I am writing on behalf of Legal Aid of Western Missouri ("LAWMO"), a grantee of federal funding through the Legal Services Corporation ("LSC"), to express my concern about Grant Assurances #10 and #11of LSC's proposed new grant conditions, as referenced in 79 CFR 24454. I very much appreciate the opportunity to make these comments.

1. Introduction and Overview

At the outset I would note that I am a proponent of making client files open and available to LSC for its inspection. LSC provides approximately $2 million per year to LAWMO. That's roughly 21% of our budget and allows us to serve close to 2,000 additional clients per year. We are mindful that this is taxpayer money and that LSC has the responsibility of making sure that the money is well spent. We want to facilitate LSC's work in this regard in every way that we can. Accordingly, to the extent that we are allowed to do so, under applicable laws and without adverse consequences to our clients, we welcome LSC's review of all of our files and other records.

Indeed, we are very proud of the work that we do for our clients and to the extent that LSC reviewers can make suggestions for either improving that work or better complying with the regulations that apply to our work, we want to hear it.

So, in principal, I welcome the concept of LSC obtaining greater access to our client files and all of our other documentation. As discussed below, however, the proposed grant conditions appear to have many unintended adverse consequences. These range from waiving the attorney client privilege for our work (thereby making our privileged communications with our clients discoverable by opposing counsel in all our cases), to subjecting our staff and our program to disciplinary action that could result in serious consequences up to the loss of their right to practice law.

In light of these consequence, I respectfully submit that LSC should withdraw the proposed grant conditions.

2. The Unintended Consequences of the Grant Assurances

My primary concern about the draft grant assurances is that, even if LSC has a legal right to demand that its grantees produce confidential documents, the consequences of LSC exercising that right would be severely detrimental to its grantees and their clients.

The proposed Grant Assurances #10 and #11 would require LAWMO and all other LSC grantees in Missouri to produce documents that are clearly confidential under the Missouri Rules of Professional Responsibility, which state in pertinent part: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." Rule 4-1.6(a) Missouri Rules of Professional Responsibility.

Rule 4-1.6(a) is an ethical rule and not an evidentiary rule or a rule of civil procedure. The Rules of Professional Responsibility themselves do not provide the basis for a motion to

quash a subpoena or for objection to an otherwise properly propounded discovery request. That protection is provided by Missouri's law of the attorney-client privilege.

If LSC statutes or regulations are deemed to pre-empt state law on the issue of attorney-client privilege, allowing LSC to secure production of confidential client communications, attorneys and programs that end up producing the information may find themselves the subject of enforcement actions under the state rules of professional conduct. Again, these are two distinct rules. The abrogation of the Missouri attorney-client privilege may have no impact on our attorney's ethical obligations under Rule 4-1.6(a). The attorney-client privilege governs third party requests for production of information. While there may be arguments that federal law pre-empts that state law, there is a serious risk that the Missouri Office of Ethics Counsel and the Missouri Supreme Court may still find that any attorney who produces that information has committed an ethical violation under Rule 4-1.6(a).

Even if the state Supreme Court or the U.S. Supreme Court ultimately found that it was not an ethical violation for a grantee to produce those documents, it is likely to take hundreds of hours of attorney time to litigate the issue. And there is a serious risk that the ultimate determination would be that the grantee was required to produce the documents under federal law and that, nonetheless, it was an ethical violation of state law for the grantee to do so. A state court could determine that it was the grantee's decision to accept the federal funding and with it the contractual obligation to disclose confidential client communications. The argument that we had to commit an ethical violation to obtain federal funding is not a valid defense to allegations of an ethical violation. Nothing forces an LSC grantee to accept the funding and (if the new grant conditions were in effect) in doing so, the grantee would knowingly subject itself and its attorneys to disciplinary proceedings, potentially including the loss of their license, for having violated the Missouri Rules of Professional Responsibility.

In determining whether to move forward with these grant conditions, LSC should analyze the cost and benefits of the proposed grant conditions. Currently, whenever requested to do so, LAWMO provides LSC access to every page of every client file in its possession. The only limitation on the review of files is that client names and other client identifying information are redacted. So, LSC site review teams are allowed to see all file notes, all documentation of our client interaction, everything in the file, except client-identifying information. LAWMO has had two OCE site visits in the last six years and LSC staff members have never expressed any frustration at the minor limitations that we have put on their file review. So, the benefit of the new grant assurances would be small.

The cost to the programs, however, would be gigantic. The risk of subjecting our staff to state disciplinary actions would, at a minimum, greatly harm morale and could actually result in disciplinary action, even potentially the loss of law licenses for our staff. If LAWMO tried to obtain client consent for every client, that would take a tremendous amount of time. The rules of Professional Conduct require that the consent be "after consultation". So, just putting the consent in a retainer agreement would not make for an effective waiver.

Given that many of our clients are skeptical of lawyers to begin with, having to start our relationship with our clients with a demand that they waive their right of confidentiality would

damage the attorney-client relationship for many of our clients. Furthermore, many of our clients have mental health issues, including paranoia. So, the explanation to obtain the informed consent could take 10-20 minutes per case and still not be effective. Given that we serve over 5,000 clients per year, even 10 extra minutes per client would take an additional 833 hours of staff time.

Furthermore, there are likely to be many clients in substantial need who refuse to consent to waive the privilege. Would we then be required to deny them representation? I have serious concern that the denial of representation based on a client's refusal to waive their legal right to confidentiality may, in itself, be an ethical violation. Even if conditioning representation on waiver of their rights is ethical, should we really be turning away victims of domestic violence and homeless Veterans with serious mental health issues just because they want to preserve their right to confidentiality?

Also, once the attorney-client privilege is waived, it is waived for all time and if all our clients agree at the outset of representation that we can show their entire file to LSC at any time, there is a good argument that they have waived the privilege at the outset of representation. Savvy opposing counsel may start demanding that we produce all of our attorney notes and client communications for their cases and legally, we may have no ground for objecting.

Adopting Grant Assurances #10 and #11 would be opening a Pandora's Box of legal issues and to what benefit—being able to see client names, instead of having them covered up?

LAWMO has grants with HUD and with the IRS. Both of these federal government entities allow us to produce client files with client identifying information redacted. So do all of our state, local and private funders. All these other funders have no problem monitoring our work in spite of these minor constraints.

Given that our current system works for everyone else (and indeed from all indications still works for LSC) and given that the costs of change would be gigantic and the benefits few, I would respectfully submit that the proposed new assurances should be withdrawn.

3. <u>Legal Concerns</u>

I would also note a secondary and lesser concern—which is that the proposed grant assurances might not have a proper basis in the law.

The Court in *U.S. v. California Rural Legal Assistance, Inc.*, 722 F.3d 424 (D.C. Cir. 2013) ruled that LSC's Office of Inspector General—not LSC as a whole—have the power under federal law to compel the disclosure of confidential client communications. The *CRLA* decision relied on specific language contained in the OIG Act to "conduct, supervise and coordinate audits and investigations relating to the programs." *Id.* at 428 (citing 5 U.S.C. app. 3, Section 4(a)(1)).

The specific, special statutory authority provided to the OIG under the Act allowed the Court to overcome CRLA's argument that "'[f]ederal law may not be interpreted to reach into

areas of State sovereignty unless the language of the federal law compels the intrusion.'" *Id.* (citing *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005)).

To my knowledge, there is no comparable statutory or regulatory language allowing LSC to see confidential client communications. Accordingly, unlike OIG, there is a valid argument that LSC does not have the right to abrogate state laws of attorney-client privilege. Thus, as a matter of law, LSC does not appear to have the legal right to demand the production of documents and other materials that it seeks in Grant Assurances #10 and #11.

Thank you for your consideration.

--Sincerely,

Gregg Lombardi
Executive Director
Legal Aid of Western Missouri