NLADA
National Legal Aid & Defender Association

Sent via e-mail to: *LSCGrantAssurances@lsc.gov*

Memorandum:

To: Reginald Haley

From: Dennis Groenenboom; Chair, NLADA Civil Policy Group
Silvia Argueta, Chair; NLADA Regulations and Policy Committee
Robin C. Murphy; NLADA Chief Counsel for Civil Programs

Re: **Comments Concerning Proposed Revisions to LSC 2015 Grant Assurances, Paragraphs 10 & 11 (**79 Fed. Reg. 24454-24455 (April 30, 2014))

Date: June 20, 2014

NLADA would like to thank the Legal Services Corporation ("LSC") for the opportunity to comment on the proposed revisions to the 2015 Grant Assurances. These comments are submitted on behalf of NLADA by its Civil Policy Group, the elected representative body that establishes policy for the NLADA Civil Legal Services Division, and by its Regulations and Policy Committee. NLADA offers the following comments to Paragraphs 10 and 11 in the Notice of Proposed Revisions for the LSC Grant Assurances for Calendar Year 2015 Funding, published on April 30, 2014 in the Federal Register at 79 FR 24454.

We appreciate LSC's efforts to clearly set out in its annual grant assurances the duties and obligations of its grant recipients and LSC, thereby ensuring oversight for taxpayer dollars provided to organizations that provide civil legal assistance to eligible low income clients. However, the proposed revisions to paragraphs 10 and 11 do not serve to appropriately clarify recipients' responsibilities and obligations with respect to access to records issues.

In our view, the proposed changes in the assurances are unnecessary and raise concerns regarding how LSC intends to handle recipients' legitimate ethical questions on behalf of their clients regarding the proper scope or application of an administrative request or subpoena. We are concerned that the revisions might be misread to suggest that LSC could change its current practice and begin to address any differences it may have with a grantee over applicable ethical and legal rules through enforcement of grant assurances rather than by long-established procedures, initiated in 2004, that respect critical interests in the attorney-client relationship while also meeting LSC's need for appropriate oversight.

Elaborating on these concerns, first of all the proposed changes are simply unnecessary. LSC cites the decision in *U.S. v. California Rural Legal Assistance, Inc.,* 722 F.3d 424 (D.C. Cir. 2013) ("the *CRLA* decision") as necessitating a change from the current language allowing

access to client records under "applicable law" to access based on "Federal law." The *CRLA* decision, as well as other previous federal court decisions (e.g. *U.S. v. Legal Services New York*, 249 F. 3d 1077 (D.C. Cir. 2001)), are already "applicable law," and therefore are already covered by the current grant assurances. The proposed revisions attributed to the CRLA decision are thus not necessary.

Second, the changes are confusing, and might be misread to suggest that LSC intends to penalize grantees merely for asserting colorable client and other protections in good faith. Not only would such a policy comprise a sudden and unprecedented change in longstanding practice, it would exceed LSC's authority under governing law.

In the *CRLA* case, LSC-OIG and CRLA engaged in mediation before a magistrate judge, where it was determined that the OIG would voluntarily withdraw portions of its requests, including requests for all client telephone numbers, all client-identifying information in juvenile and domestic relations matters, and certain information within CRLA's database that contained attorney notes. The parties agreed that the court should only resolve "the general issue of whether, and if so, which California state privileges apply." *U.S. v. CRLA,* 824 F.Supp.2d at 39.

Despite the district court ruling against CRLA's assertions of state privilege and confidentiality, it made clear that CRLA "raised legitimate concerns about the privacy of their clients' confidential information." *U.S. v. CRLA,* 824 F.Supp.2d at 47. Therefore, the court issued a protective order establishing protocols for discovery consistent with the agreement of the parties. *Id* (reversed in part by the Court of Appeals, but leaving most of the protective order intact). These steps demonstrate both the court's and the OIG's recognition that recipient claims to protect client information under federal/applicable law may be properly raised and resolved in a district court. The decision clearly indicates that a number of colorable claims might still be raised, even in the overall context of federal law supremacy.

Decided case law and LSC Office of Legal Affairs ("OLA") External Opinion #EX-2004-1001 also establish that colorable claims can be made based on the federal attorney-client privilege (and, by extension, the federal attorney work-product doctrine), even for the specific records that LSC and the OIG are able to request under §509(h). In analyzing *U.S. v. LSNY,* 100 F.Supp.2d 42 (D.D.C. 2000), OLA determined that "while the courts rejected [the] blanket claims, they recognized that there *may* be specific cases in which a client name connected to a problem code would reveal privileged communications."

OLA drew this analysis directly from the *U.S. v. LSNY* district court decision: "This ruling does not mean that there is no case in which disclosure of the combination of a client's name and a problem code would reveal a client's 'motive' for seeking representation. This ruling is not intended to foreclose specific claims of privilege as to individual clients." *U.S. v. LSNY*, 100 F.Supp.2d at 46. Based on this decision, OLA concluded that "recipients may be able to make colorable 'specific claims of privilege as to individual clients' that providing such information would breach the privilege… we cannot foreclose the possibility that situations might arise in which the privilege would apply to these types of information." Similarly, "a recipient could raise a colorable specific claim of privilege as to §509(h) information in particular cases if the

information requested in the format requested would reveal genuinely privileged information about that case or client." OLA EX-2004-1001, p 5.

For all these reasons, the proposed amendments are both unnecessary and could be misinterpreted in ways inconsistent with prevailing law and current practice. We respectfully suggest that they be deleted.

If LSC nevertheless decides to go forward with these revisions, however, we strongly urge the inclusion of the following language to ensure that grant recipients and their staff attorneys are assured that they are able to meet their ethical obligations and protect the interests of their clients without the fear that doing so may jeopardize program funding:

> "Nothing in these Grant Assurances is intended to limit a grantee's right or duty to assert any colorable ground under applicable Federal law to withhold or prevent disclosure of any document or information, and present any such ground to an appropriate court for adjudication."

This language acknowledges an appropriate balance between LSC powers under the *CRLA* decision and other applicable law to obtain client records, and the critical duties that programs and their staff attorneys have to protect client information.

We appreciate your consideration of our comments.