executive Director of DPLS indicated that he is currently drafting a desk manual for intake.



OCE also compared the information yielded by the ACMS to the information in the case files that were reviewed during the visit. There were relatively few files that contained information that was inconsistent with the information yielded in the ACMS. Specifically, Case Nos. 09-07-01000638, 09-01-01000060, 09-01-01000195, Case Nos. 08-05-01000407, 09-07-06000880, and closed 2008 Case No. 07-05-01000577, these were closed 2009 cases where the problem codes in the files were different than the problem codes listed in the ACMS. Also in the Mission office a closed 2009 Case No. 06-01-01000301 where the closure date in the file was different than the closing code listed in the ACMS. Furthermore case review revealed several inconsistencies between the open date identified in the case file to that which is reported in the ACMS. Specifically Closed 2009 Case Nos. 09-01-01000089, 08-01-01000646, 08-01-01000489, 07-01-01000891, 08-01-01000713, 09-01-01000219. Staff interviews indicate that DPLS' staggered intake process may create the discrepancy. During DPLS' intake process, applicants may complete an application on one date, have eligibility review on another, and an interview with a case handler on a third date. PAI clients are required to complete an intake application for DPLS and then again during the private attorney referral process.

DPLS should ensure that information from the case files is accurately entered into the case system.

In its response to the DR, DPLS objected to the characterization that its ACMS is insufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded and requests that this finding be amended accordingly. The Finding states: "There were relatively few files that contained information that was inconsistent with the information yielded in the ACMS." According to DPLS, this finding suggests that DPLS' ACMS is sufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded. According to DPLS, the review found a very small number of cases with these problems. DPLS indicates that overall the program has done a good job of ensuring that information from the case files is accurately entered into the case system and that it is impossible to expect to achieve 100% accuracy due to human error with the large number of cases handled by the program. According to DPLS, there is always room for improvement and DPLS will train staff to accurately enter case information into its ACMS and will develop written procedures for such entries.

After careful consideration of DPLS' comments, LSC has determined that revisions to this Finding are warranted and finds that DPLS' ACMS is sufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded.

**Finding 2: DPLS' intake procedures and case management system are in non-compliance with compliance related requirements; additionally, the program is utilizing an outdated income eligibility policy.**

DPLS conducts intake in each of its local offices. Interviews reveal that general intake procedures are consistent in each office, though hours and days of intake may vary due to staffing. Essential compliance information is gathered on forms utilized program-wide. In

addition, each office conducts outreach intake. No clinics were identified. No group clients were identified. During case acceptance meetings, all offices identify cases appropriate for referral to private attorneys, mostly conflict, cases which are sent to the Mission office for referral, oversight and closure.

DPLS is in the process of drafting an Intake Procedure and Practice Desk Manual to ensure all staff follows consistent policies. The draft provided to LSC in advance of the review compiles in a single document the various memoranda sent by Executive Director to staff regarding compliance issues and intake policies, and written case management procedures. The case management procedures include sections regarding intake, acceptance, opening, monitoring, and closing procedures. In addition, DPLS provided an overview of intake procedures in each office.

DPLS' intake practices are inconsistent and staff requires additional training on DPLS' income eligibility policy. Additionally, eligibility screening is based upon an outdated board approved policy which is not in compliance with the current 45 CFR Part 1611.

The overwhelming majority of intake in all the offices is in-person. Applicants complete the front of the program-wide Application/Intake Form, which includes a compliant citizenship attestation and attached retainer agreement. The application is a collection of the applicant's personal information, household financial status, monthly income, value of assets, and case information. If the applicant needs assistance completing the form, the screener, either a legal secretary or paralegal depending upon the office, provides such assistance. The screener reviews the form with the applicant asking more specific questions from the reverse side of the form; specifically, income and asset questions are repeated, though the back side of the form includes more income sources and asset questions. This requires the screener to ensure that the information on the front matches the information on the back.

In the extremely rare event that an eligible alien applies for services, staff will obtain copies of the required documentation and indicate the status in the ACMS. The staff in all offices visited, could recall only one applicant who was an eligible alien. The screening staff stated this would be such an unusual circumstance that the managing attorney and perhaps the program's compliance officer would be involved in ensuring proper documentation.

Telephone intake is conducted if necessary. If the applicant is unable to come to the office, the screener asks the nature of legal problem. If the individual has a hearing date or other urgency, the application is taken over the phone and the legal secretary completes the Application/Intake form. The form has a section to indicate whether the applicant contacted the program by phone or in-person and, if by phone if the applicant is a United States Citizen. The screener also writes, "Telephone Intake" across the attestation line of the form. Counsel and advice is provided over the phone by the managing attorney or the paralegal, depending upon the issue. If the case is not an emergency, the screener mails the Application/Intake form and other documents to the individual for completion and signatures. Cases requiring additional assistance are reviewed at weekly intake/case acceptance meetings and if accepted for additional assistance and signatures have not been obtained, the forms are mailed at that time. There is no call-back log.

In the extremely rare event that an eligible alien applies for services, staff will request the required documentation and indicate the status in the ACMS. The screening staff stated this would be such an unusual circumstance that the Managing Attorney and perhaps the program's compliance officer would be involved in ensuring proper documentation.

Intake staff indicated they inquire about prospective income; however, this is not documented in the ACMS. In light of the Office of Legal Affairs Advisory Opinion, AO-2009-1006, regarding prospective income, it is necessary for DPLS to document the screening of prospective income. This can either be accomplished by adding a field to the ACMS or indicating such in the Notes screen.

According to the comments submitted by DPLS, the program's Intake Application and its ACMS are being modified to ensure that intake staff documents the screening of prospective income.

After completing the form, the screeners follow the intake/eligibility screens of the ACMS entering the applicant's information directly into the system. A program-wide conflicts check is conducted at this time. If there is a conflict, the record is closed as rejected and this information is maintained in the database.

An assessment of eligibility is usually made by the screener unless further assessment is required by the managing attorney. The 2009 Income and Asset Guidelines were posted at all of the screeners' desks. The amounts are also programmed into the ACMS and changed annually when LSC publishes the new income amounts. These guidelines contain income and asset limits for each household size. The board adopted policy, dated 1997, states that the income ceiling is 125% of the Federal Poverty Guidelines (FPG) and the asset ceiling for a household is equal to 125% of the FPG for the applicant's household size. The income and asset dollar amounts are listed on the guidelines and programmed into the ACMS.

Interviews revealed confusion and inconsistency regarding the procedures to financially qualify applicants with an income between 125%-150%. The Board approved Financial Eligibility Policy is not in compliance with the revised 45 CFR Part 1611 which was last updated in 1997. Furthermore, the policy does not include an upper income ceiling. The Executive Director indicated the maximum income used is 200% of the FPG, however, the ceiling listed in the ACMS is 150% of the FPG which is consistent with the guidelines posted at the screeners' desk. All screeners stated that if the applicant's income is above 150% of the FPG, the applicant is ineligible and referred outside the program. If an applicant's income is between 125% - 150% of the FPG, screeners were inconsistent in screening for the factors listed in the ACMS. Some screeners completed an Over-Income/Asset Client form, other offices rejected any applicant whose income was over 125% of the FPG, and some screeners were confused regarding the process of qualifying an applicant for legal services.<sup>4</sup>

The ACMS income screen includes a section entitled Income Exceptions. This section is not utilized in offices that do not accept applicants whose income is above 125%. The section is designed so that more than one factor can be selected from the drop-down box. The drop down

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<sup>4</sup> It should be noted that, in the cases reviewed, the confusion regarding the screening process of applicants with income between 125%-150% has not led to the acceptance of ineligible applicants.

box includes: Medical Expenses, Fixed Debt/Obligations, Child Care for Employment, Transportation, Other Employment Related Expenses, and Geriatric Expenses. These options do not list all of the factors contained in the regulation (Current Income Prospects, Current Taxes or Other Significant Factors) and several of the factors listed are overly broad. For example, the Transportation factor is not limited to transportation necessary for employment as is required by the regulation. *See* 45 CFR § 1611.5(a)(4)(iv). The Application/Intake Form used during intake does not list the factors. Since the board policy is outdated, it cannot be determined if it is the board's intent to consider all or only some of the factors. The Application/Intake Form used during intake does not list the factors.

The governing body must adopt a new Financial Eligibility Policy which includes the requirements of the revised 45 CFR Part 1611. The policy must include a maximum ceiling in the policy if a client's income exceeds 125% of the FPG. Additionally, DPLS must ensure staff is provided additional training regarding DPLS' income policy, specifically for applicants whose income exceeds 125% of the FPG.

According to the comments submitted by DPLS, the income policy has been updated to comply with the current 45 CFR Part 1611 and will be presented to its Board of Directors during their December 18, 2009 Board of Directors meeting for their approval. The updated policy includes a maximum ceiling of 150% of the FPG for a determination of eligibility for the authorized exceptions pursuant to 45 CFR 1611.5 (3) and (4).

Once a case is accepted, the client either speaks with a case handler immediately or is scheduled for an appointment to speak with a case handler, depending upon staff availability and type of case. Clients whose case simply requires counsel and advice or brief service are generally provided assistance immediately. Cases which require extended services are reviewed at weekly case acceptance meetings attended by all staff in the office. While the decision-making process is a group effort, the managing attorney has the final decision. Case acceptance meetings are held and decisions are made more frequently if there are emergencies. Applicants are advised of the decision regarding their application following the meeting. If accepted, the screener calls or sends a letter to the applicant and arranges the next appointment. If rejected, the screener sends a rejection letter.

When cases are closed, the case handler completes a Case Closing Memo and a Case Service Report Data Collection Form and assigns a closing code. The case handler then gives the file to the legal secretary or paralegal, who completes a yellow Grant Compliance Checklist. Subsequently the information is entered into the CSR ACMS screen and closed within a couple of days by the legal secretary or paralegal.

**Finding 3: Sampled cases evidenced that DPLS maintains the income eligibility documentation required by 45 CFR § 1611.4, CSR Handbook (2001 Ed.), ¶ 5.3, CSR Handbook (2008 Ed.), § 5.3, however DPLS' income policy fails to comply with LSC instructions for clients whose income exceed 125% of the Federal Poverty Guidelines (FPG).**

Recipients may provide legal assistance supported with LSC funds only to individuals whom the recipient has determined to be financially eligible for such assistance. *See* 45 CFR § 1611.4(a). Specifically, recipients must establish financial eligibility policies, including annual income ceilings for individuals and households, and record the number of members in the applicant's household and the total income before taxes received by all members of such household in order to determine an applicant's eligibility to receive legal assistance.<sup>5</sup> *See* 45 CFR § 1611.3(c)(1), CSR Handbook (2001 Ed.), ¶ 5.3, and CSR Handbook (2008 Ed.), § 5.3. For each case reported to LSC, recipients shall document that a determination of client eligibility was made in accordance with LSC requirements. *See* CSR Handbook (2001 Ed.), ¶ 5.2 and CSR Handbook (2008 Ed.), § 5.2.

In those instances in which the applicant's household income before taxes is in excess of 125% but no more than 200% of the applicable FPG and the recipient provides legal assistance based on exceptions authorized under 45 CFR § 1611.5(a)(3) and 45 CFR § 1611.5(a)(4), the recipient shall keep such records as may be necessary to inform LSC of the specific facts and factors relied on to make such a determination. *See* 45 CFR § 1611.5(b), CSR Handbook (2001 Ed.), ¶ 5.3, and CSR Handbook (2008 Ed.), § 5.3.

For CSR purposes, individuals financially ineligible for assistance under the LSC Act may not be regarded as recipient "clients" and any assistance provided should not be reported to LSC. In addition, recipients should not report cases lacking documentation of an income eligibility determination to LSC. However, recipients should report all cases in which there has been an income eligibility determination showing that the client meets LSC eligibility requirements, regardless of the source(s) of funding supporting the cases, if otherwise eligible and properly documented. *See* CSR Handbook (2001 Ed.), ¶ 4.3(a) and CSR Handbook (2008 Ed.), § 4.3.

DPLS' Financial Eligibility Standards were adopted by its Board on October 25, 1997. The policy has not been updated to reflect the August 8, 2005 revisions to 45 CFR Part 1611 and therefore does not comply with 45 CFR § 1611.3(a) which requires recipient governing bodies to adopt policies consistent with Part 1611. Furthermore, DPLS' income policy has established exceptions if an applicant's income exceeds 125% of the FPG but the policy fails to indicate a maximum income ceiling if this occurs. This has led to inconsistencies during the intake process. The Executive Director indicated that he follows LSC's policy of an applicant's income not exceeding 200% of the FPG, however, interviews of intake staff indicate the policy is not to exceed 150% of the FPG and in some offices the maximum level is 125% of the FPG. Additionally, if an applicant's income is between 125% and 150% of the FPG there is confusion among intake staff regarding the process of qualifying the applicant for legal services.

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<sup>5</sup> A numerical amount must be recorded, even if it is zero. *See* CSR Handbook (2001 Ed.), ¶ 5.3 and CSR Handbook (2008 Ed.), § 5.3.

DPLS' financial eligibility policy must be updated and should be modified to include a maximum ceiling if an applicant's income exceeds 125% of the FPG. Additionally, DPLS must ensure staff is provided additional training regarding DPLS' income policy, specifically for applicants whose income exceeds 125% of the FPG.

According to DPLS, the income policy has been updated to comply with the current 45 CFR Part 1611 and will be presented to its Board of Directors during their December 18, 2009 Board of Directors meeting for their approval. The updated policy includes a maximum ceiling of 150% of the FPG for a determination of eligibility with authorized exceptions pursuant to 45 CFR 1611.5(3) and (4). Furthermore, DPLS indicated that staff will be trained regarding the policy and using the ACMS to determine if the applicant is eligible for LSC-funded services for applicants whose household income exceeds 125% of the FPG.

**Finding 4: Sampled cases evidenced that DPLS maintains the asset eligibility documentation as required by 45 CFR §§ 1611.3(c) and (d), CSR Handbook (2001 Ed.), ¶ 5.4, and CSR Handbook (2008 Ed.), § 5.4.**

As part of its financial eligibility policies, recipients are required to establish reasonable asset ceilings in order to determine an applicant's eligibility to receive legal assistance. *See* 45 CFR § 1611.3(d)(1). For each case reported to LSC, recipients must document the total value of assets except for categories of assets excluded from consideration pursuant to its Board-adopted asset eligibility policies.<sup>6</sup> *See* CSR Handbook (2001 Ed.), ¶ 5.4 and CSR Handbook (2008), § 5.4.

In the event that a recipient authorizes a waiver of the asset ceiling due to the unusual circumstances of a specific applicant, the recipient shall keep such records as may be necessary to inform LSC of the reasons relied on to authorize the waiver. *See* 45 CFR § 1611.3(d)(2).

The revisions to 45 CFR Part 1611 changed the language regarding assets from requiring the recipient's governing body to establish, "specific and reasonable asset ceilings, including both liquid and non-liquid assets," to "reasonable asset ceilings for individuals and households." *See* 45 CFR § 1611.6 in prior version of the regulation and 45 CFR § 1611.3(d)(1) of the revised regulation. Both versions allow the policy to provide for authority to waive the asset ceilings in unusual or meritorious circumstances. The older version of the regulation allowed such a waiver only at the discretion of the Executive Director. The revised version allows the Executive Director or his/her designee to waive the ceilings in such circumstances. *See* 45 CFR § 1611.6(e) in prior version of the regulation and 45 CFR § 1611.3(d)(2) in the revised version. Both versions require that such exceptions be documented and included in the client's files.

The Financial Eligibility Standards approved by the DPLS Board of Directors on October 25, 1997, establishes a Standard Asset Limitation of an amount of money equal 125% of the FPG. Exempt from consideration is the person's reasonable value in work-related equipment, providing the equipment is presently being used or can reasonably be expected to be used in the future for the purpose of generating income consistent with its market value (including the

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<sup>6</sup> A numerical total value must be recorded, even if it is zero or below the recipient's guidelines. *See* CSR Handbook (2001 Ed.), ¶ 5.4 and CSR Handbook (2008 Ed.), § 5.4.

reasonable equity value of automobile(s) necessary for transportation of members of the family unit to and from employment); property held in trust by the United States for the benefit of and on behalf of Native Americans; religious articles and other personal property necessary for and incidental to traditional Indian ceremonies and culture; assets which are not immediately available to the person due to the fact that accessibility to those assets requires cooperation of a person who will not cooperate or is in a position adverse to the applicant; assets which would otherwise be available and used for the care and treatment of the elderly, institutionalized or handicapped persons who are members of a family unit. In as much as the board policy, however outdated, sets reasonable asset limits, it complies with the current regulation.

Interviews revealed that staff is well versed with the program asset ceilings and exclusions. Asset ceiling amounts are listed on the 2009 Income and Asset Guidelines which were posted next to each screener's desk. The asset categories on the Application/Intake Form are consistent with the board policy. All staff interviewed screen for assets in a consistent manner

Sampled case files reviewed revealed that DPLS maintains asset eligibility documentation as was required by 45 CFR § 1611.6 and as is required by revised 45 CFR §§ 1611.3(c) and (d), CSR Handbook (2001 Ed.), ¶ 5.4, and CSR Handbook (2008 Ed.), § 5.4.<sup>7</sup> There were no exceptions identified in the file review.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 5: Sampled cases evidenced compliance with 45 CFR Part 1626 (Restrictions on legal assistance to aliens).**

The level of documentation necessary to evidence citizenship or alien eligibility depends on the nature of the services provided. With the exception of brief advice or consultation by telephone, which does not involve continuous representation, LSC regulations require that all applicants for legal assistance who claim to be citizens execute a written attestation. *See* 45 CFR § 1626.6. Aliens seeking representation are required to submit documentation verifying their eligibility. *See* 45 CFR § 1626.7. In those instances involving brief advice and consultation by telephone, which does not involve continuous representation, LSC has instructed recipients that the documentation of citizenship/alien eligibility must include a written notation or computer entry that reflects the applicant's oral response to the recipient's inquiry regarding citizenship/alien eligibility. *See* CSR Handbook (2001 Ed.), ¶ 5.5 and CSR Handbook (2008 Ed.), § 5.5; *See also*, LSC Program Letter 99-3 (July 14, 1999). In the absence of the foregoing documentation, assistance rendered may not be reported to LSC. *See* CSR Handbook (2001 Ed.), ¶ 5.5 and CSR Handbook (2008 Ed.), § 5.5.

Prior to 2006, recipients were permitted to provide non-LSC funded legal assistance to an alien who had been battered or subjected to extreme cruelty in the United States by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household, or an alien

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<sup>7</sup> The revised 45 CFR § 1611.2 defines assets as meaning cash or other resources of the applicant or members of the household that are readily convertible to cash, which are currently and actually available to an applicant. Accordingly, the terms "liquid" and "non-liquid" have been eliminated.

whose child had been battered or subjected to such cruelty.<sup>8</sup> Although non-LSC funded legal assistance was permitted, such cases could not be included in the recipient's CSR data submission. In January 2006, the Kennedy Amendment was expanded and LSC issued Program Letter 06-2, "Violence Against Women Act 2006 Amendment" (February 21, 2006), which instructs recipients that they may use LSC funds to provide legal assistance to ineligible aliens, or their children, who have been battered, subjected to extreme cruelty, is the victims of sexual assault or trafficking, or who qualify for a "U" visa. LSC recipients are now allowed to include these cases in their CSRs.

All sampled cases contained the necessary citizen/alien eligibility documentation.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 6: Sampled cases evidenced non-compliance with the requirements of 45 CFR § 1611.9 (Retainer agreements).**

Pursuant to 45 CFR § 1611.9, recipients are required to execute a retainer agreement with each client who receives extended legal services from the recipient. The retainer agreement must be in a form consistent with the applicable rules of professional responsibility and prevailing practices in the recipient's service area and shall include, at a minimum, a statement identifying the legal problem for which representation is sought, and the nature of the legal service to be provided. *See* 45 CFR § 1611.9(a).

The retainer agreement is to be executed when representation commences or as soon thereafter is practical and a copy is to be retained by the recipient. *See* 45 CFR §§ 1611.9(a) and (c). The lack of a retainer does not preclude CSR reporting eligibility.<sup>9</sup> Cases without a retainer, if otherwise eligible and properly documented, should be reported to LSC.

All files reviewed contained retainer agreements, however, intake interviews revealed that the retainer agreements are deficient, therefore DPLS is not compliant with 45 CFR § 1611.9. DPLS' policy is to have applicants sign and date a blank retainer agreement at the time of intake. Subsequently, the case handlers complete the retainer by entering the scope of legal services to be provided and the subject matter of the case without having the client initial, re-sign, or review the agreement with the additional information.

DPLS must fully complete the retainer agreements prior to obtaining a signature from the client in order to comply with 45 CFR § 1611.9.

According to the comments submitted by DPLS, all staff were ordered and advised that all retainer agreements must be completed prior to the client signing the retainer agreement and this procedure has been included in the draft Practice/Desk Manual. Furthermore, DPLS indicated

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<sup>8</sup> *See* Kennedy Amendment at 45 CFR § 1626.4.

<sup>9</sup> However, a retainer is more than a regulatory requirement. It is also a key document clarifying the expectations and obligations of both client and program, thus assisting in a recipient's risk management.



that the Executive Director will remind staff of this at each monthly staff teleconference to ensure compliance with this mandate.

**Finding 7: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1636 (Client identity and statement of facts).**

LSC regulations require that recipients identify by name each plaintiff it represents in any complaint it files, or in a separate notice provided to the defendant, and identify each plaintiff it represents to prospective defendants in pre-litigation settlement negotiations. In addition, the regulations require that recipients prepare a dated, written statement signed by each plaintiff it represents, enumerating the particular facts supporting the complaint. *See* 45 CFR §§ 1636.2(a) (1) and (2).

The statement is not required in every case. It is required only when a recipient files a complaint in a court of law or otherwise initiates or participates in litigation against a defendant, or when a recipient engages in pre-complaint settlement negotiations with a prospective defendant. *See* 45 CFR § 1636.2(a).

Case files reviewed indicated that DPLS is in compliance with the requirements of 45 CFR Part 1636.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 8: Sampled cases evidenced compliance with the requirements of 45 CFR § 1620.4 and § 1620.6(c) (Priorities in use of resources).**

LSC regulations require that recipients adopt a written statement of priorities that determines the cases which may be undertaken by the recipient, regardless of the funding source. *See* 45 CFR § 1620.3(a). Except in an emergency, recipients may not undertake cases outside its priorities. *See* 45 CFR § 1620.6.

Prior to the visit, DPLS provided LSC with a list of its priorities. The priorities are stated as “Indian law, family law, criminal defense, health, housing, income maintenance, education, economic development assistance and incorporation, consumer/finance, individual rights and other civil rights matters, and wills/estates.”

DPLS is in compliance with 45 CFR Part 1620. None of the sampled files reviewed revealed cases that were outside of DPLS’ priorities.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 9: Sampled cases evidenced compliance with CSR Handbook (2001 Ed.), ¶ 5.1 and CSR Handbook (2008 Ed.), § 5.6 (Description of legal assistance provided).**

LSC regulations specifically define “case” as a form of program service in which the recipient provides legal assistance. *See* 45 CFR §§ 1620.2(a) and 1635.2(a). Consequently, whether the assistance that a recipient provides to an applicant is a “case”, reportable in the CSR data, depends, to some extent on whether the case is within the recipient’s priorities and whether the recipient has provided some level of legal assistance, limited or otherwise.

If the applicant’s legal problem is outside the recipient’s priorities, or if the recipient has not provided any type of legal assistance, it should not report the activity in its CSR. For example, recipients may not report the mere referral of an eligible client as a case when the referral is the only form of assistance that the applicant receives from the recipient. *See* CSR Handbook (2001 Ed.), ¶ 7.2 and CSR Handbook (2008 Ed.), § 7.2.

Recipients are instructed to record client *and* case information, either through notations on an intake sheet or other hard-copy document in a case file, or through electronic entries in an ACMS database, or through other appropriate means. For each case reported to LSC such information shall, at a minimum, describe, *inter alia*, the level of service provided. *See* CSR Handbook (2001 Ed.), ¶ 5.1(c) and CSR Handbook (2008 Ed.), § 5.6.

All cases reviewed contained a description of the legal assistance provided.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 10: Sampled cases evidenced that DPLS’s application of the CSR case closure categories were inconsistent with Section VIII, CSR Handbook (2001 Ed.) and Chapters VIII and IX, CSR Handbook (2008 Ed.).**

The CSR Handbook defines the categories of case service and provides guidance to recipients on the use of the closing codes in particular situations. Recipients are instructed to report each case according to the type of case service that best reflects the level of legal assistance provided. *See* CSR Handbook (2001 Ed.), ¶ 6.1 and CSR Handbook (2008 Ed.), § 6.1.

There were several instances where the files reviewed demonstrated that DPLS’ application of the CSR case closing categories were inconsistent with Section VIII, CSR Handbook (2001 Ed.) and Chapters VIII and IX, CSR Handbook (2008 Ed.). *See* Case No. 08-0101000577 (This is a closed 2008 Mission office case which was closed utilizing the closing code “F”, negotiated settlement without litigation, however, the file contained no settlement agreement and the notes in the file indicate the case handler made one phone call on the client’s behalf. This case should have been closed utilizing the closing code “B”, brief service). According to the comments submitted by DPLS, “F” is the appropriate closing code for this case. DPLS indicates that the client was being evicted from his apartment. The case handler contacted the landlord who then agreed to allow the client to stay in his apartment if certain documentation was completed. The documentation was completed by DPLS and the client was not evicted.

Chapters VIII of the CSR Handbook (2008 Ed.) requires that the case file contain documentation of the settlement, either actual, written settlement, a written confirmation of the settlement with the opposing party, or, if neither of these are available, a copy of a communication to the client outlining the terms of the settlement. After careful consideration of DPLS' comments, LSC has determined that revisions regarding the closing code of this case are unwarranted and "B" is the proper closing code. The case review and DPLS' comments revealed no evidence that the requirements of the CSR Handbook (2008 Ed.) were met; Case No. 08-03-01000067 (This is a closed 2008 Ft. Yates office case that the DR indicated should have been closed under closing code "A" but was incorrectly closed under closing code "B"). According to the comments submitted by DPLS, "B" is the appropriate closing code for this case. DPLS indicated that an email was sent to a third party on behalf of the client regarding her termination of parental rights and a copy of the email is in the case file. After careful consideration of DPLS' comments, LSC has determined that revisions to the finding regarding this closing code are warranted and "B" is the appropriate closing code; Case No. 09-07-01000349 (This is a closed 2009 Rapid City office case closed with closing code "L" where the only work done was to have client sign a previously drafted power of attorney (POA). The case should have been closed under closing code "B". The confusion in this case was due to the client failing to return after the attorney had drafted the POA, resulting in the closing of her case in a previous reporting year. A year later the client returned to complete the POA.). DPLS agrees with LSC's finding regarding this case; Case Nos. 09-01-01000011, 08-01-01000489, and 09-01-01000251 (These are closed 2009 Mission office cases using closing code "L", extensive service, however, the case files did not demonstrate extensive interaction with third parties or extensive on-going assistance to clients, therefore, closing category "B", brief service, would have been the more appropriate closing code). DPLS disagreed with LSC's findings regarding these cases and believes that "L" is the appropriate closing code. After careful consideration of DPLS' comments, LSC has determined that revisions to the finding regarding this closing code are unwarranted and "B" is the appropriate closing code; Case No. 08-01-01000409 (This is a closed 2009 Mission office case using closing code "G", negotiated settlement with litigation, however, there was a contested court decision in the file, therefore, closing category "I(b)", contested court decision, would have been the more appropriate closing code). DPLS agrees with LSC's finding regarding this case; Case No. 06-01-01000301 (This is a closed 2009 Mission office case which the DR indicated was closed using closing code "I(c)", appeals, however, the file contained a contested final trial order and no evidence of appellate activities, therefore, "I(b)", contested court decision, would have been the more appropriate closing code). According to the comments submitted by DPLS, the closing document in the file is an Order from the Supreme Court of the Rosebud Sioux Tribe. Additionally, time slips indicate that there was a brief and argument submitted to the court. Based on this information, DPLS believes that "I(c)" is the appropriate closing code. After careful consideration of DPLS' comments, LSC has determined that revisions to this closing code are warranted and "I(c)" is the appropriate closing code; Case No. 09-01-01000187 (This is a closed 2009 PAI case using the closing code "I(b)", contested court decision, however, the case file lacked sufficient documentation reflecting the contested nature of the litigation; therefore, closing category "I(a)", uncontested court decision, would have been the more appropriate closing code). DPLS provided no comments regarding this case; and Case No. 7-01-01000621 (This is a closed 2007 case using

the closing code “K”, other, however, there was a contested trial court decision in the file, therefore the closing code “T”, court decision, would have been the more appropriate closing code). According to the comments submitted by DPLS, the Tribe dismissed the case. DPLS indicated that the case handler never went to a hearing on the client’s behalf, however, spent an extensive time on the case with calls and advice. After careful consideration of DPLS’ comments, LSC has determined that a slight revision regarding the finding the closing code of this case is warranted. The closing code “K” utilized by DPLS is incorrect and this case should be closed utilizing the closing code “B” or “T” according to Section VIII, CSR Handbook (2001 Ed.), depending on the amount of work done in the case.

It is recommended that DPLS ensure that staff is trained on the proper use of closing code categories to comply with CSR Handbook (2008 Ed.), § 6.1. DPLS offered no comments with respect to this recommendation.

**Finding 11: Sampled cases evidenced substantial compliance with the requirements of CSR Handbook (2001 Ed.), ¶ 3.3 and CSR Handbook (2008 Ed.), § 3.3.**

To the extent practicable, programs shall report cases as having been closed in the year in which assistance ceased, depending on case type. Cases in which the only assistance provided is counsel and advice, brief service, or a referred after legal assessment (CSR Categories, A, B, and C), should be reported as having been closed in the year in which the counsel and advice, brief service, or referral was provided. *See* CSR Handbook (2001 Ed.), ¶ 3.3(a).<sup>10</sup> There is, however, an exception for cases opened after September 30, and those cases containing a determination to hold the file open because further assistance is likely. *See* CSR Handbook (2001 Ed.), ¶ 3.3(a) and CSR Handbook (2008 Ed.), § 3.3(a). All other cases (CSR Categories D through K, 2001 CSR Handbook and F through L, 2008 CSR Handbook) should be reported as having been closed in the year in which the recipient determines that further legal assistance is unnecessary, not possible or inadvisable, and a closing memorandum or other case-closing notation is prepared. *See* CSR Handbook (2001 Ed.), ¶ 3.3(b) and CSR Handbook (2008 Ed.), § 3.3(b). Additionally LSC regulations require that systems designed to provide direct services to eligible clients by private attorneys must include, among other things, case oversight to ensure timely disposition of the cases. *See* 45 CFR § 1614.3(d)(3).

DPLS is in substantial compliance regarding the requirements of CSR Handbook (2001 Ed.), ¶ 3.3 and CSR Handbook (2008 Ed.), § 3.3(a). There were two cases reviewed that were not closed and reported in a timely manner. *See* Case Nos. 06-01-01000301 and 02-01-01000007.

In response to the DR, DPLS offered no comments with respect to this Finding.

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<sup>10</sup> The time limitation of the 2001 Handbook that a brief service case should be closed “as a result of an action taken at or within a few days or weeks of intake” has been eliminated. However, cases closed as limited action are subject to the time limitation on case closure found in CSR Handbook (2008 Ed.), § 3.3(a) this category is intended to be used for the preparation of relatively simple or routine documents and relatively brief interactions with other parties. More complex and/or extensive cases that would otherwise be closed in this category should be closed in the new CSR Closure Category L (Extensive Service).

**Finding 12: Sampled cases evidenced substantial compliance with the requirements of CSR Handbook (2001 Ed.), ¶ 3.2 and CSR Handbook (2008 Ed.), § 3.2 regarding duplicate cases.**

Through the use of automated case management systems and procedures, recipients are required to ensure that cases involving the same client and specific legal problem are not recorded and reported to LSC more than once. *See* CSR Handbook (2001 Ed.), ¶ 3.2 and CSR Handbook (2008 Ed.), § 3.2.

When a recipient provides more than one type of assistance to the same client during the same reporting period, in an effort to resolve essentially the same legal problem, as demonstrated by the factual circumstances giving rise to the problem, the recipient may report only the highest level of legal assistance provided. *See* CSR Handbook (2001 Ed.), ¶ 6.2 and CSR Handbook (2008 Ed.), § 6.2.

When a recipient provides assistance more than once within the same reporting period to the same client who has returned with essentially the same legal problem, as demonstrated by the factual circumstances giving rise to the problem, the recipient is instructed to report the repeated instances of assistance as a single case. *See* CSR Handbook (2001 Ed.), ¶ 6.3 and CSR Handbook (2008 Ed.), § 6.3. Recipients are further instructed that related legal problems presented by the same client are to be reported as a single case. *See* CSR Handbook (2001 Ed.), ¶ 6.4 and CSR Handbook (2008 Ed.), § 6.4.

DPLS is in compliance with the requirements of CSR Handbook (2001 Ed.), ¶ 3.2 and CSR Handbook (2008 Ed.), § 3.2 regarding duplicate cases as there was only one duplicate case file noted in the review sample. *See* Case No. 09-01-01000195 (This is a closed 2009 case which was listed on the case list as both a staff and PAI case).

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 13: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1608 (Prohibited political activities).**

LSC regulations prohibit recipients from expending grants funds or contributing personnel or equipment to any political party or association, the campaign of any candidate for public or party office, and/or for use in advocating or opposing any ballot measure, initiative, or referendum. *See* 45 CFR Part 1608.

Sampled files reviewed indicate that DPLS is not involved in such activity. Discussions with the Executive Director also confirmed that DPLS is not involved in this prohibited activity.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 14: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1609 (Fee-generating cases).**

Except as provided by LSC regulations, recipients may not provide legal assistance in any case which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably might be expected to result in a fee for legal services from an award to the client, from public funds or from the opposing party. *See* 45 CFR §§ 1609.2(a) and 1609.3.

Recipients may provide legal assistance in such cases where the case has been rejected by the local lawyer referral service, or two private attorneys; neither the referral service nor two private attorneys will consider the case without payment of a consultation fee; the client is seeking, Social Security, or Supplemental Security Income benefits; the recipient, after consultation with the private bar, has determined that the type of case is one that private attorneys in the area ordinarily do not accept, or do not accept without pre-payment of a fee; the Executive Director has determined that referral is not possible either because documented attempts to refer similar cases in the past have been futile, emergency circumstances compel immediate action, or recovery of damages is not the principal object of the client's case and substantial attorneys' fees are not likely. *See* 45 CFR §§ 1609.3(a) and 1609.3(b).

LSC has also prescribed certain specific recordkeeping requirements and forms for fee-generating cases. The recordkeeping requirements are mandatory. *See* LSC Memorandum to All Program Directors (December 8, 1997).

Case review revealed no fee-generating cases.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 15: DPLS' is in compliance with 45 CFR Part 1610 (Use of non-LSC funds, transfer of LSC funds, program integrity)**

Part 1610 was adopted to implement Congressional restrictions on the use of non-LSC funds and to assure that no LSC funded entity engage in restricted activities. Essentially, recipients may not themselves engage in restricted activities, transfer LSC funds to organizations that engage in restricted activities, or use its resources to subsidize the restricted activities of another organization.

The regulations contain a list of restricted activities. *See* 45 CFR § 1610.2. They include lobbying, participation in class actions, representation of prisoners, legal assistance to aliens, drug related evictions, and the restrictions on claiming, collecting or retaining attorneys' fees.

Recipients are instructed to maintain objective integrity and independence from any organization that engages in restricted activities. In determining objective integrity and independence, LSC looks to determine whether the other organization receives a transfer of LSC funds, and whether such funds subsidize restricted activities, and whether the recipient is legally, physically, and financially separate from such organization.

Whether sufficient physical and financial separation exists is determined on a case by case basis and is based on the totality of the circumstances. In making the determination, a variety of factors must be considered. The presence or absence of any one or more factors is not determinative. Factors relevant to the determination include:

- i) the existence of separate personnel;
- ii) the existence of separate accounting and timekeeping records;
- iii) the degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
- iv) the extent to which signs and other forms of identification distinguish the recipient from the other organization.

*See* 45 CFR § 1610.8(a); *see also*, OPO Memo to All LSC Program Directors, Board Chairs (October 30, 1997).

Recipients are further instructed to exercise caution in sharing space, equipment and facilities with organizations that engage in restricted activities. Particularly if the recipient and the other organization employ any of the same personnel or use any of the same facilities that are accessible to clients or the public. But, as noted previously, standing alone, being housed in the same building, sharing a library or other common space inaccessible to clients or the public may be permissible as long as there is appropriate signage, separate entrances, and other forms of identification distinguishing the recipient from the other organization, and no LSC funds subsidize restricted activity. Organizational names, building signs, telephone numbers, and other forms of identification should clearly distinguish the recipient from any organization that engages in restricted activities. *See* OPO Memo to All LSC Program Directors, Board Chairs (October 30, 1997).

While there is no *per se* bar against shared personnel, generally speaking, the more shared staff, or the greater their responsibilities, the greater the likelihood that program integrity will be compromised. Recipients are instructed to develop systems to ensure that no staff person engages in restricted activities while on duty for the recipient, or identifies the recipient with any restricted activity. *See* OPO Memo to All LSC Program Directors, Board Chairs (October 30, 1997).

Review of DPLS' donor notification policies and procedures found that the program failed to notify its non-LSC funding sources of the LSC prohibitions and conditions that apply to non-LSC funds greater than \$250 donated to DPLS as required by 45 CFR § 1610.5. Specifically, LSC regulation 45 CFR § 1610.5(a) states, in part, that no recipient may accept funds from any source other than the Corporation, unless the recipient provides to the source of the funds written notification of the prohibitions and conditions which apply to the funds. As of the date of the review, DPLS indicated that it had not notified its non-LSC funding sources as required by 45 CFR §1610.5.

To correct and comply with this requirement, while OCE was on-site the program developed a donor notification letter that will be sent to its non-LSC funding sources and will also be sent

annually with its grant solicitation or acknowledgement. DPLS provided a copy of the notification letter and a statement of action along with a listing of the non-LSC funding to be notified of the prohibitions and conditions which apply to the funds.

The program's integrity certification for 2008 with the Executive Director's memorandum to the board of directors, selected non-LSC grant agreements, audited financial statements for 2007 and 2008, and the general ledger trial balance as of May 31, 2009, were reviewed and found to comply with the accounting and fiscal requirements of 45 CFR Part 1610. Further, discussions with program management confirmed that the program is not involved in any restricted activities and its use of non-LSC funds, transfer of LSC funds, and its program integrity were not inconsistent with this regulation.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 16: DPLS' PAI plan complies with 45 CFR Part 1614 which is designed to ensure that recipients of LSC funds involve private attorneys in the delivery of legal assistance to eligible clients.**

LSC regulations require LSC recipients to devote an amount of LSC and/or non-LSC funds equal to 12.5% of its LSC annualized basic field award for the involvement of private attorneys in the delivery of legal assistance to eligible clients. This requirement is referred to as the "PAI" or private attorney involvement requirement.

Activities undertaken by the recipient to involve private attorneys in the delivery of legal assistance to eligible clients must include the direct delivery of legal assistance to eligible clients. The regulation contemplates a range of activities, and recipients are encouraged to assure that the market value of PAI activities substantially exceed the direct and indirect costs allocated to the PAI requirement. The precise activities undertaken by the recipient to ensure private attorney involvement are, however, to be determined by the recipient, taking into account certain factors. *See* 45 CFR §§ 1614.3(a), (b), (c), and (e)(3). The regulations, at 45 CFR § 1614.3(e)(2), require that the support and expenses relating to the PAI effort must be reported separately in the recipient's year-end audit. The term "private attorney" is defined as an attorney who is not a staff attorney. *See* 45 CFR § 1614.1(d). Further, 45 CFR § 1614.3(d)(3) requires programs to implement case oversight and follow-up procedures to ensure the timely disposition of cases to achieve, if possible, the results desired by the client and the efficient and economical utilization of resources.

Recipients are required to develop a PAI Plan and budget. *See* 45 CFR Part 1614.4(a). The annual plan shall take into consideration the legal needs of eligible clients in the geographical area, the delivery mechanisms potentially available to provide the opportunity for private attorneys to meet legal needs, and the results of consultation with significant segments of the client community, private attorneys and bar associations, including minority and women's bar associations. The recipient must document that its proposed annual Plan has been presented to all local bar associations and the Plan shall summarize their response. *See* 45 CFR §§ 1614.4(a) and (b).



DPLS' PAI plan provides for the use of PAI funds to contract with private attorneys in the states of South Dakota and North Dakota. DPLS has failed to document whether the plan has been presented to all local bar associations within its service area which is required by 45 CFR § 1614.4 (b). DPLS must update its PAI Plan, submit it to each Bar in the service area for comments and include a summary of the comments in the Plan.

According to the comments submitted by DPLS, the PAI plan has been updated and it was published in the November 2009 South Dakota Bar Association Newsletter for comment. In past years DPLS' PAI plan has been published in the State Bar Newsletter as a means of submitting the plan to all local Bar Associations for comment. DPLS indicated that it has found, from experience and practice, that this is the only and most effective way to submit the PAI plan for comment to each local Bar Association in the program's service area. According to DPLS, the local Bar Associations in the program's service area are very small and informal. They meet only sporadically and do not maintain physical offices or addresses where notice can be sent for comment, therefore, notice to each Bar Association would be futile. All members of the South Dakota Bar receive the State Bar Newsletter.

After careful consideration of DPLS' comments, LSC has determined that DPLS publishing its PAI plan in the State Bar Newsletter as a means of submitting the plan to all local Bar Associations for comment fulfills the requirements of 45 CFR § 1614.4 (b).

Cases appropriate for referral to private attorneys are identified in weekly case acceptance meetings. Accordingly, intake has been conducted in the same manner as the staff cases. Once a case is identified as appropriate for PAI referral, the local office sends the Application/Intake Form and a cover letter to the Mission Office (addressed to the Executive Director and the Administrator). The cover letter sets forth information regarding the case and the reason it was identified for PAI. The Mission office is responsible for placement of cases with private attorneys, oversight and closure of the cases.

DPLS' procedure is to have conflict cases represented by a PAI attorney. DPLS conducts intake prior to transferring the case to the PAI attorney and oversight is conducted by the Executive Director. DPLS has not implemented any type of information barrier to separate DPLS staff from viewing material information which may influence case decisions. DPLS must ensure that the procedures which are in place to handle conflict cases do not violate South Dakota's Canons of Ethics and Code of Professional Responsibility.

According to the comments submitted by DPLS, the Intake Application has been modified in order for intake staff to obtain opposing party information and conduct a conflict check prior to any other information being gathered from the applicant.

DPLS indicated it is no longer referring conflict of interest cases to PAI contracts. DPLS is referring these conflict of interest cases to Access to Justice, the state bar pro bono project. DPLS indicated it will explore ways to implement some type of information barrier to separate DPLS staff from viewing material information which may influence case decisions before it will consider a referral of a conflict of interest case to a PAI attorney.

Interviews and case review reveal that DPLS is in compliance with 45 CFR § 1614.3(d)(3) which requires oversight of the PAI case files. The Executive Director has created a policy to monitor and track PAI cases. All oversight is conducted by the Executive Director. The Executive Director generates quarterly PAI ACMS reports to ensure cases do not become dormant and are timely closed. The Executive Director also sends quarterly requests for status updates from PAI attorneys. This is done through letters, telephone calls, and email. Once a case is closed the PAI attorney assigns the case a closing code which is reviewed by the Executive Director prior to the case being closed in the ACMS.

The review of DPLS' PAI cost allocation policy statement and worksheets for 2007 and 2008 and the audited financial statements for the review period found that the program complies with the accounting requirements of this Part. The program requested, and LSC granted, partial waivers of DPLS' PAI expenditure requirements for 2007 and 2008. However, the program did not meet its adjusted PAI requirement for 2008 and, as a result and pursuant to 45 § CFR 1614.7(b), the program's 2009 PAI requirement was increased to compensate for the shortfall.

DPLS' administrator acknowledged the adjustment and projects that the program should meet its adjusted PAI requirement for the current reporting year. The review of the program's PAI cost allocation policies and procedures found that the program maintains sufficient supporting documentation and methodologies for its PAI cost allocation. No exceptions were noted.

**Finding 17: DPLS is in compliance with 45 CFR § 1627.4(a) which prohibits programs from utilizing LSC funds to pay membership fees or dues to any private or nonprofit organization.**

LSC regulation 45 CFR § 1627.4(a) requires that:

- a) LSC funds may not be used to pay membership fees or dues to any private or nonprofit organization, whether on behalf of a recipient or an individual.
- b) Paragraph (a) of this section does not apply to the payment of membership fees or dues mandated by a government organization to engage in a profession, or to the payment of membership fees or dues from non-LSC funds.

The review of accounting records for selected expenses accounts that track and account for litigation expenses which include fees and dues payments for 2007, 2008 and through May 31, 2009, in addition to discussions with program management disclosed compliance with 45 CFR § 1627.4(a).

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 18: DPLS is in compliance with 45 CFR Part 1635 (Timekeeping requirements).**

The timekeeping requirement, 45 CFR Part 1635, is intended to improve accountability for the use of all funds of a recipient by assuring that allocations of expenditures of LSC funds pursuant to 45 CFR Part 1630 are supported by accurate and contemporaneous records of the cases, matters, and supporting activities for which the funds have been expended; enhancing the ability of the recipient to determine the cost of specific functions; and increasing the information available to LSC for assuring recipient compliance with Federal law and LSC rules and regulations. *See* 45 CFR § 1635.1.

Specifically, 45 CFR § 1635.3(a) requires that all expenditures of funds for recipient actions are, by definition, for cases, matters, or supporting activities. The allocation of all expenditures must satisfy the requirements of 45 CFR Part 1630. Time spent by attorneys and paralegals must be documented by time records which record the amount of time spent on each case, matter, or supporting activity. Time records must be created contemporaneously and account for time by date and in increments not greater than one-quarter of an hour which comprise all of the efforts of the attorneys and paralegals for which compensation is paid by the recipient. Each record of time spent must contain: for a case, a unique client name or case number; for matters or supporting activities, an identification of the category of action on which the time was spent. The timekeeping system must be able to aggregate time record information on both closed and pending cases by legal problem type. Recipients shall require any attorney or paralegal who works part-time for the recipient and part-time for an organization that engages in restricted activities to certify in writing that the attorney or paralegal has not engaged in restricted activity during any time for which the attorney or paralegal was compensated by the recipient or has not used recipient resources for restricted activities.

The review of DPLS' timekeeping policies and procedures and a sample of completed time records for an attorney and a paralegal along with discussion with the Executive Director and the administrator disclosed that time records are kept electronically and contemporaneously. The time spent on each case, matter or supporting activity is recorded in substantial compliance with 45 CFR §§ 1635.3(b) and (c).

In response to the Draft Report, DPLS was requested to report whether it has part-time attorneys or paralegals in its staff that work for organizations that conduct LSC restricted work.

In response to the DR, DPLS offered no comments with respect to this Finding. DPLS must send a report to LSC within 60 days of receiving this Final Report detailing the number, if any, of part-time attorneys or paralegals on staff who also work for organizations that conduct LSC restricted work.

**Finding 19: DPLS' internal control policies and procedures compare favorably to LSC's Internal Control/Fundamental Criteria of an Accounting and Financial Reporting System.**

An LSC recipient, under the direction of its board of directors, is required to establish and maintain adequate accounting records and internal control procedures. Internal control is defined

as the process put in place by the recipient's board of directors, management, and other personnel which is designed to provide reasonable assurance of achieving objectives of safeguarding of assets against unauthorized use or disposition, reliability of financial information and reporting; and compliance with regulations and laws that have a direct and material effect on the program. *See* Chapter 3 of the Accounting Guide for LSC Recipients (August 1997).

Review of DPLS' accounting policies and procedures manual, accounting records and discussions with program management found that the program has established an adequate internal control structure which includes adequate accounting records, competent personnel, defined duties and responsibilities, segregation of duties, independent checks and proofs and a written accounting manual, which was being revised and updated. Further, DPLS' auditor's reports on internal controls for 2007 and 2008 did not identify any deficiencies in the internal control areas that could be considered to be material weaknesses.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 20: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1642 (Attorneys' fees).**

Except as provided by LSC regulations, recipients may not claim, or collect and retain attorneys' fees in any case undertaken on behalf of a client of the recipient. *See* 45 CFR § 1642.3. The regulations define "attorneys' fees" as an award to compensate an attorney of the prevailing party made pursuant to common law or Federal or State law permitting or requiring the award of such fees or a payment to an attorney from a client's retroactive statutory benefits. *See* 45 CFR § 1642.2(a).

None of the sampled files reviewed during the visit contained a claim for, award of, or retention of attorneys' fees.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 21: Sampled cases reviewed and documents reviewed evidenced compliance with the requirements of 45 CFR Part 1612 (Restrictions on lobbying and certain other activities).**

The purpose of this part is to ensure that LSC recipients and their employees do not engage in certain prohibited activities, including representation before legislative bodies or other direct lobbying activity, grassroots lobbying, participation in rulemaking, public demonstrations, advocacy training, and certain organizing activities. This part also provides guidance on when recipients may participate in public rulemaking or in efforts to encourage State or local governments to make funds available to support recipient activities, and when they may respond to requests of legislative and administrative officials.

None of the sampled files and documents reviewed, including the program's legislative activity reports, evidenced any lobbying or other prohibited activities. Discussions with the Executive Director also confirmed that DPLS is not involved in this prohibited activity.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 22: Sampled cases evidenced non-compliance with the requirements of 45 CFR Parts 1613 and 1615 (Restrictions on legal assistance with respect to criminal proceedings, and actions collaterally attacking criminal convictions).**

Recipients are prohibited from using LSC funds to provide legal assistance with respect to a criminal proceeding. *See* 45 CFR § 1613.3. Nor may recipients provide legal assistance in an action in the nature of a habeas corpus seeking to collaterally attack a criminal conviction. *See* 45 CFR § 1615.1.

There was one case reviewed in the Ft. Yates office that was a criminal case. *See* Case No. 08-03-01000233. However interviews revealed there are approximately 11 additional criminal cases in which the program represents clients through appointment from the Walworth County Court. According to the managing attorney these cases are coded as State Court Referrals but are not pursuant to statute, contract or court rule. The managing attorney voluntarily placed her name on the Court Appointed Attorney List at the County Courthouse. DPLS subsidizes these cases with LSC funds until the program receives reimbursement from the County Court in the amount of \$89 an hour which occurs at the completion of the case. The use of LSC funds to subsidize these criminal cases is a violation of 45 CFR § 1613.3 which states that corporation funds shall not be used to provide legal assistance with respect to criminal proceedings unless authorized by this part.

According to 45 CFR § 1613.4(a), legal assistance in criminal proceedings pursuant to court appointment may be provided only when two conditions are satisfied. First, the rule or practice under which court appointments are made must be equally applicable to all attorneys in the jurisdictions. Secondly the program may authorize the provision of legal assistance in a criminal proceeding only after the program has determined that such representation is consistent with its primary responsibility to provide legal assistance to eligible clients in civil matters.

Based on the information obtained from the managing attorney, there is no rule or practice in effect in the jurisdiction that requires all attorneys to place their name on the court appointment list; therefore, DPLS does not satisfy the first requirement of 45 CFR § 1613.4 (a) and must cease using LSC Funds in providing legal assistance with respect to criminal proceedings.

In its comments to the DR, DPLS objected to the finding that it is in non-compliance with the requirements of 45 CFR Parts 1613 and 1615 by accepting state court adult criminal appointments and requested that LSC reconsider its position that DPLS is in non-compliance with the requirements of 45 CFR Part 1613.

According to DPLS, the statement that the Managing Attorney voluntarily placed her name on the court appointed attorney list needs to be put in proper context. DPLS indicated that the Fort Yates office had been without an attorney for a period of time. When the current Managing Attorney was hired, she contacted the court to be placed on Court Appointed Attorney List to notify the Court that there was now an attorney available in the Fort Yates office to accept cases. According to DPLS, they have historically provided legal assistance on state court criminal appointments at the Fort Yates branch office service area. DPLS indicated that the client community expects DPLS to take criminal state court appointments because DPLS attorneys possess a cultural understanding private attorneys do not when representing Native Americans in criminal actions in state court. According to DPLS, Native American criminal defendants do not trust off-reservation attorneys to adequately represent their interest and to account for cultural differences and perceive DPLS as fulfilling these deficiencies.

DPLS contends that the two conditions required to provide legal assistance in criminal cases are satisfied according to 45 CFR § 1613.4(a). The first condition requires the rule or practice under which court appointments are made must be equally applicable to all attorneys in the jurisdictions. According to DPLS, the service areas are sparsely populated and there is a shortage of attorneys in these areas to handle either civil or criminal matters. DPLS feels it has a professional responsibility to provide legal assistance in state court criminal court appointments. According to SDCL 23A-40-7, "The board of county commissioners of each county. . .shall provide for the representation of indigent persons. . .They shall provide this representation by any or all of the following: (2) Arranging with the courts in the county to appoint attorneys on an equitable basis through a systematic, coordinated plan;. . ." (A copy of this statute is attached to the program's comments). Rule 6.2 of the South Dakota Rules of Professional Conduct states "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause" then list 3 good cause exceptions not relevant to this finding. DPLS requested that LSC consider comment [2] to Rule 6.2 which defines good cause to refuse court appointments. (A copy of Rule 6.2 and its comments is attached to the program's comments). DPLS attached a letter from the Executive Director and Secretary-Treasurer of the State Bar of South Dakota which explains that DPLS' offices are in rural areas with a lack of attorneys and that DPLS is required by judges to take a share of criminal court appointments to represent the Native American population. According to DPLS, these statutes and the attorney oath make court appointments equally applicable to all attorneys in the jurisdictions.

The second condition allows the program to authorize the provision of legal assistance in criminal proceedings only after the program has determined that such representation is consistent with its primary responsibility to provide legal assistance to eligible clients in civil matters. According to DPLS, representation in criminal appointments in state court has been a priority of the program since its inception. DPLS indicated that this priority is based upon the trust DPLS has developed with its client community over the past 40 plus years. Native American criminal defendants feel that they will not receive a fair outcome from the state criminal system or from court appointed attorneys who have no connection with their reservations or culture. According to DPLS, non-DPLS court-appointed attorneys for Native American defendants have little knowledge of Indian or tribal culture, tradition or religion. Therefore, DPLS fills this void by providing legal assistance in court appointed criminal proceedings to protect their rights in state

court which reassures DPLS clients that the program is available and providing culturally sensitive representation.

After careful consideration of DPLS' comments, LSC has determined that revisions to this Finding are unwarranted. Although DPLS "feels" they have a professional responsibility under SDCL 23A-40-7, they have not provided sufficient information to justify engaging in this type of work with LSC funds. DPLS, in their response, indicated that the client community expects DPLS to take criminal state court appointments because DPLS attorneys possess a cultural understanding that private attorneys do not in representing Native Americans in criminal actions in state court. 45 CFR § 1613.4(a) states that the practice of equal applicability apply to all attorneys in the jurisdiction, not to some attorneys with a particular knowledge or specialty, e.g. Native American Law. Furthermore, 45 CFR § 1613.4(a) makes no reference to representing clients in criminal cases based on the expectations of the client community, therefore, DPLS has not provided adequate justification for representing clients in these cases.

DPLS indicated that it will change its accounting and timekeeping system to use non-LSC funds to subsidize these cases until they are completed and payment is made by the County. In order to represent future clients in criminal cases, non-LSC funds must be used to subsidize these cases. Any use of LSC funds to subsidize these cases is non-compliant.

DPLS must send a report to LSC, within 60 days of receiving this Final Report, detailing the actions taken by the program to resolve this matter.

**Finding 23: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1617 (Class actions).**

Recipients are prohibited from initiating or participating in any class action. *See* 45 CFR § 1617.3. The regulations define "class action" as a lawsuit filed as, or otherwise declared by a court of competent jurisdiction, as a class action pursuant Federal Rules of Civil Procedure, Rule 23, or comparable state statute or rule. *See* 45 CFR § 1617.2(a). The regulations also define "initiating or participating in any class action" as any involvement, including acting as co-counsel, amicus curiae, or otherwise providing representation relative to the class action, at any stage of a class action prior to or after an order granting relief. *See* 45 CFR § 1617.2(b)(1).<sup>11</sup>

None of the sampled files reviewed involved initiation or participation in a class action. Discussions with the Executive Director also confirmed that DPLS is not involved in this prohibited activity.

In response to the DR, DPLS offered no comments with respect to this Finding.

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<sup>11</sup> It does not, however, include representation of an individual seeking to withdraw or opt out of the class or obtain the benefit of relief ordered by the court, or non-adversarial activities, including efforts to remain informed about, or to explain, clarify, educate, or advise others about the terms of an order granting relief. *See* 45 CFR § 1617.2(b)(2).

**Finding 24: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1632 (Redistricting).**

Recipients may not make available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or representing any party, or participating in any other way in litigation, related to redistricting. *See* 45 CFR § 1632.3.

None of the sampled files reviewed revealed participation in litigation related to redistricting. Discussions with the Executive Director also confirmed that DPLS is not involved in this prohibited activity.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 25: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1633 (Restriction on representation in certain eviction proceedings).**

Recipients are prohibited from defending any person in a proceeding to evict the person from a public housing project if the person has been charged with, or has been convicted of, the illegal sale, distribution, manufacture, or possession with intent to distribute a controlled substance, and the eviction is brought by a public housing agency on the basis that the illegal activity threatens the health or safety or other resident tenants, or employees of the public housing agency. *See* 45 CFR § 1633.3.

None of the sampled files reviewed involved defense of any such eviction proceeding. Discussions with the Executive Director also confirmed that DPLS is not involved in this prohibited activity.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 26: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1637 (Representation of prisoners).**

Recipients may not participate in any civil litigation on behalf of a person incarcerated in a federal, state, or local prison, whether as plaintiff or defendant; nor may a recipient participate on behalf of such incarcerated person in any administrative proceeding challenging the condition of the incarceration. *See* 45 CFR § 1637.3.

None of the sampled files reviewed involved participation in civil litigation, or administrative proceedings, on behalf of an incarcerated person. Discussions with the Executive Director also confirmed that DPLS is not involved in this prohibited activity.

In response to the DR, DPLS offered no comments with respect to this Finding.



**Finding 27: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1638 (Restriction on solicitation).**

In 1996, Congress passed, and the President signed, the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (the "1996 Appropriations Act"), Pub. L. 104-134, 110 Stat. 1321 (April 26, 1996). The 1996 Appropriations Act contained a new restriction which prohibited LSC recipients and their staff from engaging a client which it solicited.<sup>12</sup> This restriction has been contained in all subsequent appropriations acts.<sup>13</sup> This new restriction is a strict prohibition from being involved in a case in which the program actually solicited the client. As stated clearly and concisely in 45 CFR § 1638.1: "This part is designed to ensure that recipients and their employees do not solicit clients."

None of the sampled files, included documentation such as community education materials and program literature, indicated program involvement in such activity. Discussions with the Executive Director also confirmed that DPLS is not involved in this prohibited activity.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 28: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1643 (Restriction on assisted suicide, euthanasia, and mercy killing).**

No LSC funds may be used to compel any person, institution or governmental entity to provide or fund any item, benefit, program, or service for the purpose of causing the suicide, euthanasia, or mercy killing of any individual. No may LSC funds be used to bring suit to assert, or advocate, a legal right to suicide, euthanasia, or mercy killing, or advocate, or any other form of legal assistance for such purpose. *See* 45 CFR § 1643.3.

None of the sampled files reviewed involved such activity. Discussions with the Executive Director also confirmed that DPLS is not involved in this prohibited activity.

In response to the DR, DPLS offered no comments with respect to this Finding.

**Finding 29: Sampled cases evidenced compliance with the requirements of certain other LSC statutory prohibitions (42 USC 2996f § 1007 (a) (8) (Abortion), 42 USC 2996f § 1007 (a) (9) (School desegregation litigation), and 42 USC 2996f § 1007 (a) (10) (Military selective service act or desertion)).**

Section 1007(b) (8) of the LSC Act prohibits the use of LSC funds to provide legal assistance with respect to any proceeding or litigation which seeks to procure a non-therapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs

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<sup>12</sup> *See* Section 504(a)(18).

<sup>13</sup> *See* Pub. L. 108-7, 117 Stat. 11 (2003) (FY 2003), Pub. L. 108-199, 118 Stat. 3 (2004) (FY 2004), Pub. L. 108-447, 118 Stat. 2809 (2005) (FY 2005), and Pub. L. 109-108, 119 Stat. 2290 (2006) (FY 2006).

or moral convictions of such individual or institution. Additionally, Public Law 104-134, Section 504 provides that none of the funds appropriated to LSC may be used to provide financial assistance to any person or entity that participates in any litigation with respect to abortion.

Section 1007(b) (9) of the LSC Act prohibits the use of LSC funds to provide legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school or school system, except that nothing in this paragraph shall prohibit the provision of legal advice to an eligible client with respect to such client's legal rights and responsibilities.

Section 1007(b) (10) of the LSC Act prohibits the use of LSC funds to provide legal assistance with respect to any proceeding or litigation arising out of a violation of the Military Selective Service Act or of desertion from the Armed Forces of the United States, except that legal assistance may be provided to an eligible client in a civil action in which such client alleges that he was improperly classified prior to July 1, 1973, under the Military Selective Service Act or prior law.

All of the sampled files reviewed demonstrated compliance with the above LSC statutory prohibitions. Interviews conducted further evidenced and confirmed that DPLS was not engaged in any litigation which would be in violation of Section 1007(b) (8) of the LSC Act, Section 1007(b) (9) of the LSC Act, or Section 1007(b) (10) of the LSC Act.

In response to the DR, DPLS offered no comments with respect to this Finding.

#### IV. RECOMMENDATIONS<sup>14</sup>

In view of the foregoing, it is recommended that DPLS:

1. Ensure that information from the case files are accurately entered into the case system.

In its comments to the DR, DPLS indicated that, overall, the program has done a good job of ensuring that information from the case files is accurately entered into the case system and that it is impossible to expect to achieve 100% accuracy due to human error with the large number of cases handled by the program. According to DPLS, there is always room for improvement and DPLS will train staff to accurately enter case information into its ACMS and will develop written procedures for such entries.

2. Ensure that staff is trained on the proper closing codes categories to comply with CSR Handbook (2008 Ed.), § 6.1.

DPLS offered no comments with respect to this recommendation.

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<sup>14</sup> Items appearing in the “Recommendations” section are not enforced by LSC and therefore the program is not required to take any of the actions or suggestions listed in this section. Recommendations are offered when useful suggestions or actions are identified that, in OCE’s experience, could help the program with topics addressed in the report. Often recommendations address potential issues and may assist a program to avoid future compliance errors.

By contrast, the items listed in “Required Corrective Actions” must be addressed by the program, and will be enforced by LSC.

## V. REQUIRED CORRECTIVE ACTIONS

Consistent with the findings of this Report, DPLS is required to take the following corrective actions:

1. Ensure staff is provided additional training regarding DPLS' income policy, specifically for clients whose income exceeds 125% of the FPG;

In its comments to the DR, DPLS indicated that staff will be trained regarding the policy and using the ACMS to determine if the applicant is eligible for LSC-funded services for applicants whose household income exceeds 125% of the FPG.

2. The financial eligibility policy must be updated to comply with 45 CFR Part 1611 and include a maximum ceiling in the policy if an applicant's income exceeds 125% of the FPG;

According to the comments submitted by DPLS, the income policy has been updated to comply with the current 45 CFR Part 1611 and will be presented to its Board of Directors at their December 18, 2009 Board of Directors meeting for their approval. The updated policy includes a maximum ceiling of 150% of the FPG for a determination of eligibility for the factors in 45 CFR 1611.5(3) and (4).

3. Complete the retainer agreements prior to obtaining a signature from the client;

In its comments to the DR, DPLS indicated that all staff were ordered and advised that all retainer agreements must be completed prior to the client signing the agreement and this procedure has been added to the draft Practice/Desk Manual.

4. Update its PAI Plan, submit it to each Bar Association in its service area for comments and include a summary of the comments in the Plan;

According to the comments submitted by DPLS, the PAI plan has been updated and it was published in the November, 2009 South Dakota Bar Association Newsletter for comment. In past years DPLS' PAI plan has been published in the State Bar news letter as a means of submitting the plan to all local Bar Associations for comment.

5. Cease accepting criminal cases unless the cases comply with 45 CFR Part 1613;

In its comments to the DR, DPLS indicated that it will change its accounting and timekeeping systems to use non-LSC funds to subsidize these cases until they are completed and payment is made by the County.

DPLS must send a report to LSC, within 60 days of receiving this Final Report, detailing the actions taken by the program to resolve this matter.

6. Ensure that the procedures which are in place to handle conflict cases do not violate South Dakota's Canons of Ethics and Code of Professional Responsibility;

According to the comments submitted by DPLS, its Intake application has been modified in order for intake staff to gather opposing party information and to do a conflict check prior to any other information, confidential and financial, being gathered from the applicant.

7. Ensure intake staff documents the screening of prospective income.

According to the comments submitted by DPLS, the program's Intake Application and its ACMS are being modified and updated to ensure that intake staff documents the screening of prospective income.



# DAKOTA PLAINS LEGAL SERVICES

Administrative Offices are located in the Mission Branch Office

OFFICE OF COMPLIANCE  
AND ENFORCEMENT

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December 9, 2009

Office of Compliance and Enforcement  
Attention: Danilo A. Cardona  
Legal Services Corporation  
3333 K Street, NW, 3<sup>rd</sup> Floor  
Washington DC 20007

RE: Comments to LSC's Draft Report for the September 14-18 on-site Case Service Report/Case Management System ("CSR/CMS") Review of Dakota Plains Legal Services, Inc. ("DPLS")

Dear Mr. Cardona:

Enclosed please find comments to the Required Corrective Actions. Also enclosed are specific responses to three (3) Findings.

DPLS has already implemented most of the Required Corrective Actions.

DPLS contest Findings 1 and 22.

DPLS seeks clarification and guidance to Finding 16.

DPLS would like to commend Mr. Dober and his review team on their professionalism and input on the review process and findings.

As always, DPLS takes these reviews as an opportunity to improve our Case Service Reporting and Case Management System to be in compliance with LSC regulations.

We look forward to your decision on Findings 1 and 22 and guidance on Finding 16.

Sincerely,  
  
Pat Donovan,  
Executive Director

Enclosures



## **DPLS' Comments to the Required Corrective Actions**

### **1. Ensure staff is provided additional training regarding DPLS' income policy; specifically for clients whose income exceeds 125% of the FPG.**

DPLS Policy 1611A has been updated to comply with the current 45 CFR Part 1611 and will be presented to its Board of Directors at their December 18, 2009 Board of Directors meeting for their approval. The updated policy includes a maximum ceiling of 150% of the FPG for a determination of eligibility for the factors in 45 CFR 1611.5(3) and (4).

DPLS has revised its Intake Application and developed an "Income Eligibility Exception" form to record and determine if the applicant, whose income exceeds 125% of FPG is eligible for LSC-funded services. All staff will be trained regarding the policy and using the form to determine if the applicant is eligible for LSC-funded services for applicants whose household income exceeds 125% of the FPG. (Attached is the revised Intake Application and "Income Eligibility Exception" form).

The ACMS income screen section for Income Exceptions drop down box will be modified to include and meet the requirements of the factors contained in 45 CFR 1611.5. DPLS Administration will be working with it's IT contractor and the Western New York Law Center (the ACMS-TIME vendor) to modify and correct it's ACMS.

### **2. The financial eligibility policy must be updated to comply with 45 CFR 1611 and include a maximum ceiling in the policy if an applicant's income exceeds 125% of the FPG.**

DPLS Policy 1611A has been updated to comply with the current 45 CFR Part 1611 and will be presented to its Board of Directors at their December 18, 2009 Board of Directors meeting for their approval. The updated policy includes a maximum ceiling of 150% of the FPG for a determination of eligibility for the factors in 45 CFR 1611.5(3) and (4).

Attached is the updated DPLS Policy 1611A.

### **3. Complete the retainer agreements prior to obtaining a signature from the client.**

Immediately after the OCE review exit conference this problem was addressed. All staff were ordered and advised that all retainer agreements must be complete prior to the client signing the agreement. Attached is the Memo.

The Executive Director will remind staff of this at each monthly staff teleconference to ensure compliance with this mandate.

This procedure has been added to the draft Practice/Desk Manual.

### **4. Update its PAI plan, submit it to each Bar Association in its service area for comments and include a summary of the comments in the Plan.**

The PAI plan has been updated and it was published in the November South Dakota Bar Association news letter for comment.

DPLS would request the Legal Services Corporation provide clarification and guidance on whether this practice fulfills the requirement of submitting its PAI plan to each Bar Association in our service area.

See the specific response to Finding 16.

**5. Cease accepting criminal cases unless the cases comply with 45 CFR 1613.**

Staff had been advised to cease taking Adult criminal court appointments in state court.

DPLS objects to this finding. See the response Finding 22.

**6. Ensure that the procedures which are in place to handle conflict cases do not violate South Dakota's Canons of Ethics and Code of Professional Responsibility.**

The Intake application has been modified in order for intake staff to gather opposing party information and to do a conflict check prior to any other information, confidential and financial, being gathered from the applicant.

DPLS is no longer referring conflict of interest cases for PAI contracts. DPLS is referring these conflict of interest cases to Access to Justice, the state bar pro bono project. DPLS will explore ways to implement some type of information barrier to separate DPLS staff from viewing material information which may influence case decisions before it will consider a referral of a conflict of interest case to a PAI attorney and only after permission from LSC's Office of Compliance and Enforcement.

**7. Ensure intake staff documents the screening of prospective income.**

DPLS' Intake Application and its ACMS are being modified and updated to ensure that intake staff documents the screening of prospective income. See the attached Intake Application.



ELIGIBILITY GUIDELINES  
45 CFR 1611

A. Policy

The board of Directors of Dakota Plains Legal Services, having considered all relevant factors, including:

1. Cost of living in the DPLS services area;
2. The number of clients who can be served by the resources of DPLS and the priorities of the program;
3. The population who would be eligible at and below alternative income and resource levels; and
4. The availability and cost of legal services provided by the private bar in the DPLS service area,

hereby establishes the maximum annual income and asset levels for persons to be eligible to receive legal assistance from DPLS. Unless authorized hereunder, no person whose income and or assets exceeds the maximums established herein shall be eligible for legal assistance from DPLS. In addition, a person must meet the residency requirements of Section G below, although referrals of cases concerning persons who reside outside DPLS service areas may be accepted with approval of the Executive Director.

The current DPLS income and asset eligibility guidelines are found in the Appendix, Form A.

B. Income

1. Maximum Income Level:

Maximum annual income for persons to be eligible for legal assistance shall not exceed 125 percent of the official Federal Poverty Income Guidelines as provided by the Legal Services Corporation and adopted by the DPLS Board of Directors.

2. Income:

For purposes of these guidelines, "income" means actual current annual total cash receipts before taxes, of all persons who are resident members of, and contribute to, the support

of a family unit. Total cash receipts shall include:

- a. Gross wages and salaries;
- b. Income from self-employment, after deduction for business or farm expenses;
- c. Public assistance payments from Social Security;
- d. Unemployment and workmen's compensation benefits,
- e. Strike and veteran's benefits;
- f. Alimony, child support and military allotment payments, or any other payments from absent family member;
- g. Public or private employee pension, and regular insurance or annuity payments; and
- h. Income from dividends, interests, rent, royalties or from estates and trusts.

3. Family Unit

When computing eligibility or determining the number of dependents, a family shall be defined as an extended family unit consisting of grandparents, parents, aunts, uncles, cousins, children, stepchildren and grandchildren. A family unit shall include cohabitating couples, regardless of marital status.

4. Exceptions

An applicant whose income exceeds the annual income ceiling may be financially eligible if the applicant's assets do not exceed the asset ceiling, or the asset ceiling has been waived, and:

a. The applicant is seeking legal assistance to maintain benefits provided by a governmental program for low-income individuals or families; or

b. The Executive Director, or his/her designee, has determined on the basis of documentation that the applicant's income is primarily committed to medical or nursing home expenses and that, excluding such portion of the applicant's income which is committed to medical or nursing home expenses, the applicant would otherwise be financially eligible for services.

A person whose gross income exceeds the income guidelines but is less than 150% of the income guidelines, may be provided legal assistance if one of the following apply:

- a. The applicant is seeking legal assistance to obtain government benefits for low-income

individuals or families, or

b. The applicant is seeking legal assistance to obtain or maintain governmental benefits for persons with disabilities, or

c. Consideration of one or more of the following factors:

i. Seasonal variations in income

ii. Unreimbursed medical expenses and medical insurance premiums

iii. Fixed debts and obligations, excluding food, credit card debt, business expenses, mortgage payments, rent, child support and spousal support and other such routine obligations

iv. Expenses such as dependent care, transportation, clothing and equipment expenses necessary for employment, job training, or educational activities, in preparation for employment

v. Non-medical expenses associated with age or disability

vi. Current tax obligations on applicant's primary residence

vii. Other significant factors that affect the applicant's ability to afford legal assistance

Prior approval from the Executive Director to take a case for an applicant that is over-income is required and Form 1611 or Form O in DPLS Policies must be used.

C. Assets

1. Maximum assets ceiling:

The maximum value of assets owned by and available to persons to be eligible for legal assistance shall not exceed 150 percent of the official Federal Poverty Income Guidelines as provided by the Legal Services Corporation and adopted by the DPLS Board of Directors. For purposes of this paragraph, "assets" shall include all liquid and non-liquid assets of all persons who are resident members of the family unit, except as set forth in paragraph 2. b., below. In no event, however, shall a person's principal residence be considered as an asset.

2. Exceptions:

A person whose total assets exceed the maximum level in paragraph C. 1., above, may be provided legal assistance by DPLS if:

- a. The person would suffer hardship or inequity if denied legal assistance; and
- b. The person would be eligible for assistance but for the inclusions of the value of the following assets:
  - i. The reasonable value of work related equipment which is essential to the employment or self-employment of an applicant or a member of a family unit (including the reasonable equity value of automobile(s) necessary for transportation of members of the family unity to and from employment) provided that the owner is attempting to produce income consistent with its fair market value.
  - ii. Property held in trust by the United States for the benefit of and on behalf of Native Americans.
  - iii. Religious articles and other personal property necessary for and incidental to traditional Indian ceremonies and culture;
  - iv. Assets which are not immediately available to the person due to the fact that accessibility to those assets requires cooperation of a person who will not cooperate or is in a position adverse to the applicant;
  - v. Assets which would otherwise be available and used for the care and treatment of the elderly, institutionalized or handicapped persons who are members of a family unit.

3. Waiver

- a. The DPLS Executive Director may waive the assets-based exclusion of a person who would be ineligible for legal assistance based upon the provisions of paragraph C. 1. (above), if he/she finds that:
  - i. The applicant has an unusual or extremely meritorious case;
  - ii. It is unlikely that the matter would be handled by a private attorney in the service area.
- b. Any such waiver by the Executive director shall be in writing and the factual basis for such determination shall be documented and included in the client's file.

D. Manner of Determining Eligibility

- 1. The Executive Director shall prepare a simple form and procedure to obtain information to determine eligibility in a manner that promotes the development of trust between attorney client, subject to the approval of the Legal Service

Corporation. See Appendix, Form B.

2. If there is substantial reason to doubt the accuracy of the information provided by the applicant, DPLS shall make appropriate inquiries to verify that information in a manner consistent with the attorney-client relationship.
3. Information furnished by a client to DPLS to establish financial eligibility shall not be disclosed to a person who is not employed by DPLS in a manner that permits identification of the client, without express written consent of the client, except that DPLS may provide such information to the Legal Services Corporation when:
  - a. The Corporation is investigating allegations that question the financial eligibility of the previously identified client and DPLS' representation thereof;
  - b. The information sought by the Corporation relates solely to the financial eligibility of that particular client;
  - c. The information sought by the Corporation is necessary to confirm or deny a specific allegations relating to that particular client's financial eligibility and DPLS' representation thereof;
  - d. The specific information sought by the Corporation is not protected by the attorney-client privilege.

In all cases in which information is provided to the Corporation as provided above, the applicant shall be so notified.

E. Retainer Agreement

1. The Executive Director shall prepare, subject to approval by the Legal Services Corporation, a written retainer agreement, which agreement shall be executed by DPLS with each client who receives legal services from DPLS. The agreement shall be executed when representation commences (or, if not possible owing to an emergency situation, as soon thereafter is practicable), and shall clearly identify the relationship between the client and recipient, the manner in which representation is sought, and the nature of legal services to be provided, and the rights and responsibilities of the client. DPLS shall retain the executed retainer agreement as part of the client's file and shall make the agreement available for review by the Legal Services Corporation in a manner which protects the identity of the client. See Appendix, Form C.
2. A retainer agreement shall not be required when the only service to be provided by DPLS to a client is brief advice and consultation.

F. Change of Circumstances

If an eligible client becomes ineligible due to a change in circumstances, DPLS shall discontinue representation if the change in circumstances is sufficiently likely to result in the client's ability to afford private legal assistance and discontinuation is not inconsistent with the attorney's professional responsibilities.

G. Residency Requirements

In addition to meeting income and asset guidelines, an applicant for legal services from DPLS must reside within one of the following counties or Indian reservations in order to be eligible for legal services:

MISSION:

GREGORY  
JONES  
MELLETTTE  
TODD  
TRIPP  
ROSEBUD RESERVATION

SISSETON:

CHARLES MIX  
GRANT  
ROBERTS  
LAKE TRAVERSE RESERVATION  
FLANDREAU RESERVATION  
YANKTON RESERVATION

FORT YATES:

CAMPBELL  
CORSON  
WALWORTH  
STANDING ROCK RESERVATION

RAPID CITY:

BUTTE  
CUSTER  
FALL RIVER  
HARDING  
LAWRENCE  
MEADE  
PENNINGTON

FORT THOMPSON:

BRULE  
BUFFALO  
HUGHES  
HYDE  
LYMAN  
STANLEY  
SULLY  
CROW CREEK RESERVATION  
LOWER BRULE RESERVATION

PINE RIDGE

BENNET  
JACKSON  
SHANNON  
PINE RIDGE RESERVATION

EAGLE BUTTE

DEWEY  
HAAKON  
POTTER  
ZEIBACK  
CHEYENNE RIVER RESERVATION

## PERKINS

Students and military personnel who are from the above counties, and who have not changed personnel who are from the above counties, and who have not changed their domicile, shall be deemed eligible for services, if otherwise client-eligible.

ADOPTED: 12/18/09

### Authority:

45 CFR Part 1611

### Cross References:

DPLS Policy 1611B (Client Eligibility and Case Selection)

DPLS Policy 1620A (Establishing Priorities)

# DAKOTA PLAINS LEGAL SERVICES

## Application/Intake Form

### Applicant Information

Problem Code: \_\_\_\_\_

Name: _____ Address: _____ _____ Telephone: Home - _____ Work - _____ Cell- _____ Date of Birth: _____ Sex: _____ Other Names Used: _____ _____	Marital Status: _____ (Please check one) ____ Single ____ Married ____ Divorced ____ Widowed Spouse's Name: _____ Address: _____ Opposing Party Information: Other Names Used: _____ Name: _____ Address: _____ City/State/Zip: _____ Phone Number: _____ Attorney: _____
---	---

A Conflict Check must be done using TIME and the Client Cards before any further information is obtained from the Applicant:  
\_\_\_\_ Conflict of Interest Exists (Stop Application and Reject and make a Referral if possible)  
\_\_\_\_ No Conflict of Interest Exists (Proceed with Application)

Social Security Number: _____ County: _____ Ethnicity: ____ Caucasian ____ Native American ____ Afr. American ____ Hispanic ____ Asian ____ Other Household Composition (# of Persons): Age 0-17 ____ Age 18-59 ____ Age 60+ ____ Total: _____ Method of Applicant Contact: In Person ____ Telephone ____ If telephone advice, is applicant a US citizen? Yes ____ No ____ Is your current problem a result of: Domestic Abuse? ____ Yes ____ No Stalking? ____ Yes ____ No Sexual Abuse? Yes No
---

### Case/Client Information

#### Monthly Income

Are you or any household member employed? _____ Yes _____ No If yes, list employer name(s) _____	Gross Monthly Income? \$ _____
Do you or any household member receive any of the following:	
Social Security? _____ Yes _____ No	If yes, amount \$ _____
SSI? _____ Yes _____ No	If yes, amount \$ _____
Disability? _____ Yes _____ No	If yes, amount \$ _____
TANF/Welfare? _____ Yes _____ No	If yes, amount \$ _____
Unemployment? _____ Yes _____ No	If yes, amount \$ _____
Pensions? _____ Yes _____ No	If yes, amount \$ _____
VA Pensions? _____ Yes _____ No	If yes, amount \$ _____
Retirement? _____ Yes _____ No	If yes, amount \$ _____
Other Income? _____ Yes _____ No	If yes, amount \$ _____
TOTAL HOUSEHOLD INCOME: \$ _____	
Is Household Income within 125% of Federal Poverty Guidelines: ____ Yes ____ No (If "No" use the "Income Eligibility Exceptions" form to determine if there is an exception to the income guidelines for eligibility).	

#### Prospective Income

Do you have any reason to believe that your income is likely to change significantly in the near future?: ____ No (No further inquiry is required) ____ Yes: Source of Income Prospect: (employment income, Pension, etc.) _____ Specific Monthly Amount of Income Prospect: \$ _____
---



## Value of Assets

<b>Do you or any household member have any of the following:</b>	<b>Trust Account?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If yes, amount \$ _____
	<b>Savings Account?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If yes, amount \$ _____
	<b>Checking Account?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If yes, amount \$ _____
<b>Do you or any household member own more than one home?</b>		<input type="checkbox"/> Yes	<input type="checkbox"/> No	If yes, value \$ _____
<b>*Exempt primary residence and only use value of any non-primary residence</b>				
<b>Do you or any household member own more than one car?</b>		<input type="checkbox"/> Yes	<input type="checkbox"/> No	If yes, value \$ _____
<b>*Exempt one vehicle per wage earner</b>				
<b>Do you or any household member own deeded land?</b>		<input type="checkbox"/> Yes	<input type="checkbox"/> No	If yes, value \$ _____
<b>If yes, do you live on the deeded land?</b>		<input type="checkbox"/> Yes	<input type="checkbox"/> No	If yes, value \$ _____
<b>Do you or any household member have any other assets?</b>		<input type="checkbox"/> Yes	<input type="checkbox"/> No	If yes, value \$ _____
<b>If yes, please list:</b> _____				
				<b>TOTAL AMOUNT OF ASSETS: \$</b> _____
<b>Is Household Assets within 150% of Federal Poverty Guidelines:</b> <input type="checkbox"/> Yes <input type="checkbox"/> No				

## Case Information

**Applicant's legal problem:** \_\_\_\_\_

**Has Applicant or the opposing party filed pleadings in this matter?**  Yes  No  
(If yes, please attach copies of the pleadings to this application.)

**Has Applicant been served with pleadings?**  Yes  No **If yes, list date of service?** \_\_\_\_\_

**Is there a hearing date scheduled?**  Yes  No **If yes, date of hearing:** \_\_\_\_\_

**Are there any existing Court Orders in this matter?**  Yes  No  
(If yes, please attach copies of the Court Orders to this application.)

**Screened by:** \_\_\_\_\_, DPLS Employee **Date:** \_\_\_\_\_

I hereby apply for legal services from Dakota Plains Legal Services. I understand that DPLS will consider my application and decide whether they can provide me with assistance in accordance with their rules and policies and the rules and regulations of the Legal Services Corporation. I also understand that if I am not satisfied with the decision of DPLS, I may file a grievance or appeal of that decision in accordance with the DPLS Grievance Policy. I certify to DPLS that the above information is true and correct.

\_\_\_\_\_  
Applicant Signature Date

I am a citizen of the United States: \_\_\_\_\_ Date: \_\_\_\_\_  
(Signature of Applicant)

DPLS Case #: \_\_\_\_\_

## INCOME ELIGIBILITY EXCEPTIONS FORM

I. Does applicant's household income exceed 125% of the annual income ceiling \_\_\_ Yes \_\_\_ No  
Is the applicant's household assets below the asset ceiling \_\_\_ Yes \_\_\_ No

Is the applicant seeking legal assistance to maintain benefits provided by a governmental program for low-income individuals or families (e.g. SSI or TANF): \_\_\_ Yes \_\_\_ No

If the answer is "Yes" to all the above then the applicant is eligible for LSC-funded legal services and the application may proceed to the case acceptance meeting for a determination whether services will given to the applicant under LSC-funding.

II. Does applicant's household income exceed 125% of the annual income ceiling \_\_\_ Yes \_\_\_ No  
Is the applicant's household assets below the asset ceiling \_\_\_ Yes \_\_\_ No

Is the applicant's income primarily committed to medical or nursing home expenses \_\_\_ Yes \_\_\_ No

If Yes:

A. \$ \_\_\_\_\_ Applicant's gross monthly household income

B. \$ \_\_\_\_\_ Documented monthly amount committed to medical or nursing home expenses

C. \$ \_\_\_\_\_ A. minus (-) B. Does this amount place the applicant's household income below 125% of the annual income ceiling for eligibility? \_\_\_ Yes \_\_\_ No

If the answer is "Yes" to all the above it will be the intake staffs responsibility to request, gather and forward the applicant's monthly medical and/or nursing home expenses/bills and Form 1611 (Over-Income Form) to the Executive Director for permission and approval to take this case.

III. Does applicant's household income exceed 125% of the annual income ceiling \_\_\_ Yes \_\_\_ No

Is the applicants household income less than 150% of the income guidelines \_\_\_ Yes \_\_\_ No

If the answer to is "Yes" to all the above and a "Yes" answer to A. or B. below, then the applicant is eligible for LSC-funded legal services and the application may proceed to the case acceptance meeting for a determination whether services will given to the applicant under LSC-funding:

A. Is the applicant seeking legal assistance to obtain government benefits for low-income individuals or families (e.g. SSI or TANF): \_\_\_ Yes \_\_\_ No

B. Is the applicant seeking legal assistance to obtain or maintain governmental benefits for persons with disabilities: (e.g. SSI or SSDI): \_\_\_ Yes \_\_\_ No

IV. Does applicant's household income exceeds 125% of the annual income ceiling \_\_\_ Yes  
\_\_\_ No

Is the applicants household income less than 150% of the income guidelines \_\_\_ Yes \_\_\_ No

If the answer to is "Yes" to all the above and one or more of the following factors applies then the applicant is eligible for LSC-funded legal services and the application may proceed to the case acceptance meeting for a determination whether services will given to the applicant under LSC-funding:

A. Seasonal variations in income \$ \_\_\_\_\_ Please explain seasonal variations in applicant's income: \_\_\_\_\_  
\_\_\_\_\_

B. Unreimbursed medical expenses and medical insurance premiums \$ \_\_\_\_\_

C. Fixed debts and obligations, excluding food, credit card debt, business expenses, mortgage payments, rent, child support and spousal support and other such routine obligations (e.g. monthly student loan payments, wage garnishments, or back taxes) \$ \_\_\_\_\_

D. Expenses such as dependent care, transportation, clothing and equipment expenses necessary for employment, job training, or educational activities, in preparation for employment  
\$ \_\_\_\_\_

E. Non-medical expenses associated with age or disability \$ \_\_\_\_\_

F. Current tax obligations on applicant's primary residence \$ \_\_\_\_\_

G. Other significant factors that affect the applicant's ability to afford legal assistance  
\$ \_\_\_\_\_ What are the other significant factors that affect the ability to afford legal assistance  
\_\_\_\_\_  
\_\_\_\_\_

If the applicant does not meet any of these exceptions they may be eligible for services under OAA funding (over the age of 60 and not a criminal case, divorce case or tax help).

**DAKOTA PLAINS LEGAL SERVICES  
INCOME ELIGIBILITY EXCEPTIONS FORM**

**MAINTAINING BENEFITS**

I. Does applicant's household income exceed 125% of the annual income ceiling \_\_\_ Yes \_\_\_ No  
Is the applicant's household assets below the asset ceiling \_\_\_ Yes \_\_\_ No

Is the applicant seeking legal assistance to maintain benefits provided by a governmental program for low-income individuals or families (e.g. SSI or TANF): \_\_\_ Yes \_\_\_ No

If the answer is "Yes" to all the above then the applicant is eligible for LSC-funded legal services and the application may proceed to the case acceptance meeting for a determination whether services will given to the applicant under LSC-funding.

**MEDICAL/NURSING HOME EXPENSES**

II. Does applicant's household income exceed 125% of the annual income ceiling \_\_\_ Yes \_\_\_ No  
Is the applicant's household assets below the asset ceiling \_\_\_ Yes \_\_\_ No

Is the applicant's income primarily committed to medical or nursing home expenses \_\_\_ Yes \_\_\_ No

If Yes:

A. \$ \_\_\_\_\_ Applicant's gross monthly household income

B. \$ \_\_\_\_\_ Documented monthly amount committed to medical or nursing home expenses

C. \$ \_\_\_\_\_ A. minus (-) B. Does this amount place the applicant's household income below 125% of the annual income ceiling for eligibility? \_\_\_ Yes \_\_\_ No

If the answer is "Yes" to all the above it will be the intake staffs responsibility to request, gather and forward the applicant's monthly medical and/or nursing home expenses/bills and Form 1611 (Over-Income Form) to the Executive Director for permission and approval to take this case.

**OBTAINING GOVERNMENT BENEFITS FOR LOW INCOME PERSONS**

III. Does applicant's household income exceed 125% of the annual income ceiling \_\_\_ Yes \_\_\_ No

Is the applicants household income less than 150% of the income guidelines \_\_\_ Yes \_\_\_ No

If the answer to is "Yes" to all the above and a "Yes" answer to A. or B. below, then the applicant is eligible for LSC-funded legal services and the application may proceed to the case acceptance meeting for a determination whether services will given to the applicant under LSC-funding:

A. Is the applicant seeking legal assistance to obtain government benefits for low-income individuals or families (e.g. SSI or TANF): \_\_\_ Yes \_\_\_ No

**OBTAIN/MAINTAIN GOVERNMENT BENEFITS FOR THE DISABLED**

B. Is the applicant seeking legal assistance to obtain or maintain governmental benefits for persons with disabilities: (e.g. SSI or SSDI): \_\_\_ Yes \_\_\_ No

**OTHER FACTORS**

IV. Does applicant's household income exceed 125% of the annual income ceiling \_\_\_ Yes \_\_\_ No

Is the applicants household income less than 150% of the income guidelines \_\_\_ Yes \_\_\_ No

If the answer to is "Yes" to all the above and one or more of the following factors applies then the applicant is eligible for LSC-funded legal services and the application may proceed to the case acceptance meeting for a determination whether services will given to the applicant under LSC-funding:

A. Seasonal variations in income \$ \_\_\_\_\_ Please explain seasonal variations in applicant's income: \_\_\_\_\_

B. Unreimbursed medical expenses and medical insurance premiums \$ \_\_\_\_\_

C. Fixed debts and obligations, excluding food, credit card debt, business expenses, mortgage payments, rent, child support and spousal support and other such routine obligations (e.g. monthly student loan payments, wage garnishments, or back taxes) \$ \_\_\_\_\_

D. Expenses such as dependent care, transportation, clothing and equipment expenses necessary for employment, job training, or educational activities, in preparation for employment \$ \_\_\_\_\_

E. Non-medical expenses associated with age or disability \$ \_\_\_\_\_

F. Current tax obligations on applicant's primary residence \$ \_\_\_\_\_

G. Other significant factors that affect the applicant's ability to afford legal assistance \$ \_\_\_\_\_ What are the other significant factors that affect the ability to afford legal assistance

If the applicant does not meet any of these exceptions they may be eligible for services under OAA funding (over the age of 60 and not a criminal case, divorce case or tax help).

Screened by: \_\_\_\_\_, DPLS Employee Date: \_\_\_\_\_

CLIENT NAME: \_\_\_\_\_ CASE #: \_\_\_\_\_



# DAKOTA PLAINS LEGAL SERVICES

Administrative Offices are located in the Mission Branch Office

*Please address reply to:*

☑ P.O. Box 727  
Mission, SD 57555-0727  
605-856-4444 • 1-800-658-2297  
FAX 605-856-2075

☐ 2009 E Hwy 10 Suite C  
Sisseton, SD 57262-2501  
605-698-3971  
FAX 605-698-4156

☐ P.O. Box 20  
Fort Thompson, SD 57339-0020  
605-245-2341  
FAX 605-245-2393

☐ P.O. Box 1989  
Pine Ridge, SD 57770-1989  
605-867-1020  
FAX 605-867-1092

☐ P.O. Box 500  
Eagle Butte, SD 57625-0500  
605-964-2175  
FAX 605-964-1215

☐ 528 Kansas City St., Suite 1  
P.O. Box 1500  
Rapid City, SD 57709-1500  
605-342-7171 • 1-800-742-8602  
Fax: 605-348-5874

☐ P.O. Box 507  
Fort Yates, ND 58538-0507  
701-854-7204  
FAX 701-854-3686

**MEMO**

**DATE: September 23, 2009**

**TO: DPLS Staff**

**FROM: Pat Donovan, Executive Director (D)**

**RE: OCE Corrective Action-Retainer Agreements**

**OCE has determined from their review that our executed Retainer Agreements are deficient and probably unenforceable.**

**Retainer Agreements are deficient because we have the client sign the agreement without the scope and subject matter of the representation being filled in (this is an incomplete Retainer Agreement). In effect, the client is not agreeing to anything when this information is absent on the retainer when they sign it.**

**OCE advised two possible solutions 1) Have client initial agreement by the scope and subject matter once it is filled in, or 2) sign it after the Retainer Agreement is complete.**

**Please follow up and get this done on any open cases. On cases already opened, it would be best to get the client to initial by the scope and subject matter line of the agreement**

**For future cases, have the client sign a completed Retainer Agreement (ie., the subject matter and scope of representation is filled in or inserted into the retainer agreement before the client signs it).**

**45 CFR §1611.9(a) and (c) requires the retainer agreement to be executed when representation commences or as soon thereafter is practical and a copy is to be retained by the recipient (i.e. DPLS). This means the subject matter and scope of representation portion must be filled in before the client executes (signs) the retainer agreement.**

**We should not begin representation of a client on a particular case until a fully and complete retainer agreement is executed by the case-handler and the client. You should inform the client that DPLS cannot begin work on their case until this is done.**

 LSC



United Way

## **DPLS' RESPONSE TO FINDING 1**

**Finding 1: Sampled cases evidenced that DPLS' automated case management system (ACMS) is insufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded.**

The review found that DPLS' ACMS is insufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded.

### **DPLS Response:**

DPLS objects to the characterization that it's ACMS is insufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded and requests that this finding be amended accordingly. The Finding states: "There were relatively few files that contained information that was inconsistent with the information yielded in the ACMS." This finding would seem to suggest that DPLS' ACMS is sufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded. Relatively few files which contained information that was inconsistent with the information yielded in the ACMS would seem to imply that DPLS' ACMS is sufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded. The review found a very small number of cases with these problems. Overall the program has done a good job of ensuring that information from the case files is accurately entered into the case system. It is impossible to expect to achieve 100% accuracy due to human error with the large number of cases handled by the program. There is always room for improvement and DPLS will train staff to accurately enter case information into its ACMS and will develop written procedures for such entries.

DPLS is developing procedures and will integrate them into the Intake and Procedure and Practice Desk Manual. The protocols will include the appropriate procedures for the use of compliance critical fields, such as the LSC-Eligible box and asset categories as recommended by this Finding.

## **DPLS' RESPONSE TO FINDING 16 and REQUIRED CORRECTIVE ACTION 4**

**Finding 16: DPLS' PAI plan does not comply with 45 CFR 1614 which is designed to ensure that recipients of LSC funds involve private attorneys in the delivery of legal assistance to eligible clients.**

**The Required Corrective Action 4: Update its PAI plan, submit it to each Bar Association in its service area for comments and include a summary of the comments in the Plan.**

The PAI plan has been updated (see attached) and it was published in the November, 2009 South Dakota Bar Association news letter for comment. In past years DPLS' PAI plan has been published in the State Bar news letter as a means of submitting the plan to all local Bar Associations for comment.

DPLS has found, from experience and practice, that this is the only and most effective way to submit the PAI plan for comment to each local Bar Association in our service areas. The local Bar Associations in our service area are very small and informal. They meet only sporadically, sometimes only once a year, if even that, to elect officers. Nor do they maintain physical offices or addresses where notice can be sent for comment. Notice to each one would be futile since they only meet sporadically and since they have no physical address or location. All members of the South Dakota Bar receive the State Bar news letter. None of the local Bar Associations provide pro bono services due to being informal associations, small in size and lacking funding. The South Dakota Bar Association is the only provider of pro bono services through its Access to Justice, Inc. program.

DPLS would request the Legal Services Corporation provide clarification and guidance on whether this practice of publishing its PAI plan in the State Bar newsletter fulfills the requirement of submitting its PAI plan to each Bar Association in our service area.



## NOTICE

Dakota Plains Legal Services, Inc. (DPLS) has developed its annual Private Attorney Involvement (PAI) Plan for 2010.

Dakota Plains Legal Services (DPLS) is a non-profit private corporation, providing legal services to eligible low-income clients on nine Indian reservations and thirty-four counties in North and South Dakota. DPLS receives funds from the Legal Services Corporation (LSC) and, for purposes of LSC, is classified as a Native American Program. However, DPLS receives a Basic Field Grant each year which comes with a requirement that DPLS spend 12.5% of that grant on Private Attorney Involvement (PAI) which is approximately \$63,838. DPLS has historically requested LSC to waive a portion of the PAI funds because those funds have not been spent. In an effort to spend a greater portion of the PAI funds for Fiscal Year 2010, the PAI plan calls for the following:

### Delivery Mechanism

In the past, DPLS used its PAI funds to contract with private attorneys in the states of South Dakota and North Dakota to help deliver legal services to our low income clients. In 2010 private attorneys will be utilized on a contract basis in the following areas: (1) a private attorney has superior expertise in a specialized area of law, (2) the staff is overloaded and not able to accept additional cases, (3) extra help is needed in a particular office by entering into independent contractor contracts with private attorneys to provide for temporary help on LSC eligible cases, (4) provide more private attorney representation to clients in the Charles Mix County service area due to the great distance of that county to an existing DPLS office to save on travel expenses, (5) provide clients access to private attorneys, (6) provide private attorney representation for a limited number of bankruptcy cases, (7) expand professional representation in tribal court to include non-DPLS attorneys, and (8) provide private attorney representation when staff is not located near the client or where the client's case is venued.

### Types of Cases

Cases will be contracted with the Private Bar will be in the primary areas of Indian law, family law, consumer law (including a limited number of bankruptcy cases) and cases in which domestic violence is a factor. These cases are the highest priorities of DPLS and also present areas where the local private bar has expertise. It is projected that 30-50 cases will be handled under PAI in FY 2010. Experience has shown that involving private attorneys in tribal court case work facilitates the development of the tribal court systems in the DPLS service area.

## Budget

DPLS expects to spend up to \$63,838 on PAI activities in FY 2010. The majority of the money will be used to contract with private attorneys on a reduced fee basis. A license to practice in tribal court(s) may be required to practice, and is not considered a reimbursable expense. Related to this requirement, DPLS shall account for or identify separately all administrative, overhead, staff and support costs associated with administering the Plan.

## Reduced Fee Contracts

In an effort to make this Plan available to all attorneys, no sole practitioner or firm participating in this program will be allowed to receive more than \$19,000 in any one calendar year if at all possible. DPLS will pay a private attorney up to \$2,000 per case at a rate of \$45 per hour for their out of court time and \$60 per hour for their in-court time.

All private attorneys in the states of South Dakota and North Dakota are eligible to contract with DPLS under the PAI program. However, current attorney board members and former DPLS staff attorneys (within 2 years of departure) are prohibited from contracting with DPLS.

Any member of the bar or any local bar associations within DPLS service area that would like to comment on or have suggestions on this plan or would like to be placed on the PAI Attorney roster can contact Pat Donovan, Executive Director, at P.O. Box 727, Mission, SD 57555 or (605) 856-4444.

## **DPLS' RESPONSE TO FINDING 22 and REQUIRED CORRECTIVE ACTION 5**

**Finding 22: Sampled cases evidenced non-compliance with the requirements of 45 CFR Parts 1613 and 1615 (Restrictions on legal assistance with respect to criminal proceedings, and actions collaterally attacking criminal convictions).**

**Required Corrective Action 5: Cease accepting criminal cases unless they comply with 45 CFR 1613.**

DPLS Response:

DPLS objects to the finding that it is in non-compliance with the requirements of 45 CFR Part 1613 and 1615 by accepting state court adult criminal appointments and request that LSC reconsider its position that DPLS is in non-compliance with the requirements of 45 CFR Part 1613.

The finding states the Managing Attorney in the Fort Yates office voluntarily placed her name on the court appointed attorney list. This statement needs to put in proper context. The Fort Yates office had been without an attorney for a period of time. When the Managing Attorney was hired she contacted the court to be placed on Court Appointed Attorney List. Otherwise the court would not have known that there now was an attorney available in the Fort Yates office. DPLS has historically provided legal assistance on state court criminal appointments in certain offices whose service areas lack enough attorneys to take court appointments including the Fort Yates branch office service area. This reassures our clients that we are available to protect their rights in state court. Our client community expects DPLS to take criminal state court appointments. DPLS attorneys possess a cultural understanding private attorneys do not in representing Native Americans in criminal actions in state court. Native American criminal defendants do not trust off reservation attorneys to adequately represent their interest and to account for cultural differences and perceive DPLS as fulfilling these deficiencies.

DPLS contends that the two conditions required to provide legal assistance in criminal cases are satisfied according to 45 CFR §1613.4(a).

The first condition requires the rule or practice under which court appointments are made must be equally applicable to all attorneys in the jurisdictions. DPLS' service areas are sparsely populated and there is a shortage of attorneys in these areas to handle either civil or criminal matters. DPLS feels it has a professional responsibility to provide legal assistance in state court criminal court appointments. SDCL 23A-40-7 Representation provided by county for indigents. This statute reads in relevant part: "The board of county commissioners of each county. . .shall provide for the representation of indigent persons. . .They shall provide this representation by any or all of the following: (2) Arranging with the courts in the county to appoint attorneys on an equitable basis through a systematic, coordinated plan;. . ." (A copy of this statute is attached). Rule 6.2 of the South Dakota Rules of Professional Conduct states "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause" then list 3 good cause exceptions not relevant to this finding. Please comment [2] to Rule 6.2 regarding good

cause to refuse court appointments. (A copy of Rule 6.2 and comments is attached). Also attached is a letter from the Executive Director and Secretary-Treasurer of the State Bar of South Dakota. This letter explains that our offices are in rural areas with a lack of attorneys and that DPLS is required by judges to take our share of criminal court appointments to represent our Native American population. These statutes and the attorney oath make court appointments equally applicable to all attorneys in the jurisdictions.

The second condition allows the program to authorize the provision of legal assistance in criminal proceedings only after the program has determined that such representation is consistent with its primary responsibility to provide legal assistance to eligible clients in civil matters. Representation in criminal appointments in state court has been a priority of DPLS since its inception. This priority is based upon the trust DPLS has developed with its client community over the past 40 plus years. Native American criminal defendants feel that they will not receive a fair shake from the state criminal system or from court appointed attorneys who have no connection with their reservations or culture. Non-DPLS court appointed attorneys for Native American defendants have little knowledge of Indian or tribal culture, tradition or religion. DPLS fills this void by providing legal assistance in court appointed criminal proceedings to protect their rights in state court. These appointments allow DPLS attorneys to work more closely with judges and attorneys whom they would otherwise not work as closely with. These cases allow DPLS attorneys to hone their trial skills, client counseling skills, interview skills, and discovery skills that can be applied to their civil cases. They also reassure our clients that we are available and providing culturally sensitive representation. Our client community expects DPLS to take criminal state court appointments.

If it is still found that DPLS is restricted from providing legal assistance with respect to these criminal proceedings, DPLS would request a waiver from LSC to allow it to provide legal assistance in this matters to our indigent Native American clients.

This finding also found that DPLS subsidizes these cases with LSC funds until the program receives reimbursement from the Court in the amount of \$89 an hour which occurs upon completion of the case and that the use of LSC funds to subsidize these criminal cases is a violation of 45 CFR §1613.3. DPLS does not dispute this finding. However, if allowed to continue to provide legal assistance on these cases, DPLS can change its accounting and time keeping system to use non-LSC funds to subsidize these cases until they are completed and payment is made by the County.

Note 2

conclusory in nature and covers numerous items. SDCL 23A-40-6. State v. Dale, 1989, 439 N.W.2d 112. Criminal Law ⇨ 641.9

Indigent parolee is not automatically entitled to counsel. Op.Atty.Gen. Opinion No. 78-43, 1978 WL 33912.

3. Compensation of private counsel

Fee arrangement between privately retained defense cocounsel and purportedly indigent defendant was not privileged in light of court's efforts to determine whether defendant was still indigent or had assets available to reimburse county for expense of representation by public defender. SDCL 23A-40-6, 23A-40-10, 23A-40-11. Matter of Discipline of Rensch, 1983, 333 N.W.2d 713. Witnesses ⇨ 201(1)

4. Revocation of probation

A probation violation report is similar to a pleading, in that the purpose of each is to frame the issues upon which the case is to be tried and to advise the defendant of what he is called

upon to meet. State v. Christian, 588 N.W.2d 881, 1999 SD 4. Sentencing And Punishment ⇨ 2011

A suspended sentence is an act of grace and the decision to so suspend is within the trial court's discretion. State v. Christian, 588 N.W.2d 881, 1999 SD 4. Sentencing And Punishment ⇨ 1802

Written notice of claimed violations is one of the minimum due process requirements of parole or probation revocation. U.S.C.A. Const. Amend. 14. State v. Christian, 588 N.W.2d 881, 1999 SD 4. Constitutional Law ⇨ 270(5); Constitutional Law ⇨ 272.5

5. Presumptions and burden of proof

When a defendant's ability to afford counsel has been placed in issue, defendant has the burden of proving by a preponderance of the evidence his inability to afford counsel. SDCL 23A-40-6. State v. Dale, 1989, 439 N.W.2d 112. Criminal Law ⇨ 641.9

**23A-40-6.1. Assigned counsel not required where defendant not deprived of liberty—Statement of judge required**

At the time of arraignment for a violation of a Class 2 misdemeanor or a violation of an ordinance or at the time of the hearing for a petty offense, the circuit court judge or magistrate may conclude and state on the record, in the defendant's presence, that the defendant will not be deprived of his liberty if he is convicted. The circuit court judge's or magistrate's statement that the defendant will not be deprived of his liberty if he is convicted shall be made before the defendant enters his plea. If the defendant is not in custody and if the court has concluded that he will not be deprived of his liberty if he is convicted, an indigent defendant charged with violating a Class 2 misdemeanor, an ordinance not having a penalty greater than a Class 2 misdemeanor or a petty offense, is not entitled to court assigned counsel.

Source: SL 1983, ch 190, § 2.

**Cross References**

Crimes, penalties for classified misdemeanors, see § 22-6-2.

**Library References**

Criminal Law ⇨ 641.2(4).  
Westlaw Key Number Search: 110k641.2(4).  
C.J.S. Criminal Law § 278.

**23A-40-7. Representation provided by county or municipality for indigents detained without formal charge**

The board of county commissioners of each county and the governing body of any municipality shall provide for the representation of indigent persons described in § 23A-40-6. They shall provide this representation by any or all of the following:

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## RIMINAL PROCEDURE

ate v. Christian, 588 N.W.2d  
Sentencing And Punishment

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State v. Christian, 588  
SD 4. Sentencing And Pun-

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revocation. U.S.C.A. Const.  
v. Christian, 588 N.W.2d  
Constitutional Law ¶ 270(5);  
¶ 272.5

### und burden of proof

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by a preponderance of the  
ity to afford counsel. SDCL  
v. Dale, 1989, 439 N.W.2d  
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## GOUNSEL FOR INDIGENT DEFENDANT

§ 23A-40-8

Note 1

- (1) Establishing and maintaining an office of a public defender;
- (2) Arranging with the courts in the county to appoint attorneys on an equitable basis through a systematic, coordinated plan; or
- (3) Contracting with any attorney licensed to practice law in this state.

In those counties which have established an office of public defender, any proceedings after judgment may be assigned to the public defender. The provisions of § 5-18-2 do not apply to this section.

Source: SL 1979, ch 159, §§ 34, 35; SL 1998, ch 152, § 1.

### Library References

Attorney and Client ¶ 132.  
Criminal Law ¶ 641.11.

Westlaw Key Number Searches: 45k132;  
110k641.11.

C.J.S. Attorney and Client §§ 299 to 303.

C.J.S. Criminal Law §§ 300, 317.

### Notes of Decisions

#### In general 1

##### 1. In general

A county board of commissioners may seek to provide for the representation of indigent per-

sons within their county through the acceptance of bids for a professional services contract with a licensed attorney from the county; the plan for these appointments should, however, include the input of the circuit court. Op. Atty. Gen. Opinion No. 89-05, 1989 WL 505646.

### 23A-40-8. Compensation of assigned counsel

Counsel assigned pursuant to § 23A-40-6 and subdivision 23A-40-7(2) shall, after the disposition of the cause, be paid by the county in which the action is brought, or, in case of a parole revocation, by the county from which the inmate was sentenced, a reasonable and just compensation for his services and for necessary expenses and costs incident to the proceedings in an amount to be fixed by a judge of the circuit court or a magistrate judge within guidelines established by the presiding judge of the circuit court.

Source: SDC 1939, § 34.1901; SL 1957, ch 182; SDCL, §§ 23-2-2, 23-2-3; SL 1968, ch 147; SL 1969, ch 155; SL 1978, ch 178, § 493; SDCL Supp, § 23A-40-4; SL 1979, ch 159, § 34; SL 1983, ch 191, § 1.

### Cross References

Public defender, see § 7-16A-1 et seq.

### Library References

Attorney and Client ¶ 132.

Westlaw Key Number Search: 45k132.

C.J.S. Attorney and Client §§ 299 to 303.

### Notes of Decisions

#### In general 1

##### 1. In general

Trial court's explanation of its reasons for reducing, by approximately \$4,100, the

\$13,299.50 in attorney fees sought by defendant's appointed counsel did not apply the correct legal standard; trial court did not take into account all of the *Duffy* factors, such as defendant's exposure to possible punishment of life sentence for child rape, and reduction in fees

accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of

each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

#### Library References

Attorney and Client §32(10).  
Westlaw Key Number Search: 45k32(10).  
C.J.S. Attorney and Client §§ 49 to 50.

### Rule 6.2. Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of the rules of professional conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Source: SL 2004, ch 327 (Supreme Court Rule 03-26), eff. Jan. 1, 2004.

COMMENT:

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

**Appointed Counsel**

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if

undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

**Library References**

Attorney and Client §32(10).  
Westlaw Key Number Search: 45k32(10).  
C.J.S. Attorney and Client §§ 49 to 50.

**Rule 6.3. Membership in Legal Services Organization**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Source: SL 2004, ch 327 (Supreme Court Rule 03-26), eff. Jan. 1, 2004.

COMMENT:

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.



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November 19, 2009

Mr. Patrick Donovan  
PO Box 727  
Mission, SD 57555

Re: DPLS court appointments

Dear Mr. Donovan:

As you know, I started my legal career over thirty years ago as a legal aid lawyer for South Dakota Legal Services, now Dakota Plains Legal Services. Its offices then, as now, were in rural areas with a paucity of private practitioners. Thus, we were required by the judges to take our share of criminal court appointments. As a practical matter, we were appointed to represent indigent Native Americans – usually clients with whom we had long-established relationships. We were compensated just like private practitioners (as was only fair) and the income generated facilitated our programs ability to serve our clientele on the civil side.

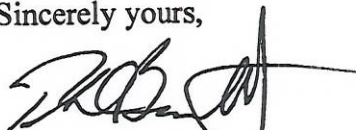
These criminal court appointments were not nor are they now, fee generating. Our courts have set the criminal court appointment rate at the office overhead level. This simply means that whether the lawyer is in private practice or is an employee of a Legal Aid office, the compensation isn't net income; rather, it is break even.

Our oath, as lawyers, says that we will not refuse a case for the indigent. Our judges expect that all lawyers, private practice or not, take the occasional court appointment. The Rules of Professional Conduct do not permit us to pick and choose which court orders we will obey. Thus, your lawyers do not have the option of refusing court appointments. Now, I suppose you could refuse to bill the county for handling the case, thus solving the issue of whether it is fee generating. However, then all that you have

accomplished is to provide public defender services paid for from LSC funds intended to help indigents in the civil arena.

I do not know how many criminal court appointments the lawyers at DPLS get on an annual basis. What I will do, over the next month or so, is review the number of private practitioners on or adjacent to the reservations served by DPLS. I will also review the number of criminal cases in each of those jurisdictions. You can then analyze whether your lawyers are receiving a disproportionate number of criminal appointments.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'T. Barnett, Jr.', with a long horizontal stroke extending to the right.

Thomas C. Barnett, Jr.  
Executive Director & Secretary-Treasurer

## Response to the OCE report re: finding 10

### case # 08-01-01000577

draft report indicates the closing code should be "b" and not "f" as was coded by DPLS--

the client was being evicted from Sunrise apts. & the case handler notes state that through his negotiations over the phone with the landlord the client is able to stay in her home contingent upon her completing the requested docs to the landlord. The docs were completed by DPLS & the client was allowed to remain in her apt.

### **CSR Closure Category F – Negotiated Settlement Without Litigation**

A case closed in which the program negotiated and reached an actual settlement on behalf of a client without any court or administrative actions pending should be closed as Negotiated Settlement Without Litigation. This category should be reserved for cases in which the program conferred with another party so as to reach a resolution of the client's legal problem. This category includes settlements negotiated with an administrative agency prior to the filing of a formal administrative proceeding

the case was correctly coded with a closing code of F

### case 08-03-01000067 Draft report says should be coded to A not to B as was by DPLS

in this case DPLS sent an email to a third party on behalf of the client regarding her termination of parental rights and a copy of the email is attached the closing file

### **CSR Closure Category B – Limited Action**

A case closed in which the program took limited action(s) on behalf of an eligible client that addressed the client's legal problem that is not so complex or extended as to meet the requirements for CSR Category L should be closed as Limited Action. Examples include, communications by letter, telephone or other means to a third party; preparation of a simple legal document such as a routine will or power of attorney; or legal assistance to a *pro se* client<sup>46</sup> that involves assistance with preparation of court or other legal documents

in this case DPLS contacted a third party on her behalf and the case was correctly coded as a B by DPLS

### case 09-07-01000349 draft report says the case should have been closed as a B not an L-- and they are correct

### case 09-01-01000011 draft report says the case should have been closed as a B and not an L

this is a case where the client couldn't get her water on because of someone else's debt to the city-- there were numerous calls and meetings with the client & 11.5 hours spent on the matter, finally the it was picked up by another agency --

### **CSR Closure Category L – Extensive Service (not resulting in Settlement or Court or**

**Administrative Action)**

A case closed in which the program undertook extensive research, preparation of complex legal documents, extensive interaction with third parties on behalf of an eligible client, or extensive on-going assistance to clients who are proceeding *pro se* should be closed as Extensive Service. Some examples of extensive service include the preparation of complex advance directives, wills, contracts, real estate documents or other legal documents, or the provision of extensive transactional work. This category also includes cases closed after extensive interaction or negotiations with another party which do not result in a negotiated settlement. In addition, cases closed after litigation is initiated in which the program appears as counsel of record that do not result in a negotiated settlement, administrative agency or court decision, or in which an order of withdrawal or voluntary dismissal is entered should be closed in this category.

In this case there was extensive contact with third parties and all documented in the timeslips & it was correctly coded as an L by DPLS

**Case No. 08-01-01000489**

the draft report says it should have been coded as a B and not an L

in this case there were 5 calls made and one document drafted on behalf of the client to get the info she needed –

as above, cases are closed as “L” when there is extensive interaction with third parties on behalf of client

in this case as there was extensive interaction it was correctly coded by DPLS as an L

**Case No. 09-01-01000251**

in this case DPLS got a copy of an order from the SD OCSE and sent it to client, which is what she used to get her child back from the father in another state- there were 4.25 hours put into this, but it seems since the action helped get the child back, even though the client proceeded *pro se*-- the case went on for almost a month & the conclusion was the child being returned to the client with the help of the info she got from DPLS and the info DPLS got from the state

I believe under the definition above the case would be an L– but because the client did all *pro se*’ it is a close call– DPLS coded it correctly with closing code L

**Case no. 08-01-01000409**

the draft report says it should be coded to an Ib – it was coded to a G

they are correct, Dawn had it coded correctly and I misread my notes –the case above it was to be changed to a G.– totally my fault

**Case No. 06-01-01000301**

the draft report says this should be coded to IB and not IC as it isn't an appeal

the last and closing document is an Order from the Supreme Court of the Rosebud Sioux Tribe. The timeslips indicate the brief and arguments submitted to the supreme ct-

(C) Appeals to an appellate court taken from a decision of any court or tribunal (*See* 45 CFR §§ 1605.2 and 1605.3). This category does not include appeals or writs taken from administrative agency decisions or lower trial court decisions to a higher level trial court acting as an appellate court, whether they are on the record or *de novo* proceedings.

This case is clearly an appeal from a decision from the tribal court

DPLS correctly coded this as an I ( C )

Case no. 09-01-01000187

I asked for supporting info on the case, but never received it from the office

Case No. 07-01-01000621

the draft report says this should have been coded to an I - but DPLS closing code was K

in this case DSS asked the Tribe to dismiss the charges against our client & they did, the DPLS office never went to a hearing on this, but did spend extensive time on the case with calls and advice

I.

A case closed in which the program represented a client in a court proceeding that resulted in a case dispositive decision made by the court should be closed as a Court Decision.

There was no representation of the client in Court by DPLS so it cannot be closed to category I

DPLS correctly coded this as a K