



Sent by e-mail to: rweir@lsc.gov

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Rebecca D. Weir
Senior Assistant General Counsel
Legal Services Corporation
3333 K Street NW
Washington, D.C. 20007

Re: 2018 Basic Field Grant Terms and Conditions

This letter is submitted in response to the Legal Services Corporation's (LSC) Notice of Proposed Rulemaking (NPRM) request for public comments regarding proposed revisions to the Grant Assurances, now titled Grant Terms and Conditions (GTC). These comments are submitted on behalf of NLADA by its Civil Policy Group, the elected representative body that establishes policy for the NLADA Civil Division, and its Regulations Committee.

We understand LSC is not required to publish its proposed revisions to its annual grant assurances or terms and conditions in the federal register and appreciate LSC providing the opportunity for public comment on its proposed 2018 GTC. Overall, the revised document is more comprehensive than the 2017 Grant Assurances and provides additional clarity regarding LSC's expectations for grantees when they agree to receive funds from LSC. However, there are several important sections of the 2017 Grant Assurances that delineate LSC's and recipients' responsibilities which should continue to be included in LSC's 2018 GTC. LSC has also added several new provisions that raise a number of questions regarding these requirements and/or impose significant additional burdens on grantees. Below, we highlight areas of concern resulting from either eliminating certain provisions of the 2017 Grant Assurances or based on LSC's proposed new provisions.

1. Proposed 2018 Grant Terms and Conditions, Paragraph 3 Restricted Activities:

Paragraph 3 contains a table listing many of LSC's regulatory restrictions with three columns indicating which of three funding sources the restriction applies to: LSC Funds, Private Funds or Public Funds. Overall, this section provides a quick reference list of the restrictions and what type of funding is restricted and helpful hyperlinks to the actual regulation.

However, the way in which the list is presented in the proposed 2018 GTC is misleading. It indicates that many activities are strictly prohibited, whereas in many areas there are not

blanket prohibitions on the activity and/or a number of qualifications and exceptions. For example, for fee generating cases the table appears as follows:

“Fee-generating Cases – No representation in fee-generating cases unless private lawyers are not available. 45 C.F.R. 1609”

In fact, there are a number of sections of this regulation that allow attorneys employed at LSC-funded programs to represent clients when private attorneys are available. For example, this regulation exempts cases from the definition of a fee-generating case when:

- (1) A court appoints a recipient or an employee of a recipient to provide representation in a case pursuant to a statute or a court rule or practice equally applicable to all attorneys in the jurisdiction, or
- (2) A recipient undertakes representation under a contract with a government agency or other entity.

45 C.F.R. 1609.2(b)

Contrary to the text listed on the chart, grantees may accept certain cases even when private lawyers are available. There are also a number of other circumstances when, according the regulation, grantees may accept fee generating cases.

This is just one example in one regulation. Many of the regulations do not contain the blanket prohibitions indicated by the chart.

LSC does indicate in the proposed language following the chart that: “This is not a comprehensive list of all restricted activities or the nuances associated with them.” However, this does not contain sufficient information to indicate that there are numerous exceptions to the restrictions or that the restrictions do not apply under all circumstances.

The table is also located on LSC’s website. The text which precedes the table on LSC’s website more accurately explains that the table “is not a comprehensive guide to all restrictions and exceptions.” This text that appears before the table on LSC’s webpage states:

“LSC grants are subject to statutory and regulatory restrictions that prohibit the grantee from specific activities and from representing specific categories of clients. Many of these restrictions also apply to a grantee’s use of non-LSC funds (private funds, tribal funds, and public funds). In most states, funds from an interest on lawyers trust account program are public funds. Tribal funds are not covered by most of these restrictions (subject to the purposes and rules in those grants). This table provides an overview of the major restrictions, but it is not a

comprehensive guide to all restrictions and exceptions.

Entity restrictions apply to all activities of every LSC grantee using LSC funds, private funds, and federal, state, local or other public funds.

Funds restrictions apply to all uses of LSC funds and most uses of private funds (e.g., private donations, United Way funds, private foundation grants). They do not apply to most uses of public funds from state and local governments or other federal grants (subject to the purposes and rules in those grants).

Generally, these restrictions do not apply to advising eligible clients about their rights, even when the grantee cannot provide representation.”

<http://www.lsc.gov/lsc-restrictions-and-funding-sources>

We recommend that the table be revised and the text, which incorrectly indicates that each regulation does not allow any activity described in the regulation, be removed.

For example:

“Fee-generating Cases – No representation in fee-generating cases unless private lawyers are not available. 45 C.F.R. 1609”

Would appear as: **“Fee-generating Cases - 45 C.F.R. 1609”**

We further recommend that instead of including the table within the 2018 GTC, the table could be referenced by using a link to LSC’s webpage where the table is located.

If LSC determines that the table should still be included in the body of the 2018 GTC, in addition to revising the table, the same text that appears before the table on LSC’s webpage should precede the table in the 2018 GTC.

2. Proposed Grant Term and Conditions, Paragraph 6, Grantee Reporting Requirements

LSC’s proposed paragraph 6 contains five reporting requirements that were in the 2017 Grant Assurances. However, the time frame for reporting has been shortened from the 30 days provided in the 2017 Grant Assurances to 15 days in LSC’s new proposal. There might well be circumstances where there would be good cause for a grantee to miss the 15 day deadline, such as transition in leadership or emergency closures of an office. We recommend that the 30- day time frame be retained. If there are circumstances where the 30-day period has led to problems that would not occur with a shorter reporting period, then we recommend LSC include a good cause exception to cover instances where grantees reasonably failed to make a report within 15 days.

3. Proposed 2018 Grant Terms and Conditions, Paragraph 10 LSC Requests for Records:

Paragraph 10 in the 2017 Grant Assurances closely corresponds to paragraph 10 in the 2018 GTCs. The current language in Paragraph 10 of the 2017 Grant Assurances, which references preserving client secrets and confidences and respecting the privacy interests of the Applicant's staff members, is in line with LSC's expanded explanations and additions to the 2018 GTC and should not be eliminated.

The language that LSC proposes omitting states:

"This requirement does not apply to any such materials that may be properly withheld due to applicable law or rules. It agrees to provide LSC with the requested materials in a form determined by LSC while to the extent consistent with this requirement, preserving applicable client secrets and confidences and respecting the privacy interests of the Applicant's staff members. For each record subject to the attorney-client privilege, it will identify in writing the specific record or portion thereof not being provided and the legal justification for not providing the record or portion thereof."

This language provides grantees with clear guidance on how they may raise objections to the release of information that conflicts with their ethical obligations or impinges upon the privacy interests of employees without the risk of LSC raising a compliance concern. Further details regarding LSC's guidance and protocols for grantees to follow when protecting client records can be found on LSC's website. The inclusion of a statement that LSC does have a protocol for record access and including a link to LSC's 2015 Access to Records Protocol <http://www.lsc.gov/access-records> promotes LSC's intent to better notify its applicants about their legal, regulatory and contractual requirements and provides a clear delineation of LSC's and recipients' rights and responsibilities in the 2018 GTC's.

4. Proposed 2018 Grant Terms and Conditions, Paragraph 11 LSC Requests for Information and Paragraph 12 LSC Oversights, Audits and Investigations of Grantee Activities:

Proposed paragraph 11 states, among other requirements, **without any limitation**, that programs are required to cooperate with and respond in a timely manner to requests for information, which includes document requests, interrogatories, and meetings and interviews with LSC, LSC OIG and their respective agents and other governmental entities.

The reference to other governmental entities is broad and vague. The proposed language seems to grant greater authority to non-specified governmental agencies to intercede on program affairs ostensibly without warning or reasonable notification. Paragraph 11 should

specifically indicate which other governmental entities have such broad authority over LSC grantees and the legal basis for such authority. NLADA recommends that a reference to the statute that provides for LSC's and other entities' access to records in 509(h) and (i) of the Appropriations Act be referenced or the actual language included in paragraph 11:

“(h) Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

(i) The Legal Services Corporation shall not disclose any name or document referred to in subsection (h), except to--

(1) a Federal, State, or local law enforcement official; or

(2) an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation of a rule of professional conduct.”

The inclusion of 509 (i), in addition to 509(h), is important as it confirms that, once records are obtained from the grantee, disclosure of these records by the third party who obtained them is very limited.

Further, although federal statutes and case law provide broad latitude to LSC and the LSC OIG to obtain information and conduct oversight activities, LSC has provided in its grant assurances - currently in 2017 Grant Assurances Paragraph 11, similar to paragraph 10 - that records are subject to the federal attorney-client privilege and that the grantee can provide the legal justification for withholding the record in lieu of producing the record or portion of the record.

As indicated in our comment above in paragraph 10, we also recommend that the procedure for a grantee to assert ethical obligations and raise good faith objections to a release of requested information in the 2017 Grant Assurances should be retained. The link to LSC's 2015 Access to Records Protocol on its website, which provides further information and details on LSC's protocol for access to records and LSC's protocol, should also be referenced. <http://www.lsc.gov/access-records>

5. Proposed Paragraph 12 LSC Oversight, Audits and Investigations of Grantee Activities:

Paragraph 12 requires grantees, without any limitation, to cooperate with oversight, investigations and audits of their program by LSC, the LSC OIG, their respective agents and

other entities with oversight or investigative authority "... at any time during or after the grant term." This paragraph eliminates the word reasonable that is contained in the 2017 Grant Assurances. The corresponding paragraph 12 in the 2017 Grant Assurances indicated that the grantees are obligated to cooperate with "reasonable" oversight, audit or investigatory activities requests by LSC, LSC OIG or its agents. This qualifier of reasonable should be retained in paragraph 12 of the 2018 Grant Terms and Conditions.

We further recommend, similar to our recommendation in paragraph 11, that the reference to other governmental entities should specifically indicate what other governmental entities have such broad authority over LSC grantees and the legal basis for such authority. A reference to the statute that provides for LSC's and other entities' access to records in 509(h) and (i) of the Appropriations Act should be referenced or the actual language should be included in paragraph 12 as well.

The proposed provision also indicates that grantees are required to cooperate with oversight, investigations and audits of their program "... **at any time** during or **after (emphasis added) the grant term**. Grantees should not be required to cooperate with oversight, investigations and audits of their program ad infinitum after a grant ends. We propose a five year period once a grant term ends which is a more than ample time period and corresponds with the majority of time periods grantees are required to retain records.

6. Proposed 2018 Grant Terms and Conditions, Paragraph 8, Member of Statewide-Website Stakeholder Committee:

The proposed additions to this paragraph provide new requirements for grantees to meet in order to offer up-to-date resources and information for potential clients and those seeking legal assistance on statewide websites. However, this provision requires grantees to agree to terms that they may not be capable of complying with as these requirements may be beyond the grantee's control. Grantees should not be required to agree to comply with terms when compliance is beyond their control. We recommend revising the language as follows:

As an LSC grantee, if your state has established a statewide website committee:

You are required to seek to participate in, and if applicable, be a member of the committee and participate in providers to updating e-your state's statewide legal services website with a full range of relevant and current legal information, self-help materials, and referral assistance on the most common issues facing client communities. You will seek to participate in Committee members are also required to (1) performing targeted outreach to inform the client community of the website and how to use it and (2) periodically evaluating e-and updating e-the website for ease-of-use and accessibility compliance. You will request ; and (3) ensure that the website has a disclaimer indicating that LSC-funded programs participate in the website consistent with LSC restrictions. If your statewide website uses either the

~~LawHelp or Open Source template, you must maintain the template's functionality, including the capability of having separate sections on the website for clients, legal services advocates, and pro bono attorneys; adhering to the "National Subject Matter Index"; and the ability to use the LawHelp interactive HotDocs server.~~

7. Proposed 2018 Grant Terms and Conditions, Paragraph 22, Intellectual Property Rights:

The proposed provisions regarding intellectual property in paragraph 22 raise a number of concerns for grantees which include:

- a. This provision is different in many respects from the provision regarding LSC's, grantees' and third party interests in intellectual property which LSC has been using in its Technology Innovation Grants (TIG) grant assurances since 2012. In some areas the requirements are inconsistent, if not in direct conflict with LSC's TIG grant assurances.
- b. LSC cannot acquire an ownership interest in all works (particularly with the very broad list of examples of what is considered by LSC to be works) that are developed or improved using LSC funds. For example, grantees contract with third parties to use their software systems (e.g., LegalServer) created and developed to operate a grantees' management information system. LegalServer and other similar companies have a proprietary interest in their software products. They would not be willing to convey an ownership interest in their product simply because LSC funds were used to make changes to their system that improves a grantee's ability to serve clients using the product.
- c. The notice requirement for grantees is extremely burdensome and compliance with this provision is not feasible. Staff funded by LSC cannot notify LSC every time they create or improve on works, particularly given that LSC indicates that the definition of works includes ideas, methods, concepts, or materials.

We recommend that the proposed provision in the 2018 GTC be removed and replaced with the provision regarding technology products and software currently included in LSC's TIG grant assurances. The ownership and licensing requirements in the TIG grant assurances preserve LSC's, the grantee and third party interests and have proved to be workable for all parties.

In addition, the requirements for grantees in the TIG grant assurances and the basic field GTC's regarding intellectual property should be consistent.

The current TIG provision provides:

“Products or Software. With respect to any TIG-funded product or software: a) Ownership of the TIG-funded product or software shall vest in either the Legal Services Corporation (LSC) grantee or the developer or vendor of the software, as the particular agreement between those parties so specifies. Regardless of who owns the TIG-funded product or software, both LSC and the LSC grantee shall have a royalty-free, nonexclusive, and irrevocable license to use, reproduce, distribute, publish and prepare derivative works of the TIG -funded product or software (subject to the terms below concerning preexisting products or software), including making the TIG-funded product or software available to other LSC grantees. Each party remains the owner of any preexisting products or software not developed using grant funds, and the license to any TIG-funded product or software does not include a license to such preexisting software or products. If the TIG-funded product or software is a modification or upgrade of a preexisting product or software, the above license applies to such modification or upgrade only if the modification or upgrade can be licensed and purchased separately from the preexisting product or software (e.g., as an add-on or a plug-in). If such modification or upgrade cannot be licensed and purchased separately from the preexisting product or software, the above license does not apply and other LSC grantees must separately license and purchase the TIG-funded product or software. Nothing herein prevents a developer or vendor of the product or software from charging costs related to the use of the product or software, such as costs for the implementation, integration, and on-going use (e.g., hosting and maintenance costs) of the product or software. The LSC grantee shall have a contract with the developer or vendor of the product or software, and such contract shall include the above terms to protect the rights of LSC and its grantees.”

<http://www.lsc.gov/sites/default/files/attach/2017/02/2016-TIG-Grant-Assurances.pdf>

We recommend that this be modified for the 2018 GTC's as follows:

“With respect to any LSC-funded product or software: a) Ownership of the LSC -funded product or software shall vest in either the Legal Services Corporation (LSC) grantee or the developer or vendor of the software, as the particular agreement between those parties so specifies. Regardless of who owns the LSC-funded product or software, both LSC and the LSC grantee shall have a royalty-free, nonexclusive, and irrevocable license to use, reproduce, distribute, publish and prepare derivative works of the LSC-funded product or software (subject to the terms below concerning preexisting products or software), including making the LSC -funded product or software available to other LSC grantees. Each party remains the owner of any preexisting products or software not developed using grant funds, and the license to any LSC-funded product or software does not include a license to such preexisting software or products. If the LSC-funded product or software is a modification or upgrade of a preexisting product or software, the above license applies to such modification or upgrade

only if the modification or upgrade can be licensed and purchased separately from the preexisting product or software (e.g., as an add-on or a plug-in). If such modification or upgrade cannot be licensed and purchased separately from the preexisting product or software, the above license does not apply and other LSC grantees must separately license and purchase the LSC-funded product or software. Nothing herein prevents a developer or vendor of the product or software from charging costs related to the use of the product or software, such as costs for the implementation, integration, and on-going use (e.g., hosting and maintenance costs) of the product or software. The LSC grantee shall have a contract with the developer or vendor of the product or software, and such contract shall include the above terms to protect the rights of LSC and its grantees.”

8. Proposed 2018 Grant Terms and Conditions, Paragraph 26, Indemnification:

This is the first time LSC has included a provision that requires grantees to agree to an indemnification provision. NLADA recommends that LSC delay including an indemnification provision covering third party claims in the 2018 GTC’s until the implications of mandating that grantees consent to the terms of this provision are thoroughly considered. The proposed language in the clause is broad and raises numerous questions about whether and how grantees should bear the potentially extensive risk LSC seeks to compel grantees to assume.

We understand that it is not unusual for a government entity providing funding to a non-profit entity to require the grantee to name the government entity in the grantee’s insurance policies as a third party insured in the grantee’s existing insurance policies. Adding a third party grantor to an existing grantees’ insurance policies is a routine practice, and it is very likely that LSC could be added as a third party to a grantee’s insurance policies with no increased costs.

However, the indemnification provision LSC has drafted in the 2018 GTC’s imposes liability on grantees that far exceeds what their insurance generally covers. This provision raises a number of issues that need further consideration before the full impact on grantees can be thoroughly assessed. LSC’s proposed indemnification language includes the potential for significant increases in insurance premiums in order for grantees to obtain additional coverage.

We recommend that LSC reconsider including an indemnification clause until LSC and its grantees can assess the impact of shifting the risk of loss for third party claims onto grantees, weigh the potential costs to grantees against the potential benefits that would result from this shift, and whether the requirements should be more narrowly tailored and revised to provide clarity on how the parties should proceed when a third party claim arises. In the

meantime, as stated above, LSC could require that grantees add LSC as third party to the insurance plans currently carried by grantees.

Issues that imposition of the proposed indemnification clause for third party claims raise for grantees include:

a. Grantees will need to determine:

What grantees' existing insurance plans cover for the liabilities listed in LSC's proposed indemnification provision. The indemnification provision imposes liability for acts and omissions that are often not covered by one policy. Professional liability insurance generally only covers claims arising from the practice of law and representation of clients. The clause in the 2018 GTC's also includes indemnification for claims by a third party regarding a grantee's acts or omissions that cause bodily injury or death or damage to real or personal property. Professional liability insurance would rarely, if ever, cover these type of losses. Grantees maintain coverage for bodily injury and real and personal property damage through separate insurance policies for premises liability and/or personal injury coverage and auto insurance policies.

Grantees would need to determine what additional coverage they would need, if insurers are willing to provide the additional coverage and the costs of adding additional coverage? There are also questions on whether insurance is available to cover costs and expenses, and/or LSC's costs and expenses, to defend an allegation by a third party that the grantee failed to comply with applicable federal, state or local laws, regulations or codes as required by the fourth bullet in the proposed indemnification clause? At least one insurer of a grantee program indicated that they would not be able to provide insurance for a grantee's failure to comply with applicable laws.

b. The indemnification provision raises issues of how the defense and settlement of a claim will be handled.

If grantees are going to be responsible for third party claims brought against LSC, the grantee should receive immediate notice of the claim. Then questions arise regarding who controls the defense and settlement of the claims, which include: Who will determine how to proceed with the defense? Who will respond to the claim? Will outside counsel be retained? If so, how will this determination be made and how will outside counsel be chosen and retained? How will settlement of the claim be handled? Will LSC agree to be represented by counsel chosen by the grantee or the grantee's insurance company or will LSC want to control its own defense and costs, and then seek reimbursement from the grantee? Will the grantee's policy cover the costs of using counsel chosen by LSC, rather than the grantee or

the grantee's insurance company? Should a grantee be required to indemnify LSC for the costs of defending a third party claim alleging acts or omissions by a grantee if the grantee has no control of the defense of the claim, the costs for the defense and the settlement of the claim?

- c. The terms in paragraph 26 also require a grantee to agree to reimburse and “defend LSC, its officers, directors, employees, agents against any and all losses.... costs or expenses, including reasonable attorney's fees that LSC incurs as a **result of allegations of a third party** (emphasis added)”, imposing liability on the grantee regardless of whether a claim has any merit.

Why should a grantee who has not engaged in any negligent acts or omissions or fraudulent or criminal conduct bear the risk of loss for allegations that arise from the grantee fully complying with the terms and conditions of LSC's grant terms and conditions and all applicable laws? For example, if a grantee properly applied the law and denied an applicant services because she did not meet LSC's eligibility criteria, should the grantee or LSC bear the costs of defending a claim by the applicant that the grantee's denial violated applicable law? What if the third party files a claim against both the grantee and LSC? Based on the terms in paragraph 26 the grantee would be saddled with the costs of its own defense and LSC's expenses and costs.

LSC is in a better position to absorb the costs of defending meritless allegations of third parties than the grantee. The use of a grantee's resources will directly impact the program's ability to provide services to clients, while LSC can garner resources to defend an allegation without directly impacting services for clients.

- d. Does LSC's insurance currently cover the costs of defending these claims?

If so, grantees should not be required to use scarce resources to arrange for additional coverage. If additional coverage is needed, could LSC add additional coverage for third party claims against grantees to LSC's coverage? Would the cost of LSC adding coverage for all of its grantees be less expensive than each individual grantee increasing its coverage?

All of the above issues identified above, and any other issues raised in public comments, should be examined prior to mandating that grantees agree to an expansive indemnification clause with unknown consequences.

Technical Revision Recommendations:

9. Proposed Grant Term and Conditions, Paragraph 14, Compliance with LSC Laws, Regulations and Guidance

We recommend a technical amendment to a sentence in this paragraph: “You will also comply with any new or amended LSC laws, regulations, or guidance **adopted** (emphasis added) before or during the grant term.” Grantees are obligated to follow current laws, regulations or guidance until new or amended laws become effective.

Instead of the word adopted the sentence would state: “You will also comply with any new or amended LSC laws, regulations, or guidance **that become effective** before or during the grant term.”

10. Proposed Grant Term and Conditions, Paragraph 15, Compliance with Federal Laws on the Proper Use of Federal Funds

We recommend a technical amendment to insure clarity so that the actual link to the applicable federal laws on LSC’s website is displayed, rather than by hyperlink. The hyperlink in paragraph 15 of LSC’s proposed 2018 GTC connects the user to a Grantee Guidance webpage, not the webpage that displays the applicable federal laws. The current link to the federal laws on LSC’s website is <http://www.lsc.gov/45-cfr-part-1640-applicable-federal-laws> and should be listed in this paragraph rather than the hyperlink.

Conclusion:

NLADA appreciates LSC’s willingness to consider public comments and make revisions and updates that will provide clarification which benefits grantees and their client communities. Thank you for the opportunity to provide public comments on LSC’s proposals for the 2018 Basic Field GTC.

Sincerely,

Anthony L. Young
Chair, Civil Policy Group (CPG)
Silvia Argueta,
CPG Regulations and Policy Committee
Robin C. Murphy
Chief Counsel, Civil Programs
National Legal & Defender Association