

COMMENT ON NOTICE OF PROPOSED RULEMAKING

PART 1611 – FINANCIAL ELIBILITY

**SUBMITTED BY
THE CENTER FOR LAW & SOCIAL POLICY
ON BEHALF OF
THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION**

June 14, 2005

These comments are submitt

forms, including retainer agreements. Finally, the NPRM expands the circumstances under which recipients may provide legal assistance to group clients.

We believe that the new version of Part 1611 represents a major improvement over the current rule. It effectively addresses most of the significant concerns that field representatives raised during the reg-neg process and at later points in the process, and we urge the Board to adopt it as a final rule, with the relatively minor revisions discussed below.

KEY ISSUES

There is one issue that was discussed in the reg-neg working group, but does not appear in the text of the proposed rule. The OIG representative to the reg-neg working group urged the incorporation into the rule of the language of section 509(h) of the LSC appropriations act that gives LSC auditors and monitors access to eligibility records and client names as well as certain other records. The NPRM eliminated any reference to access to records, although there is a discussion of the rationale in the Supplementary Information for the decision to not include the statutory language on access to records in the text of the rule. We support the decision not to incorporate the statutory provision into the rule, and we urge the Board to not include any reference to access to records in the text of the rule.

The second key issue that was the subj

retainer agreement that makes it clear that the requirement does not apply to PAI cases.

The final key issue is the revision of the section on group representation. Under the current Part 1611, recipients are only permitted to use LSC funds to represent groups that are “primarily composed of” LSC eligible clients. LSC has interpreted this provision to mean that at least 51% of a group's membership must be financially eligible for LSC services. Field program representatives on the reg-neg working group had urged that the rule be revised to significantly expand the circumstances under which a recipient could represent a group, and the NPRM published in 2002 had incorporated the field position. When the proposal came back before the new Operations & Regulations Committee, the OIG reiterated its position that group representation should be substantially circumscribed, even beyond the limits in the current rule. The version of the group representation provision that emerged as a result of the Committee's deliberation is a compromise, although it is one that is much closer to the field position and clearly rejects the position espoused by the OIG. In addition to groups that are primarily composed of eligible clients, the NPRM permits recipients to use LSC funds to represent groups that have as a primary activity, the provision of services to financially eligible clients. We believe that this compromise will permit programs to serve most of the appropriate groups in their service areas. Group representation is crucial for legal services programs to effectively serve their client communities, and we urge the Board to adopt the provision on group representation that is contained in the NPRM.

SECTION-BY-SECTION ANALYSIS OF REVISIONS

Section 1611.1 Purpose: We support the revisions to this provision.

Section 1611.2 Definitions: We generally support the revisions that were made in the definitions section and the new definitions that were added to the rule. We believe that they help clarify the terms used in the rule and make the rule easier to apply. We have some relatively minor concern about the language of the preamble that accompanies the discussion of the definitions.

In order to interpret the retainer provision requirement, LSC has added definitions of “advice and counsel” (§1611.2(a)), “brief services” (§1611.2(e)) and “extended service” (§1611.2(f)). We believe that the text of these definitions is generally helpful. Nevertheless, we are concerned that the discussion in the preamble of the definition of “advice and counsel” focuses too much attention on the notion that advice and counsel should be time-limited, indicating that it “would generally be characterized by a one-time or very short-term relationship.” In many instances, programs provide advice and counsel to clients over a more extended period of time, and we think that the preamble should focus on the nature of the service provided by the grantee, rather on the period of time over which it is provided. We would suggest that the preamble simply remove the sentence that includes the reference to a “one-time or very short term relationship between the attorney and the client.”

We are particularly supportive of the new definition of "assets" (§1611.2(d)) that eliminates the distinction in the current rule between liquid and non-liquid assets and provides more practical guidance on the kinds of assets that should be considered in determining eligibility. We urge the Board to retain this new definition.

LSC specifically invited comments on the issue of whether "income" (§1611.2(h)) should be defined as gross income or income net of payroll taxes. LSC's position is that the current use of gross income is consistent with LSC's practice and with the definition of the term used in setting the federal poverty level and should be maintained. The field representatives on the reg-neg working group and testifying before the LSC Board had argued that payroll taxes should be deducted from gross income at the outset for purposes of determining whether an applicant for service is eligible under the program's annual income ceiling or may be served under the exceptions to the annual income ceiling. Because our client community now includes many more working poor whose disposable income is substantially reduced by payroll taxes that are involuntarily withheld from their paychecks, we believe that the definition of "income" should be revised to reflect income net of payroll taxes rather than gross income. This change would make the calculation of income much easier for both clients and program intake workers who can look to take-home pay, rather than gross salary. It would remove the apparent preference for applicants whose income does not come from work over those whose income from work is reduced as a result of payroll taxes. In addition, it would permit recipients to serve those working poor

The field representatives on the reg-neg working group and those testifying before the Committee urged that these exclusions should be treated as illustrative rather than exhaustive, so that other exclusions could be considered by recipients if appropriate in their client communities. LSC rejected that position, but seeks comments on the issue as well as suggestions for other specific assets that should be added to the list of possible exclusions. We believe that recipients should have flexibility to determine those assets that should be excluded from consideration and we understand that many programs now do exclude other kinds of assets that are not explicitly included in the list in the current regulations. We urge the Board to adopt language that would make the list of excludable assets illustrative, rather than exhaustive so the programs can tailor their asset policies to the circumstances of their local client community.

Section 1611.4 Financial Eligib

Director or designee not specifically be required to make the determination. We believe that requirement is an unnecessary administrative burden.

Under the current regulation, recipients may serve applicants whose income is above 125% of poverty, but does not exceed 187.5% of the Federal Poverty Level under certain circumstances. Under the proposed rule the outside income limit is raised to 200% of the Federal Poverty Level, making the calculation much simpler and slightly expanding the pool of applicants who may be eligible for LSC-funded services (§1611.5(a)(3)and(4)) to include more of the working poor that are an ever increasing part of the low-income community. We strongly support this increase in outside income limit and urge the Board to incorporate it into the final rule.

The proposed rule also contains a new provision that permits recipients to serve individuals with incomes up to 200% of poverty who are seeking to obtain or maintain governmental benefits for persons with mental and/or physical disabilities (§1611.5(a)(3)(ii)). The NPRM retains the other exceptions included in the current rule, although several are simplified and clarified (§1611.5(a)(4)). We support these revisions and urge the Board to incorporate them into the final rule.

Under the current rule the exception for "fixed debts and obligations" explicitly includes unpaid taxes as a fixed debt, but has been interpreted to exclude current taxes paid or withheld from income. The proposed rule eliminates the reference to past taxes in the "fixed debts and obligations" section and includes a new provision for current taxes (§1611.5(a)(4)(vi)). Under previous versions of the preamble to NPRM, current taxes were considered to be a "fixed debt," but the Board determined that it would be preferable to separate them out in the text of the rule as an explicit factor to be considered. Although we prefer that payroll taxes be excluded from income in the first instance (see discussion of the definition of "income" above), if LSC does not ultimately concur, we support the change that permits current taxes to be considered as a factor to be considered in making an exception to the annual income ceiling. However, we are concerned that the NPRM does not define "current taxes", nor does it give specific examples of the kinds of taxes that should be considered. Since this is an entirely new provision, we believe that it would be helpful for the commentary to include examples of the kinds of current taxes that could be considered and we urge the Board to direct the staff to include in the preamble specific examples of the kinds of taxes that should be included, including local, State and federal income tax withholding, Social Security and Medicare taxes.

In addition, the Supplementary Information notes that LSC intends to treat rent in the same way that it has treated mortgage payments in the past. Both will be treated as fixed obligations that may be considered in determining to serve an applicant whose income exceeds the recipient's annual income ceiling but is below 200% of poverty. We support this change in the LSC's interpretation of the rule.

Field programs representatives on the reg-neg working group also urged LSC to consider basic utility costs as "fixed debts or obligations" that can be considered when determining whether to make an exception to the income ceiling. LSC argued that

these expenses were not fixed as to time and amount, were expenses of daily living rather than unusual expenses and should not be included. LSC has asked for comment on whether utilities should be included within the category of fixed debts and obligations, or whether utilities or other factors should be added to the list to be considered when determining whether to make an exception to the income ceiling. We believe that LSC should, at a minimum, include in the preamble a statement to the effect that unusually high utility costs should be permitted to be considered under the section of the rule that permits recipients to make an exception where there are "other significant factors that the recipient has determined affect the applicant's ability to afford legal assistance." (§1611.5(a)(vii)). Such a statement would be consistent with LSC's concern that the exceptions should generally reflect unusual circumstances.

Section 1611.6 Representation of Groups: The field representatives participating in the reg-neg working group and those testifying before the Committee had urged LSC to adopt provisions that would broaden the circumstances under which recipients could represent groups. As discussed in the "Key Issues" section of the comment, the LSC Board ultimately adopted a version of the group representation provisions that was narrower than the field representatives' proposal, but is more flexible than the provision in the current rule.

Under the NPRM recipients may use LSC funds to represent groups that lack the means to obtain private counsel if (1) at least a majority of the group's members (or if not a membership group, then a majority of its organizing or operating group) are financially eligible for LSC-funded assistance (§1611.6(a)(1)); or (2) the group has as a primary activity the delivery of services to eligible persons in the community and the legal assistance sought relates to such activity (§1611.6(a)(2)). This revision is similar to the version of the group representation rule that was in effect before Part 1611 was revised in 1983, although the language is more narrowly drawn and less subject to misinterpretation. It would permit recipients to provide groups with representation that relates to the specific activity, including representation on structural issues, such as incorporation and bylaws, that would permit the group to engage in the specific activity.

Although narrower than originally proposed by the field representatives, NLADA believes that this version represents a reasonable compromise on group representation that will permit recipients to use their LSC funds to represent most, if not all, of the appropriate groups in the community. Thus, we are supportive of these provisions on group representation, and we urge the Board to include them in the final version of the rule.

Several last minute changes were made in the group representation provisions regarding how determinations of eligibility are to be made. First, the provision now requires the recipient to consider the resources available to the group such as income and income prospects, assets and obligations (§1611.6(b)(1)). We have no objection to this part of the provision.

Second, language was added that requires recipients to consider, for groups primarily composed of eligible individuals, "whether the characteristics of the persons

comprising the group are consistent with financial eligibility under the Act” (§1611.6(b)(1)(i)) and, for groups having as a primary activity the delivery of services to eligible persons, “whether the characteristics of the persons served by the group are consistent with financial eligibility under the Act and whether the legal assistance sought relates to the primary activity of the group” (§1611.6(b)(1)(ii)). These provisions were added to address concerns expressed by the OIG that the language of the rule requiring recipients to collect information that “reasonably demonstrates that the group...” meets the rule’s eligibility criteria (§1611.6(b)(2)) contained inadequate standards for demonstrating group eligibility. We believe that a reasonability test is adequate and that recipients with limited resources have no incentive to serve inappropriate groups. We are concerned that the purpose of the new language is unclear and will cause significant confusion among recipients. In addition, we are concerned that LSC could use this language to second-guess determinations that are more appropriately made by the recipient. We urge the Board to eliminate this language from the rule and to rely on the combination of the reasonability test and the requirement that the recipient consider the resources available to the group such as income and income prospects, assets and obligations.

Section 1611.7 Manner of Determining Eligibility: There are three significant revisions to this provision. First, the current requirement that eligibility forms and procedures must be approved by LSC has been eliminated. This is a requirement of the current rule that places an unnecessary administrative burden on both LSC and its grantees, and it does not serve any apparent purpose. Second, a provision has been added that permits one recipient to rely on the eligibility determination made by another recipient that referred a case (§1611.7(d)). This new provis

APPENDIX TO NLADA COMMENT

SUGGESTED REVISIONS TO NPRM FOR PART 1611 (FINANCIAL ELIGIBILITY)

§1611.1 Purpose

§1611.2 Definitions

§1611.3 Financial Eligibility Policies

§1611.4 Financial Eligibility for Legal Assistance

§1611.5 Authorized Exceptions to the Recipient's Annual Income Ceiling

§1611.6 Representation of Groups

§1611.7 Manner of Determining Financial Eligibility

§1611.8 Changes in Financial Eligibility Status

Deleted: 1611.9 Retainer Agreements¶

§1611.1 Purpose

This Part sets forth requirements relating to the financial eligibility of individual applicants for legal assistance supported with LSC funds and recipients' responsibilities in making financial eligibility determinations. This Part is not intended to and does not create any entitlement to service for persons deemed financially eligible. This Part also seeks to ensure that financial eligibility is determined in a manner conducive to development of an effective attorney-client relationship. In addition, this Part sets forth standards relating to the eligibility of groups for legal assistance supported with LSC funds. Finally, this Part sets forth requirements relating to recipients' responsibilities in executing retainer agreements with clients.

§1611.2 Definitions

(a) "Advice and counsel" means legal assistance that is limited to the review of information relevant to the client's legal problem(s) and counseling the client on the relevant law and/or suggested course of action. Advice and counsel does not encompass drafting of documents or making third-party contacts on behalf of the client.¹

(b) "Applicable rules of professional responsibility" means the rules of ethics and professional responsibility generally applicable to attorneys in the jurisdiction where the recipient provides legal services.

(c) "Applicant" means an individual who is seeking legal assistance supported with LSC funds from a recipient. The term does not include a group, corporation or association.

¹ We suggest that LSC delete the sentence in the preamble for §1611.2(a) that states "LSC anticipates that advice and counsel would generally be characterized by a one-time or very short term relationship between the attorney and the client."

adjustments as necessary. The recipient shall implement procedures consistent with its policies.

(b) As part of its financial eligibility policies, every recipient shall specify that only individuals and groups determined to be financially eligible under the recipient's financial eligibility policies and LSC regulations may receive legal assistance supported with LSC funds.

(c)(1) As part of its financial eligibility policies, every recipient shall establish annual income ceilings for individuals and households, which may not exceed one hundred and twenty five percent (125%) of the current official Federal Poverty Guidelines amounts. The Corporation shall annually calculate 125% of the Federal Poverty Guidelines amounts and publish such calculations in the Federal Register as a revision to Appendix A to this part.

(2) As part of its financial eligibility policies, a recipient may adopt authorized exceptions to its annual income ceilings consistent with §1611.5.

(d)(1) As part of its financial eligibility policies, every recipient shall establish reasonable asset ceilings for individuals and households. In establishing asset ceilings, the recipient may exclude consideration of assets such as a household's principal residence, vehicles required for work, assets used in producing income, and other assets which are exempt from attachment under State or Federal law.

(2) The recipient's policies may provide authority for waiver of its asset ceilings for specific applicants under unusual circumstances and when approved by the recipient's

(3) the availability and cost of legal services provided by the private bar and other free or low cost legal services providers in the area.

§1611.4 Financial Eligibility for Legal Assistance

(a) A recipient may provide legal assistance supported with LSC funds only to individuals whom the recipient has determined to be financially eligible for such assistance. Nothing in this Part, however, prohibits a recipient from providing legal assistance to an individual without regard to that individual's income and assets if the legal assistance is wholly supported by funds from a source other than LSC, and is otherwise permissible under applicable law and regulation.

(b) Consistent with the recipient's financial eligibility policies and this Part, the recipient may determine an applicant to be financially eligible for legal assistance if the applicant's assets do not exceed the recipient's applicable asset ceiling established pursuant to §1611.3(d)(1), or the applicable asset ceiling has been waived pursuant §1611.3(d)(2), and:

(1) The applicant's income is at or below the recipient's applicable annual income ceiling; or

(2) The applicant's income exceeds the recipient's applicable annual income ceiling but one or more of the authorized exceptions to the annual income ceilings, as provided in §1611.5, applies.

(c) Consistent with the recipient's policies, a recipient may determine an applicant to be financially eligible without making an independent determination of income or assets, if the applicant's income is derived solely from a governmental program for low-income individuals or families, provided that the recipient's governing body has determined that the income standards of the governmental program are at or below 125% of the Federal Poverty Guidelines amounts and that the governmental program has eligibility standards which include an assets test.

§ 1611.5 Authorized Exceptions to the Annual Income Ceiling

(a) Consistent with the recipient's policies and this Part, a recipient may determine an applicant whose income exceeds the recipient's applicable annual income ceiling to be financially eligible if the applicant's assets do not exceed the recipient's applicable asset ceiling established pursuant to §1611.3(d), or the asset ceiling has been waived pursuant to §1611.3(d)(2), and:

(1) The applicant is seeking legal assistance to maintain benefits provided by a governmental program for low income individuals or families; or

(2) The applicant is seeking legal assistance to maintain benefits provided by a governmental program for low income individuals or families; or

(3) The applicant's income does not exceed 200% of the applicable Federal Poverty Guidelines amount and:

(i) The applicant is seeking legal assistance to obtain governmental benefits for low income individuals and families; or

(2) The group has as a principal activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance and the legal assistance sought relates to such activity.

(b)(1) In order to make a determination that a group, corporation, association or other entity is eligible for legal services as required by paragraph (a) of this section, a recipient shall consider the resources available to the group, such as the group's income and income prospects, assets and obligations.

(2) A recipient shall collect information that reasonably demonstrates that the group, corporation, association or other entity meets the eligibility criteria set forth herein.

(c) The eligibility requirements set forth herein apply only to legal assistance supported by funds from LSC, provided that any legal assistance provided by a recipient, regardless of the source of funds supporting the assistance, must be otherwise permissible under applicable law and regulation.

§1611.7 Manner of Determining Financial Eligibility

(a)(1) In making financial eligibility determinations regarding individual applicants, a recipient shall make reasonable inquiry regarding sources of the applicant's income, income prospects and assets. The recipient shall record income and asset information in the manner specified in this section.

(2) In making financial eligibility determinations regarding groups seeking LSC-supported legal assistance, a recipient shall follow the requirements set forth in §1611.6(b) of this Part.

(b) A recipient shall adopt simple intake forms and procedures to obtain information from applicants and groups to determine financial eligibility in a manner that promotes the development of trust between attorney and client. The forms shall be preserved by the recipient.

(c) If there is substantial reason to doubt the accuracy of the financial eligibility information provided by an applicant or group, a recipient shall make appropriate inquiry to verify the information, in a manner consistent with the attorney-client relationship.

(d) When one recipient has determined that a client is financially eligible for service in a particular case or matter, that recipient may request another recipient to extend legal assistance or undertake representation on behalf of that client in the same case or matter in reliance upon the initial financial eligibility determination. In such cases, the receiving recipient is not required to review or redetermine the client's financial eligibility unless there is a change in financial eligibility status as described in §1611.8 or there is substantial reason to doubt the validity of the original determination, provided that the referring recipient provides and the receiving recipient retains a copy of the intake form documenting the financial eligibility of the client.

§1611.8 Change in Financial Eligibility Status

Deleted: and either:¶

(i) for a group primarily composed of individuals who would be financially eligible for LSC-funded legal assistance under the Act, whether the characteristics of the persons comprising the group are consistent with financial eligibility under the Act; or¶

(ii) for a group having as a primary activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance under the Act whether the characteristics of the persons served by the group are consistent with financial eligibility under the Act and whether the legal assistance sought relates to the primary activity of the group.

(a) If, after making a determination of financial eligibility and accepting a client for service, the recipient becomes aware that a client has become financially ineligible through a change in circumstances, a recipient shall discontinue representation supported with LSC funds if the change in circumstances is sufficient, and is likely to continue, to enable the client to afford private legal assistance, and discontinuation is not inconsistent with applicable rules of professional responsibility.

(b) If, after making a determination of financial eligibility and accepting a client for service, the recipient later determines that the client is financially ineligible on the basis