




OFFICE OF LEGAL AFFAIRS

MEMORANDUM

TO: Operations & Regulations Committee

FROM: Victor M. Fortuno
General Counsel 

DATE: January 26, 2006

SUBJECT: Staff Report on 45 CFR Part 1621 (Client Grievance Procedure)
Rulemaking

Introduction

On October 29, 2005, the Board of Directors directed that the Legal Services Corporation (LSC) initiate a rulemaking to consider revisions to LSC's regulation on client grievance procedures. 45 CFR Part 1621 (hereinafter "Part 1621"). The Board further directed that LSC convene a Rulemaking Workshop and report back to the Operations & Regulations Committee prior to the development of any Notice of Proposed Rulemaking ("NPRM"). This report is provided to inform the Committee of the results of the Rulemaking Workshop and present management's recommendation for further action in the rulemaking.

Summary of the Workshop

LSC convened a Rulemaking Workshop on January 18, 2006, to discuss Part 1621. The following persons participated in the Workshop: Gloria Beaver, South Carolina Centers for Equal Justice Board of Directors (client representative); Steve Bernstein, Director, Legal Services of New York – Brooklyn; Colleen Cotter, Director, The Legal Aid Society of Cleveland; Irene Morales, Director, Inland Counties Legal Services; Linda Perle, Senior Counsel, Center for Law and Social Policy; Melissa Pershing, Director, Legal Services Alabama; Don Saunders, Director, Civil Legal Services, National Legal Aid and Defender Association; Rosita Stanley, National Legal Aid and Defenders Association Client Policy Group (client representative); Chuck Wynder, Acting Vice President, National Legal Aid and Defenders Association; Steven Xanthopoulos, Director, West Tennessee Legal Services; Helaine Barnett, LSC President (welcoming remarks only); Karen Sarjeant, LSC Vice President for Programs and Compliance; Charles Jeffress, LSC Chief Administrative Officer; Mattie Condray, Senior Assistant General Counsel, LSC Office of Legal Affairs; Bert Thomas, Program Counsel, LSC Office of Compliance and Enforcement; Mike Genz, Director, LSC Office of Program Performance; Mark Freedman, Assistant General Counsel, LSC Office of Legal Affairs; and Karena Dees, Staff Attorney, LSC Office of Inspector General.

President Barnett welcomed the group and provided background on the LSC Board's interest in reviewing Part 1621. She explained that this is LSC's second rulemaking workshop, which is designed to share issues and problems but not to develop recommendations or consensus. After self-introductions by the participants and finalization of the agenda, the participants began their discussions.

At the outset, Ms. Condray provided some background and an overview of the requirements set forth in the current regulation. Ms. Condray also briefly mentioned a rulemaking undertaken in 1994 to consider revisions to the rule, but which was never completed. Ms. Condray did not review the particular changes proposed in that rulemaking, but rather listed a number of issues which that rulemaking sought to address. She noted that these issues were listed for informational purposes as reflective of what was of concern in 1994 and that there was no intention to limit or restrict the discussion to those issues.

The discussion was wide-ranging and open. The participants first discussed the importance of and reason for having a client grievance process. There was general agreement that the client grievance process is important to give a voice to people seeking assistance from legal services programs and to afford them dignity. The client grievance process also helps to keep programs accountable to their clients and community. It was generally agreed that the current regulation captures this purpose well. However, it was noted that the client grievance process also can be an important part of a positive client/applicant relations program and serve as a source of information for programs and boards in assessing service and setting priorities. This potential is not currently reflected in the regulation.

The participants noted that the vast majority of complaints received involve complaints regarding the denial of service, rather than complaints over the manner or quality of service provided. The vast majority of complaints over the manner and quality of service provided are resolved at the staff level (including with the involvement of the Executive Director); complaints which need to come before the governing body's grievance committee(s) are few and far between. It was noted that many recipients have the experience of receiving multiple complaints over time from the same small number of individuals.

In the course of the discussion, the group identified a significant number of other issues related to the client grievance process. These are summarized as follows:

- Whether programs can be more "proactive" in making clients and applicants aware of their rights under the client grievance procedure, but do so in a positive manner that does not create a negative atmosphere at the formation of the attorney-client relationship. It was noted that while informing clients of their rights can be empowering, suggesting at the outset that they may not like the service they receive is not conducive to a positive experience. Query whether an "ombudsman" position would be appropriate in this context;
- It is unclear how some complaints should be categorized. Is a complaint that a recipient refused to take an appeal for a client represented at the trial or initial hearing level a

complaint about the manner or quality of service or a complaint about the denial of service?;

- The appropriate role of the governing body in the client grievance/client relations process;
- Challenges presented in providing proper notice of the client grievance procedure to applicants and clients who are served only over the telephone and/or email/internet interface;
- Application of the process to Limited English Proficiency clients and applicants;
- Whether and to what extent it is appropriate for the composition of a grievance committee to deviate from the approximate proportions of lawyers and clients on the governing body, e.g. by a higher proportion of clients than the governing body has generally;
- Challenges presented by a requirement for in-person hearing and what other options may be appropriate;
- Whether the limitation of the grievance process related to denials of service to the three enumerated reasons for denial in the current rule is too limited given the wide range of reasons a program may deny someone service;
- Whether the regulation appropriately addresses issues of client confidentiality in LSC access to complaint files;
- Whether the grievance process should include cases handled by non-staff such as PAI attorneys, volunteers, attorneys on assignment to the grantee (often as part of a law firm pro bono program);
- Whether and to what extent it is appropriate for a recipient to abrogate the client grievance process, e.g., where the recipient is facing potential litigation requiring notification to the malpractice insurance carrier or where the complainant poses a reasonable threat to the health and safety of recipient employees or governing body members;
- When does an inquiry become an application for service for which there could be a denial and a grievance process? Sometimes a person who calls a program is not clear about whether they just want some information or are actually seeking legal assistance, and other times if a caller asks about something the program does not handle, they may hang up or be referred to another provider before ever going through an intake process;
- Whether and to what extent it is appropriate for a grantee to provide assistance to a client/applicant in the filing of a complaint; and

- Whether and to what extent is it appropriate for a grantee to provide assistance to a client at a grievance hearing.

The group also considered the fact that some of the issues raised, although important, may not be easily or most appropriately addressed in the text of the regulation. It may be that little or no change to the regulation itself is really necessary, but that the Corporation would be well advised to issue either non-regulatory guidance, or, if proposing regulatory changes, to ensure that the preamble covers certain interpretive and practice matters which are important even if not susceptible to being captured in regulatory text.

Finally, the group was in general agreement that additional opportunity for comment and fact finding would prove useful to both LSC and the legal services community before LSC commits to moving ahead with the development of a Notice of Proposed Rulemaking. In particular, it was felt that seeking additional input from both client representatives and other programs, especially hotline-only programs and others programs where in-person contact between staff and clients/applicants is difficult or non-existent (such as in service areas with widely disbursed and rural client populations), on the issues and challenges presented by the client grievance procedure and regulation would be advisable. It was discussed that this could be accomplished through holding another Rulemaking Workshop, either in-person or by teleconference, and/or soliciting written comment.

Management Recommendations

After consideration of the information which was developed at the Rulemaking Workshop, management recommends that LSC engage in additional fact finding prior to consideration of the development of a Notice of Proposed Rulemaking for the Committee's review. Specifically, management recommends that LSC conduct a second Rulemaking Workshop to obtain input from additional interested parties, including but not limited to programs that run exclusive or major telephone hotline operations and additional client representatives. Management further recommends that the Board authorize management to issue an Advance Notice of Proposed Rulemaking if helpful to solicit written comments from parties who may not be able to attend a second Rulemaking Workshop. If the Committee agrees and makes these recommendations to the Board and the Board provides direction to staff to proceed along these lines, management would anticipate reporting to the Committee at the April 2006 meeting on the results of the second workshop with recommendations for future action on the rulemaking.