

AMERICAN BAR ASSOCIATION

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Re: Comments in Response to LSC Further Notice of Proposed Rulemaking
Regarding 45 CFR Parts 1606, 1618 and 1623

Dear Mr. Freedman:

The American Bar Association, through its Standing Committee on Legal Aid and Indigent Defendants, submits these additional comments in response to the Further Notice of Proposed Rulemaking on proposed amendments to Legal Services Corporation (LSC) regulations on termination procedures, enforcement and suspension procedures of the Corporation.

As noted in comments submitted relating to this issue on March 30, 2012, it is of the utmost importance that the Corporation serve as a responsible steward of federal funding, and insure that such funding is used in a manner that fully complies with legal requirements.

At the same time, because imposition of any sanctions on a recipient of LSC funds can have serious and sometimes unforeseen consequences to both the individual recipient program and to the capacity of the entire network of LSC-funded programs to provide services, LSC should provide procedures that ensure that new enforcement measures yield just and consistent results.

For those reasons, we suggest the following additional changes, each of which is discussed in more detail below:

1. Establish a threshold requiring that a violation be knowing and willful to be considered “substantial;”
2. Expand the criteria to be considered in determining whether a “substantial violation” has occurred;
3. Add clearer guidance regarding the magnitude of a limited reduction in funding, or a partial termination in funding. Such guidance should include consideration of mitigating factors and a requirement of proportionality of the sanction to the violation;
4. Assess the practicality and fairness of an appeals process whereby the President delegates responsibility for deciding an appeal to another employee whom the President supervises, which employee will then be called upon to review a matter in which the President has previously taken a position;
5. Ensure due process by implementing an appeals procedure and making other changes with respect to suspensions of funding under Part 1623.

Threshold Requirement for Sanctions

There may be situations where a recipient has acted in a manner that is in clear violation of LSC enabling/funding legislation or regulations, and where the violation was intentional or done through willful failure to consult LSC requirements. In such situations, LSC enforcement action is appropriate. There will likely, in contrast, be other situations where a recipient acts in good faith reliance on a reasonable interpretation of state law, ethical requirements or other authority in pursuing a course of action. If LSC believes that such a course of action is inappropriate, then the matter should be taken to an appropriate external and impartial tribunal. It would be unjust to impose sanctions to force a recipient to act in a manner that it believes will result in violating duties owed to other authorities or individuals. To address these concerns, proposed redlined changes to the text of Part 1606.2 (b) and (h) are provided below.

Expansion of “Substantial Violation” Criteria

We suggest an additional criterion for determining whether a violation is substantial: if the violation concerns misuse of funds, the amount of funds at issue should be considered. Proposed redlined changes to Part 1606.2(h) are provided below.

Guidance on Magnitude of a Reduction in Funding

The procedures suggested in the FNPRM continue to merge together aspects of a sanctions regime that would more logically and fairly be treated as separate inquiries. To be consistent with analogous types of proceedings, the finding of grounds for action, and the determination of the size of a penalty should be separately addressed. The only place that the magnitude of a sanction to be imposed is addressed is in Part 1606.3 (c); this occurs within the “Grounds” subsection and in a subordinate clause within a sentence. As currently structured, this refers back to the “Definitions” section for criteria to be used. This gives very little, and confusing, guidance to those who must apply this sanctions scheme. It seems likely to result in inconsistency among different LSC staff, and over time. It would be far better to treat the subject of the degree of

penalty in a separate portion of the regulation. Further, that part of the regulation should address both aggravating and mitigating circumstances. Moving this to a separate portion of the regulation would render Part 1606.3(c) unnecessary, as the remainder of the text of this sub-part in essence merely states that a “substantial violation” is what the “Definitions” portion says it is. Proposed redlined changes to Part 1606.3 indicating an approach to address these concerns are provided below.

Practicality of the Appeals Process Proposed in the FNPRM

We commend the proposal, in the FNPRM, that the process provide for appeals of lesser reductions in funding to the LSC President. However, we question the practicality of Part 1606.10(d), which calls for the President, if s/he has had prior involvement in the matter, to delegate authority to decide the appeal to another senior Corporation employee. When a dispute with a recipient has risen to the level where sanctions are being considered, it is very likely that the President will have at least some involvement in the situation. Thus, in most cases the President will need to delegate the appeal to another employee. Since the President controls the hiring, firing and compensation levels of all LSC staff, there will inevitably be at least the appearance, if not the actuality, that an appeal is not being heard by a fully impartial decision-maker. For this reason, we offer redlined changes requiring that, when the President has had prior involvement in a matter, an appeal must be referred to an external administrative hearings process.

Impact of and Appeals Process for Suspensions

With respect to Part 1623, we renew our earlier comments, seeking that:

1. LSC conduct an assessment of the extent to which a lengthy suspension of funding may result in involuntary termination of the operations of recipients, particularly those recipients that are most heavily reliant on LSC funding; and
2. The proposed regulation be further modified, in the interests of balanced due process and consistent application, to:
 - (a) Provide further guidance regarding when a suspension is appropriate;
 - (b) Provide guidance regarding the length of any suspension; and
 - (c) Provide an appeals process in the case of suspensions, and in other respects conform this regulation to similar procedures as set forth for Part 1606.

We include below proposed redlined changes to Part 1623 to achieve these goals.

Proposed Redlined Changes

The text set forth below assumes that all insertions and deletions set forth in the FNPRM have been made, then shows in redlining the further proposed ABA changes. Portions of Part 1606 where no changes are suggested have been omitted for the sake of brevity.

§ 1606.2 Definitions.

For the purposes of this part:

...

(b) Knowing and willful means that the recipient had actual knowledge of the fact that its action or lack thereof constituted a violation and despite such knowledge, undertook or failed to undertake the action. A recipient will not be considered to have acted in a knowing and willful manner when it has relied in good faith on a reasonable interpretation of state or federal law as a basis for its action or failure to act.

...

(h) Substantial violation means a knowing and willful violation that merits action under this part based on consideration of the following criteria by the Corporation:

- (1) The number of restrictions or requirements violated;
- (2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;
- (3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;
- (4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and
- (5) ~~Whether the violation was knowing and willful~~ If the violation involved inappropriate use of funds, the amount of funding that was inappropriately used.

...

§ 1606.3 Grounds for a termination or a lesser reduction in funding.

(a) A grant or contract may be terminated in whole or in part, when:

- (1) There has been a substantial violation by the recipient, and the violation occurred less than 5 years prior to the date the recipient receives notice of the violation pursuant to § 1606.6(a); or
- (2) There has been a substantial failure by the recipient to provide high quality, economical, and effective legal assistance, as measured by generally accepted professional standards, the provisions of the LSC Act, or a rule, regulation, including 45 CFR 1634.9(a)(2), or guidance issued by the Corporation.

(b) The Corporation may impose a limited reduction in ~~of~~ funding when the Corporation determines that there has been a substantial violation by the recipient but that termination of the recipient's grant, in whole or in part, is not warranted.

~~(c) A determination of whether there has been a substantial violation for the purposes of this~~

section, and the magnitude of any termination, in whole or in part, or any lesser reduction in funding, will be based on consideration of the criteria set forth in the definition of “substantial violation” in this part.

...

§ 1606.4 Magnitude of a Termination or Limited Reduction in Funding [NEW]

The magnitude of any termination, in whole or in part, or any lesser reduction in funding, will be based on consideration of the following criteria:

- (a) The number of restrictions or requirements violated;
- (b) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;
- (c) The extent to which the violation is an isolated event or part of a pattern of noncompliance with LSC requirements or restrictions;
- (d) If the violation involved inappropriate use of funds, the amount of funds that were used inappropriately;
- (e) The extent to which the recipient has taken action to cure the violation and remedy any harm caused by its actions;
- (f) The availability of other funds to the recipient;
- (g) The impact that a reduction in funding will have on the recipient’s ability to fulfill its ethical obligations to service existing clients;
- (h) The impact that a reduction in funding will have on the fiscal stability of the recipient and on its ability to continue to operate; and
- (i) The impact that a reduction in LSC funding will have on other funding sources upon which the recipient relies to support its operations.

[Renumber all subsequent sub-sections.]

§ 1606.1~~10~~ Final decision for a termination, debarment, or lesser reduction.

...

(d) For a direct appeal of a final determination pursuant to § 1606.7, in which there is no hearing under § 1606.8, the President may not review the appeal if the President has had prior involvement in the preliminary and/or final determinations. If the President cannot review the appeal, or the President chooses not to do so, then the President shall ~~designate another senior Corporation employee who has not had prior involvement in the preliminary and/or final determinations~~ refer the matter for decision to an external independent hearing examiner.

...

PART 1623 SUSPENSION PROCEDURES

...

§ 1623.1 Purpose.

The purpose of this rule is to:

- (a) Ensure that the Corporation is able to take prompt action when necessary to safeguard LSC funds or to ensure the compliance of a recipient with applicable provisions of law, or a rule, regulation, guideline or instruction issued by the Corporation, or the terms and conditions of a recipient's grant or contract with the Corporation; and
- (b) Provide procedures for prompt review that will ensure informed deliberation by the Corporation when it has made a proposed determination that financial assistance to a recipient should be suspended.

§ 1623.2 Definitions.

For the purposes of this part:

- (a) Knowing and willful means that the recipient had actual knowledge of the fact that its action or lack thereof constituted a violation and despite such knowledge, undertook or failed to undertake the action. A recipient will not be considered to have acted in a knowing and willful manner when it has relied in good faith on a reasonable interpretation of state or federal law as a basis for its action or failure to act.
- (b) Recipient means any grantee or contractor receiving legal assistance from the Corporation under section 1006(a)(1)(A) of the LSC Act.
- (c) Substantial violation means a knowing and willful violation by the recipient of a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, or a Corporation rule, regulation, guideline or instruction, or a term or condition of the recipient's grant or contract that merits action under this part based on consideration of the following criteria by the Corporation:
 - (1) The number of restrictions or requirements violated;
 - (2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;
 - (3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;
 - (4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and
 - (5) If the violation involved inappropriate use of funds, the amount of funding that was inappropriately used.

(d) Suspension means an action taken during the term of the recipient's current grant or contract with the Corporation that withholds financial assistance to a recipient, in whole or in part, until the end of the suspension period pending corrective action by the recipient or a decision by the Corporation to initiate termination proceedings.

§ 1623.3 Grounds for suspension.

(a) The Corporation may issue a proposed determination to suspend ~~Financial assistance provided to a recipient may be suspended~~ when the Corporation determines that there has been a substantial violation by the recipient of an applicable provision of law, or a rule, regulation, guideline or instruction issued by the Corporation, or a term or condition of the recipient's current grant or contract with the Corporation; and the Corporation has reason to believe that prompt action is necessary to:

- (1) Safeguard LSC funds; or
- (2) Ensure immediate corrective action necessary to bring a recipient into compliance with an applicable provision of law, or a rule, regulation, guideline or instruction issued by the Corporation, or the terms and conditions of the recipient's grant or contract with the Corporation.

~~(b) A determination of whether there has been a substantial violation for the purposes of paragraph (a) of this section will be based on consideration of the following criteria:~~

- ~~(1) The number of restrictions or requirements violated;~~
- ~~(2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;~~
- ~~(3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;~~
- ~~(4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and~~
- ~~(5) Whether the violation was knowing and willful.~~

(e) Financial assistance provided to a recipient may also be suspended by the Corporation pursuant to a recommendation by the Office of Inspector General when the recipient has failed to have an acceptable audit in accordance with the guidance promulgated by the Corporation's Office of Inspector General.

§ 1623.4 Length of a Suspension. [NEW]

The length of any proposed suspension will be based on consideration of the following criteria:

- (1) The number of restrictions or requirements violated;
- (2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;

- (3) The extent to which the violation is an isolated event or part of a pattern of noncompliance with LSC requirements or restrictions;
- (4) If the violation involved inappropriate use of funds, the amount of funds that were used inappropriately;
- (5) The extent to which the recipient has taken action to cure the violation and remedy any harm caused by its actions;
- (6) The availability of other funds to the recipient;
- (7) The impact that a suspension will have on the recipient's ability to fulfill its ethical obligations to service existing clients;
- (8) The impact that a suspension will have on the fiscal stability of the recipient and on its ability to continue to operate; and
- (9) The impact that a suspension of LSC funding will have on other funding sources or banking arrangements upon which the recipient relies to support its operations.

§ 1623.45 Suspension procedures.

- (a) When the Corporation has made a proposed determination, based on the grounds set out in § 1623.3, that financial assistance to a recipient should be suspended, the Corporation shall serve a written proposed determination on the recipient. The proposed determination shall:
 - (1) State the grounds and effective date for the proposed suspension;
 - (2) Identify, with reasonable specificity, any facts or documents relied upon as justification for the suspension;
 - (3) Specify what, if any, corrective action the recipient can take to avoid or end the suspension;
 - (4) Advise the recipient that it may request, within 5 days of receipt of the proposed determination, an informal meeting with the Corporation at which it may attempt to show that the proposed suspension should not be imposed; and
 - (5) Advise the recipient that, within 10 days of its receipt of the proposed determination and without regard to whether it requests an informal meeting, it may submit written materials in opposition to the proposed suspension.
- (b) If the recipient requests an informal meeting with the Corporation, the Corporation shall designate the time and place for the meeting. The meeting shall occur within 5 days after the recipient's request is received.
- (c) The Corporation shall consider any written materials submitted by the recipient in opposition to the proposed suspension and any oral presentation or written materials submitted by the recipient at an informal meeting. If, after considering such materials, the Corporation determines that the recipient has failed to show that the suspension should not become effective, the Corporation may issue a written final determination to suspend financial assistance to the recipient in whole or in part and under such terms and conditions the Corporation deems appropriate and necessary.
- (d) The final determination shall be promptly transmitted to the recipient in a manner that verifies receipt of the determination by the recipient, and the suspension shall become effective when the final determination is received by the recipient or on such later date as is specified

therein, unless the recipient appeals the final determination pursuant to § 1623.6.

(e) The Corporation may at any time rescind or modify the terms of the final determination to suspend and, on written notice to the recipient, may reinstate the suspension without further proceedings under this part. Except as provided in paragraph (f) of this section, the total time of a suspension shall not exceed 90 days, unless the Corporation and the recipient agree to a continuation of the suspension without further proceedings under this part.

(f) When the suspension is based on the grounds in § 1623.3(eb), a recipient's funds may be suspended until an acceptable audit is completed.

§ 1623.6 Final decision for a suspension. [NEW]

(a) The recipient or the Corporation may seek review by the President of a final determination to suspend a recipient. A request shall be made in writing within 10 business days after receipt of the final determination by the party seeking review and shall state in detail the reasons for seeking review.

(b) The President shall conduct a review based solely on the information in the administrative record of the proceedings, including the appeal to the President, and any additional submissions, either oral or in writing, that the President may request. A recipient shall be given a copy of, and an opportunity to respond to, any additional submissions made to the President. All submissions and responses made to the President shall become part of the administrative record. Upon request, the Corporation shall provide a copy of the written record to the recipient.

(c) The President may not conduct the review if the President has had prior involvement in the proposed and/or final determinations. If the President cannot review the appeal, or the President chooses not to do so, then the President shall refer the matter for decision to an external independent hearing examiner.

(d) As soon as practicable after receipt of the request for review of a recommended decision, but not later than 30 days after the request for review, the President or designee may adopt, modify, or reverse the final determination, or direct further consideration of the matter.

(e) The decision of the President or designee under this section shall become final upon receipt by the recipient.

§ 1623.57 Time extensions and waiver.

(a) Except for the time limits in § 1623.4(e), any period of time provided in this part may be extended by the Corporation for good cause. Requests for extensions of time shall be considered in light of the overall objective that the procedures prescribed by this part ordinarily shall be concluded within 340 days of the service of the proposed determination.

(b) Any other provision of this part may be waived or modified by agreement of the recipient and

the Corporation for good cause.

(c) Failure by the Corporation to meet a time requirement of this part shall not preclude the Corporation from suspending a recipient's grant or contract with the Corporation.

§ 1623.68 Interim funding.

(a) Pending the completion of suspension proceedings under this part, the Corporation shall provide the recipient with the level of financial assistance provided for under its current grant or contract with the Corporation.

(b) Funds withheld pursuant to a suspension shall be returned to the recipient at the end of the suspension period.

The ABA is grateful that LSC is undertaking a deliberative process for revision of its enforcement tools, in collaboration with other interested groups. The Board has the opportunity to implement changes throughout the relevant regulations that create new and flexible LSC procedures that are calibrated to be applied only in the most appropriate circumstances, and which provide balanced due process.

Sincerely,



Lisa C. Wood, Chair
Standing Committee on Legal Aid and Indigent Defendants

Cc: Laurel Bellows, ABA President
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