



OFFICE OF LEGAL AFFAIRS

To: Operations and Regulations Committee

From: Ronald S. Flagg, General Counsel and Vice President for Legal Affairs
 Mark Freedman, Senior Assistant General Counsel
 Stefanie K. Davis, Assistant General Counsel
 Diana Camosy, Post-Graduate Fellow

Date: February 24, 2014

Re: July 2013 PAI Rulemaking Workshop—Summary of the Panel Discussion

LSC selected six panelists for the July 2013 PAI rulemaking workshop. This memo summarizes their testimony during the workshop. The transcript of the workshop, audio recordings of the workshop, background information about the panelists, panelist written comments, and the Federal Register notice are posted on the PAI rulemaking webpage at <http://bit.ly/PAIrulemakingdetails>. The three topics of discussion are:

- Topic 1: LSC Pro Bono Task Force Recommendation 2(a)—Resources spent supervising and training law students, law graduates, deferred associates, and others should be counted toward grantees’ PAI obligations, especially in “incubator” initiatives.
- Topic 2: LSC Pro Bono Task Force Recommendation 2(b)—Grantees should be allowed to spend PAI resources to enhance their screening, advice, and referral programs that often attract pro bono volunteers while serving the needs of low-income clients.
- Topic 3: LSC Pro Bono Task Force Recommendation 2(c)—LSC should reexamine the rule, as currently interpreted, that mandates adherence to LSC grantee case handing requirements, including that matters be accepted as grantee cases in order for programs to count toward PAI requirements.

Panelist	Organization	Topic 1	Topic 2	Topic 3
Silvia Argueta	Legal Aid Foundation of Los Angeles, on behalf of the National Legal Aid & Defender Association (NLADA)	X	X	X
Steve Gottlieb	Atlanta Legal Aid Society	X	X	X
Judge Mary Katherine Huffman	Greater Dayton Volunteer Lawyers Project (GDVLP)	X	X	
Joan Kleinberg	Northwest Justice Project (NJP)		X	X
Kenneth Penokie	Legal Services of Northern Michigan (LSNM)	X		X
Lisa Wood	ABA Standing Committee on Legal Aid & Indigent Defendants (SCLAID)	X	X	X

PANEL DISCUSSION: TOPIC 1

Silvia Argueta, NLADA

Ms. Argueta introduced her testimony by noting how pro bono volunteer attorneys work in conjunction with legal aid organizations to maximize their resources, especially in light of the severe funding reductions affecting legal aid. Organizations, she said, need to be creative in figuring out how to provide adequate representation. The Pro Bono Task Force recommendations would open doors to further collaboration with private attorneys to expand resources.

Regarding Topic 1, Ms. Argueta was encouraged by the movement towards expanding PAI to include counting supervision and training of law students, law graduates awaiting admission to the bar, and paralegals. Many legal aid groups already work with such people, and their doing so shows creative advocacy, such as in the creation of temporary fellowships to expand staff at legal aid offices, and provides students or graduates awaiting admission to the bar work experience. Students have expressed interest especially in issues affecting veterans. The current PAI rule does not recognize this work, so grantees and LSC cannot show how these efforts assist clients and maximize limited resources. Including this work would both capture existing efforts and encourage more creative solutions to legal service delivery.

Responding to a question about paralegals, Ms. Argueta explained that in Los Angeles more and more law firms use paralegals supervised by associates to assist legal aid providers.

Steve Gottlieb, Atlanta Legal Aid Society

Mr. Gottlieb began by discussing Atlanta Legal Aid's long history of private attorney involvement and existing programs involving both private attorneys and non-attorneys. These programs include a Saturday volunteer lawyer program, an associate fellowship program with law firms, a law school fellows program with law school graduates, volunteers who have graduated from law school but are not yet admitted to the bar, retired attorneys working on a senior hotline, law students handling intake, a paralegal handling Spanish intake, law firm administrators assisting with hotline scheduling, special-topic projects such as grandparent adoption or eviction defense, and traditional attorney panel programs.

Many of these programs, he noted, are unreportable under the PAI rule, for the most part because the volunteers and fellows are not yet practicing law. They do not count as private attorneys under the rule. Mr. Gottlieb noted that the rule may be well served by not calling it "private attorney involvement," because it results in organizations getting too caught up in the rhetoric of who is and is not a "private" attorney.

A reinterpretation or a rewriting of the PAI rule, Mr. Gottlieb remarked, would help recognize: (1) the work that such programs do for low-income clients; (2) the value of providing experience for law students and soon-to-be lawyers; and (3) the value to grantees, who get a major return on their investment in these people who will act as ambassadors for legal aid when they go on to their jobs at law firms. Mr. Gottlieb also encouraged expanding the rule to include

attorneys who are retired or licensed in other jurisdictions (including staff in many corporate legal departments).

In response to a question regarding the importance of what qualifies for the PAI 12.5%, Mr. Gottlieb said that there are practical effects of not counting certain expenses or cases toward the PAI requirement. While grantees can still conduct uncounted programs, people will follow the lead of what LSC urges and provides credit for doing.

Judge Mary Katherine Huffman, Greater Dayton Volunteer Lawyers Project

Judge Huffman echoed Mr. Gottlieb's comments and added that she would focus on the structure of PAI programs. She said that legal aid organizations need very structured programs—often with full-time professional coordinators—to provide adequate assistance to low-income clients. She provided examples from GDVLP and the University of Dayton School of Law. Her concern was that the proposed changes could lead to a dilution of the services provided. Thus, while she agreed that the work of paralegals, law students, and others should be counted, she also recommended making sure that grantees have viable pro bono programs. In response to a question about this concern, Judge Huffman explained that a viable program needed to have resources for involving services provided by attorneys.

In response to a question about paraprofessionals, Judge Huffman noted that paralegals are vital to providing services to clients and counting their work could make a difference for small programs.

In response to a question about law school clinics and student admissions, Judge Huffman explained that the Dayton program does not count law school clinic hours but it does pair law students with private attorneys and with projects at large law firms.

Kenneth Penokie, Legal Services of Northern Michigan

Mr. Penokie described the delivery of legal aid for LSNM, which has a very rural service area with many small firms and solo practitioners. If pro bono programs are to exist at all in this area, they have to be designed around these attorneys and their interests. For instance, pro bono work in a small town poses a large risk of conflicts of interest, which can make attorneys disinclined to take pro bono cases. Moreover, rural lawyers often do not want the public to know them as the “free attorney” in town because that carries a risk of too many people asking for free work. Lastly, rural lawyers have a limited tolerance for the detailed recordkeeping and oversight that LSC's case handling rules require. They simply want to take cases and do a good job, even without any recognition. Thus, Mr. Penokie concluded, flexibility should set the tone of the PAI rule, a tone he was happy to find in the Pro Bono Task Force's recommendations.

Lisa Wood, SCLAID

Ms. Wood prefaced her comments with a note that SCLAID has a long history of encouraging the expansion of the PAI rule. She then started with the question of the PAI rule's

objective. She suggested four goals for the PAI rule. First: leverage—an increase in the amount of attorneys' time available to meet the justice gap. Second: communication—explaining what civil legal aid and the justice gap are, to both the public and the legal profession, and getting lawyers involved. Third: resources—encouraging recipients' development of resources besides federal funding. Fourth—integration of legal services with the rest of the legal profession by collaborating with other stakeholders in the system. This final goal, she concluded, feeds into all the other goals. In addition, Ms. Wood stated that the dramatic changes to the legal profession and legal education show the need for flexibility in the PAI rule to allow for continuing creativity and innovation.

Ms. Wood identified law student and incubator programs as critical areas for including in the rule people who are available and eager for legal work. This approach fosters lifelong associations with legal aid.

ADDITIONAL PUBLIC COMMENTS: TOPIC 1

Patricia Risser of the Legal Action of Wisconsin Volunteer Lawyers Project explained that private attorneys often report that up to half of their work on cases is handled by paralegals and she recommended capturing and capitalizing on that work.

PANEL DISCUSSION: TOPIC 2

Silvia Argueta, NLADA

Ms. Argueta said that Topic 2 was mostly about building community and relationships with other organizations and the legal profession. This is because referral programs enable legal services groups to create long-lasting connections with local pro bono programs and bar associations through collaborative work. Screening and referrals are not simply passing on cases and forgetting about them, she noted. They are about developing good working relationships with other groups. She criticized Advisory Opinion 2011-001 as an obstacle to fostering these connections. The opinion, she said, held that the dollar amount of time spent on advice and referral of LSC-eligible applicants to other programs cannot be counted towards PAI. Ms. Argueta concluded that the opinion should be changed because it was inconsistent with the goals of building this type of legal community and enhancing legal aid resources.

In response to a question about how expanding the scope of PAI would grow pro bono, Ms. Argueta emphasized the importance of encouraging innovation and new ideas.

Steve Gottlieb, Atlanta Legal Aid Society

Mr. Gottlieb criticized the PAI rule on this front because grantees are not allowed to count their time spent assisting other, independent pro bono programs. He provided the example of an independent volunteer lawyers program that began at Atlanta Legal Aid. While they still support it, they don't manage it or allocate it to their PAI expenses. LSC should push such joint efforts, he said, because it means that the grantees and LSC could better report more of the

effective work involving private attorneys. Mr. Gottlieb recommended going further and counting these cases as PAI cases when LSC grantees had some involvement in them.

In response to a question about tracking these referrals, Mr. Gottlieb noted that often they can only obtain follow-up information from the volunteer attorneys in about 50 percent of the cases.

Judge Mary Katherine Huffman, Greater Dayton Volunteer Lawyers Project

Judge Huffman said that she fully supported the recommendation of Topic 2 because grantees and subgrantees need the extra support that the PAI rule provides. They need it for their intake because they do not have enough money to provide their private attorney contacts with sufficient referrals. Moreover, she added, sometimes conversations at intake are the only service provided, either because the client realizes he does not have a legal problem or because the client does not follow up. As a result, intake should count as a service rendered under the PAI rule. Judge Huffman added the caveat that the rule's restrictions should not be relaxed to the point where an activity is counted although services are not actually provided.

In response to a question about tracking these referrals, Judge Huffman noted that often the screening itself is the service, especially when the screener can explain that the legal issue belongs to someone other than the caller, such as a family member.

Joan Kleinberg, Northwest Justice Project

Ms. Kleinberg supported the recommendation. She stated that LSC needs to remain flexible, letting programs change with time, so that organizations can design PAI projects that fit into their area's delivery system. She noted that an integrated intake and delivery system—as Washington State has created—enhances the ability of pro bono programs to recruit and retain volunteer attorneys, because the programs are run well. NJP operates the statewide centralized intake hotline for Washington State. They screen callers and, when appropriate, can refer them directly to a local pro bono program. Volunteer lawyers have praised the ability to work on cases that have been professionally screened. With an integrated computer system, NJP can identify if the pro bono program accepted the case and whether a private attorney provided assistance. This is why, she said, the PAI rule should allow intake to be counted.

In response to a question about how expanding the scope of PAI would grow pro bono, Ms. Kleinberg discussed how doing so would allow LSC to tell the full story of different kinds of involvement of private attorneys.

Lisa Wood, SCLAID

Ms. Wood said that the current PAI rule is a disincentive to be efficient about integrating a service delivery system in a given service area. Screening, advice, and referral programs offer pro bono opportunities to lawyers who might not otherwise want to take on the work. They may not be able to offer more effort given their full-time portfolios. Counting these referral programs

would act as a recruiting tool for grantees, helping to achieve one of the PAI rule's goals. The PAI rule should encourage grantees to do their best, especially given limited resources. The current restrictive definition could discourage grantees from doing what makes the most sense for their service areas.

In response to a question about how expanding the scope of PAI would grow pro bono, Ms. Wood explained that expanding the rule would encourage pro bono projects that are most appropriate for the region and resources of each grantee. Some grantees struggle with meeting the 12.5% requirement and this would encourage them to find ways to do more PAI work.

Kenneth Penokie, Legal Services of Northern Michigan

In response to a question about tracking these referrals, Mr. Penokie answered that tracking acceptance of a case would be easy, but that capturing information about the outcome of the case can be difficult for grantees without many resources.

PANEL DISCUSSION: TOPIC 3

Silvia Argueta, NLADA

This recommendation, Ms. Argueta said, can help expand pro bono for programs without strong internal support for it. Such organizations have been challenged to support pro bono work because they have had to count every PAI case as an LSC case. In a collaborative program, where the grantee is not the main coordinator or sponsor, the organization running it owns that program. That organization will not want to follow another entity's rules. Thus, the current PAI rule is an impediment to grantees providing the training, technical assistance, and materials needed to enhance a program they support. If a service program has to meet all the CSR requirements, as Advisory Opinion 2008-1001 holds, it will be limited in what it can do. Other organizations and volunteers will not want to participate, hampering the ability of LSC grantees to incorporate them in the delivery of legal services. In places like Los Angeles, private attorneys have many options for volunteering and may choose the ones that do not impose additional requirements on them.

Steve Gottlieb, Legal Aid Society of Atlanta

Mr. Gottlieb discussed the relaxation of conflicts rules under ABA Model Rule 6.5 for attorneys providing limited services through courts or nonprofits. In Atlanta, they considered innovative court clinics and senior hotlines, but recognized that they could not apply the full LSC CSR requirements to cases in those contexts. Thus, they would not meet the PAI requirements under the current rule. In particular the court clinic would not turn away people due to LSC guidelines.

Mr. Gottlieb noted that the PAI rule was written in 1980 when PAI cases were handled through assignment and tracking of a case handled by an attorney on a panel of lawyers. As such, it doesn't account for innovative pro bono approaches and should be expanded to do so.

In response to a question regarding support for clinics and concerns about eligibility, Mr. Gottlieb suggested finding a way to test for eligibility so that the grantee could obtain PAI credit in proportion to the LSC-eligible clients served by the clinic.

Kenneth Penokie, Legal Services of Northern Michigan

In response to a question about the impact of changing the PAI rule, Mr. Penokie replied that four out of five PAI-style initiatives cannot be reported to LSC. While grantees could still participate in those initiatives, the lack of reporting has a detrimental effect. Every grantee is evaluated by LSC, Congress, and the public, but neither the grantees nor LSC are fully equipped to tell the whole story of what they do to involve private attorneys

Another problem arises with full LSC intake and screening because screening cases for handling by a pro bono attorney creates the risk of creating conflicts for the grantee. Those conflicts can exclude clients from core cases involving domestic violence or landlord-tenant lockouts when opposing parties may be assisted through a volunteer lawyer. Alternative screening mechanisms can prevent conflicts.

Mr. Penokie concluded that projects that cannot be reported as PAI might not occur when programs have limited funds. He explained that technology can foster innovative approaches, which flexibility in the rule could permit. Grantees could report that work to LSC and to Congress, regardless of whether the work is identified as cases, matters, or something else.

Joan Kleinberg, Northwest Justice Project

The difficulty of the current PAI rule, Ms. Kleinberg said, arises from the conflation of CSR case requirements with the PAI rule's reportable time requirements. This conflation keeps LSC from taking credit for leveraging massive amounts of pro bono activity through investment in local programs. She discussed examples of situations where NJP is the subject matter expert and can provide training for volunteer lawyers, but without any CSR-reportable cases. Similarly NJP is involved in a debt clinic at a courthouse, a domestic violence clinic for refugees and immigrants, and other support for local programs. They do not report these activities as PAI because there are no CSR-eligible cases.

Ms. Kleinberg also discussed an issue not raised in the PBTF report. NJP has compensated PAI cases in which NJP pays a fee of less than 50 percent of the normal attorney rate. She noted that the \$25,000 threshold for subgrants for those activities has not changed since 1980 and creates difficulties.

Lisa Wood, SCLAID

Ms. Wood explained that SCLAID was waiting to hear more about eligibility screening before commenting on it. For brief service clinics with screening for LSC eligibility, SCLAID supports allocating supervision time to the PAI requirement. Brief service work is an important

part of the delivery of legal services and highly attractive to volunteer attorneys. She explained that ethics rules are increasingly permitting brief services work without creating conflicts.

OTHER PUBLIC COMMENTS

Jonathan Asher, Colorado Legal Services (CLS)

Mr. Asher reported that CLS requested that the OLA opinion on referrals be reversed. CLS runs an internal PAI program and provides screening and referral for a large Denver area pro bono program and a number of rural, smaller bar association programs, which had been counted as PAI expenses. CLS provides support, training, and referrals for the Colorado Lawyers for Colorado Veterans program. CLS does not track the outcome of the referrals. Nonetheless, CLS spends resources screening and referring these cases to the pro bono programs and supports counting that toward the PAI allocation.

Mr. Asher supported including attorneys licensed in another state. Colorado allows single-client lawyers licensed in another state, such as in-house counsel, to handle pro bono cases.

Mr. Asher also supported changing the definition of a private attorney away from one that is measured by the income of the attorney. Stay-at-home parents who take PAI fee cases are excluded by the rule when their only professional income is PAI fees, even when the total fees are only a small amount of income.

Chuck Greenfield, NLADA

Mr. Greenfield commented that the purpose of the PAI rule is to leverage additional resources for clients, with other benefits for partnerships and fundraising. Increasing services justifies flexibility and innovation, which are frustrated by adherence to technical CSR reporting requirements. He speculated that many of the Technology Initiative Grant (TIG) accomplishments would not have occurred if the CSR requirements applied to TIG activities. He suggested thinking about PAI as having a research and development capacity. Nonetheless, he stated that NLADA understands that LSC and Congress want services to go to eligible clients. He suggested that the CSR requirements should not inhibit opportunities for LSC grantees to provide the architecture for new and creative approaches to technology, court-based services, and PAI, when those approaches produce substantial benefits primarily to the LSC-eligible community.

Helenka Marculewicz, Greater Dayton Volunteer Lawyers Project

Ms. Marculewicz commented that half of the cases that her program refers out are not reported as CSR cases because they never get back a signed citizenship attestation. She also commented that successful leveraging of resources requires private bar ownership of pro bono. Lastly, Ms. Marculewicz supporting liberalizing what can be counted as a PAI case as recommended by Steve Gottlieb.

AGENDA FOR THE SEPTEMBER 17 WORKSHOP

Silvia Argueta, NLADA

Ms. Argueta noted that fraud, waste, and abuse were not addressed, and she cautioned against creating more burdens on programs. She stated that existing auditing and compliance reviews are sufficient without more regulation.

Steve Gottlieb, Legal Aid Society of Atlanta

Mr. Gottlieb recommended discussing liberalization of what constitutes a PAI case. While there is no required number of PAI cases, the exclusion of some types of cases as a result of changes in the rules caused concern about the resulting decrease in numbers.

Judge Mary Katherine Huffman, Greater Dayton Volunteer Lawyers Project

Judge Huffman recommended discussing expanding services in an era of shrinking budgets and increased need and not just discussing how to count services towards the 12.5% PAI requirement.

Kenneth Penokie, Legal Services of Northern Michigan

Mr. Penokie supported Mr. Gottlieb and Judge Huffman's comments. He also noted that fraud concerns should be taken in the context of the risk that a private attorney, not an LSC grantee, might provide legal advice to an ineligible client.

Joan Kleinberg, Northwest Justice Project

Ms. Kleinberg suggested inviting comments on any other regulations that affect Part 1614.

Lisa Wood, SCLAID

Ms. Wood suggested devoting time to discuss methods, such as sampling, for pro bono programs that do not screen for eligibility. The ABA welcomes a conversation about that to better inform their comments. She also suggested discussing questions that had been asked during this workshop and had not been addressed.

Father Pius Pietrzyk, LSC Board of Directors

Father Pius suggested talking about the goals of the PAI rule and the value LSC intends to get out of it. He also suggested discussing how delivery of legal services has changed over the last 30 years and how that affects the PAI rule.