



OFFICE OF LEGAL AFFAIRS

To: Operations and Regulations Committee

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

LSC selected six panelists for the September PAI rulemaking workshop. This memo summarizes their testimony at the workshop panel discussion. 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 handling 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
Mark O’Brien	Pro Bono Net	X	X	X
Patricia Zeeh Risser	Legal Action of Wisconsin Volunteer Lawyers Project (LAWVLP)	X	X	X
Melissa Skilliter	Ohio State Legal Services Association (OSLSA)	X		X
David Udell	National Center for Access to Justice	X		
Jennifer van Dulmen	National Association of Pro Bono Professionals (NAPBPro)	X	X	X
John Whitfield	Blue Ridge Legal Services, on behalf of the National legal Aid & Defender Association (NLADA)	X	X	X

PANEL DISCUSSION: TOPIC 1

John Whitfield, NLADA

Mr. Whitfield began by stating that LSC created the Pro Bono Task Force to pursue the idea of unleashing the power of pro bono. Revising the PAI rule, he said, is the first step in this process because it is too restrictive. The emphasis of the PAI rule should be on expanding the availability of legal assistance to poor people, as well as providing legal information and education to the client community. The work of law students, law graduates, and paralegals can further that effort, and the resources that an LSC-funded program expends to support that work should count towards the PAI requirement.

Mr. Whitfield added that the definition of “private attorney” is confusing and limiting. It includes government attorneys, in-house counsel, and corporate attorneys, even though the term “private attorney” implies otherwise. Meanwhile, in some circumstances, new attorneys are excluded. Mr. Whitfield suggested that, instead of defining a “private attorney” as someone besides a “staff attorney,” LSC should build the new PAI regulation around volunteer attorneys and others from the legal community to expand the use of volunteers. The definition of “attorney” in the new rule should include all attorneys, including those not licensed to practice in that jurisdiction, and those with little or no other income, such as retirees, stay-at-home parents, and new lawyers.

Patricia Zeeh Risser, Legal Action of Wisconsin Volunteer Lawyers Project

In the spirit of the PAI rule, Ms. Risser began, everyone wants to enhance legal services. Yet in light of the actual PAI rule, that enhancement can be an intractable problem to deal with on a daily basis. Therefore, it is important to increase the flexibility and creativity of all aspects of the PAI rule. Nonetheless, it is equally important to maintain focus on what grantees were designed to do and what they do best—extended service. Ms. Risser encouraged the committee to reinforce within the legal community the importance of promoting pro bono work, not merely as “a little bit of service to a lot of people,” but as “getting the case from beginning to end.” She noted that there are plenty of clinics that provide limited services, but there are not any longer-term services providers besides grantees. She endorsed greater student involvement, but she noted some jurisdictions may have strict rules on student practice.

She asked that LSC seriously consider providing flexibility for the PAI rule’s 12.5% requirement because of fluctuations in grantees’ funding, especially changes with little advance notice. She expressed concern about the waiver procedure in the current rule presenting its own burdens, which she felt was excessive or even punitive. Responding to a question about whether the 12.5% requirement should be changed, Ms. Risser replied that grantees could indeed spend 12.5% of their grants on PAI programs, but that such spending impacted all their other work. In asking for greater flexibility within the PAI rule, Ms. Risser remarked she would prefer a “reasonable” standard with flexibility for considering a program’s past performance and ability to address many of the criteria.

Mark O'Brien, Pro Bono Net

Mr. O'Brien prefaced his statement by saying that, in times of exigent circumstances, organizations need to look beyond their own individual capacities to deliver services, and instead think about how their capacities fit into broader community needs. Legal services organizations, he added, live in a time of exigent need every day. Thus, they have to think creatively about how to bring more resources to bear. Adding pre-admission law graduates, as well as law students, to grantees' PAI programs would greatly expand the capacity of service delivery—especially brief services and advice. He added that students were particularly well-suited for the on-the-ground legwork of determining which problems need addressing, as Pro Bono Net experienced during their projects with students in the wake of Superstorm Sandy. It is this question about actual need, he stated, that is essential to rightly deciding where to put resources to most effectively meet needs. By drawing on law students and other non-attorney volunteers, legal services providers can better scale their projects. Technology and internet applications were also helpful, especially with providing legal information. It might even be possible, Mr. O'Brien added, to draw in other professions, such as business management, that contribute to modern law practice.

David Udell, National Center for Access to Justice

Mr. Udell began by emphasizing the importance of relying on law students to help narrow the justice gap. They have always volunteered, he noted, but there has not been much focus on what they can do to help the legal services community. Grantees should refocus where students apply their energies, especially in light of a growing trend toward mandatory pro bono work. Nonetheless, he noted the need to preserve the quality of PAI programs. He would not, for instance, recommend restructuring the PAI rule around trying to provide work to as many law graduates as possible, because grantees primarily need to assure the positive impact and effectiveness of their programs on the client community. For that, grantees need to rely on the best possible people, not just large numbers of people. Mr. Udell suggested partnering with law schools in creating, or maintaining, effective law student work within legal services programs.

Mr. Udell stated that the most important principle in expanding the PAI rule to cover law students is to actually expand programs' capacity. That kind of work should include intake, the analysis and development of facts, the drafting of pleadings, legal research, the interpretation and explanation of legal documents (especially to clients), preparation of oral arguments, and education of the public in "know your rights" meetings. Mr. Udell also noted a concern that the 12.5% requirement could encourage a program to direct spending toward ineffective activities simply to meet the required percentage. As an alternative to the current PAI rule, he suggested offering separate pro bono grants to encourage best practices and replicable successful PAI models. Moreover, altering the "private attorney" definition would increase programs' flexibility to decide where to spend their money. He also noted that programs should have options to work with a much larger community of other pro bono participants.

Jennifer van Dulmen, NAPBPro

Collaboration, Ms. van Dulmen began, is the key to unleashing pro bono, paraphrasing Mr. Whitfield's earlier remarks. Pro bono programs should be equal partners with staff-model programs for legal services delivery. She identified barriers in excessive regulation, a lack of

resources, and, in some cases, the perception that pro bono work is less valuable. Ms. van Dulmen noted that pro bono work is not free—to be successful, organizations must have resources and partners such as full-time, dedicated, and skilled professionals who are involved in the decision-making process on legal services delivery. Pro bono professionals also need to collaborate with each other and have professional standards. She endorsed the adoption of Recommendation 2(a), but only for organizations that first demonstrate that their projects meet the foundational elements of strong pro bono programs before expanding. Moreover, organizations with struggling pro bono projects should focus first on their initial mission before expanding. Ms. van Dulmen suggested a cap on the percentage of PAI allocation that can be used towards more brief service activities, rather than extended services; she warned against the dilution of resources that would result if all funding was routed to brief service clinics. Ms. van Dulmen also asked that programs not be over-regulated. She noted that law students who volunteer tend to do so again, and to return to the same programs. Thus, law students can increase programs' capacities.

Melissa Skilliter, Ohio State Legal Services Association

Ms. Skilliter began with the question of what difference the PAI rule makes to grantees, especially in light of the fact that some grantees easily exceed the 12.5% PAI requirement and then engage in other programs that did not count towards the PAI requirement. She replied that the proposed changes to the PAI rule are grounded in the reality that, for most grantees, the rule is determinative in what projects are pursued and which are not, thanks to scarce time, money, and staff. She noted that, when staff attorneys cannot be spared, paralegals can be a great resource, as in wills clinics. Other professionals are also helpful, such as accountants in tax clinics. She suggested that the new regulation should provide the flexibility to include other qualified professionals to help clients.

PANEL DISCUSSION: TOPIC 2

Jennifer van Dulmen, NAPBPro

Ms. van Dulmen expressed support for the Pro Bono Task Force's Recommendation 2(b), saying that the new PAI rule could encompass activities like screening, advice, and referral. She would, however, place the same conditions on accepting the recommendation as she did for Recommendation 2(a). In particular, she emphasized the need for a cap on expenses for advice and referral, since such activities tend to be brief services. She also cautioned against allocating PAI funds for general screening for basic eligibility. Ms. van Dulmen stated that screening, advice, and referral programs could increase pro bono service by increasing capacity and encouraging creativity and variety. She noted the concern of a potential for abuse or for a shift toward brief services over extended service.

In response to a question about tracking outcomes—the desire for which has kept screening from being counted towards PAI—Ms. van Dulmen said that pro bono programs have gotten immensely better at measuring how much work is put in and what the results of that work are. This change is a consequence of pro bono groups being encouraged, through the modeling of best practices, to evaluate outcomes. Because best practices consist of determining outcomes,

Ms. van Dulmen did not think that there would be a further incentive to do so by requiring it in the PAI rule. Thus, no additional reporting requirements were necessary.

Mark O'Brien, Pro Bono Net

Mr. O'Brien also favored the adoption of Recommendation 2(b) as addressing the question of finding the most effective way to structure the delivery of legal services. Grantees, he said, need flexibility to partner with other community access organizations. For instance, he suggested embedding legal services in other institutions that serve poor people, such as social services agencies and libraries, rather than exclusively relying on other members of the legal community at clinics. As for outcome reporting requirements, Mr. O'Brien agreed with Ms. van Dulmen, that it is better to develop best practices in order to influence behavior, rather than set up a new regulatory standard, with the risk of over-regulation. Lastly, Mr. O'Brien addressed concerns with screening for eligibility at clinics not organized by grantees. He responded that an overemphasis on eligibility screening can impede the ability of grantees to put themselves in situations where they can help eligible clients—as at co-sponsored clinics—due to the elevated “risk” of serving ineligible clients. He did not want the fear of such a possibility to overwhelm the high probability of serving more eligible than ineligible clients.

Patricia Zeeh Risser, Legal Action of Wisconsin Volunteer Lawyers Project

Grantees are still the central providers of extended legal services, Ms. Risser began, but the picture of pro bono work has changed considerably in the last thirty years. There are more players now, so grantees need to collaborate and to be on the team. They should be encouraged, she said, to provide help where they have the unique resources to do so. Thus, Ms. Risser favored expanding the current PAI rule to cover screening, advice, and referral, which would foster vitally important collaboration with other organizations. She noted that screening and referral is central to connecting people with the service that they need.

Ms. Risser noted that legal aid programs educate other entities about substantive legal issues facing the poor and about eligibility for LSC-funded entities. She explained that LAWVLP's staff is the Wisconsin experts in landlord/tenant issues and public benefits. Other organizations come to LAWVLP for information to help serve or refer people. Unfortunately, LAWVLP has lost trained volunteers who have moved to other programs that provide briefer services that are easier to provide.

John Whitfield, NLADA

Mr. Whitfield began by stating that he favors grantees being able to spend PAI resources to enhance their screening, advice, and referral services. The test for the rule, he said, should be whether the engagement of private, volunteer, or otherwise non-LSC attorneys increases the resources available to the client community, as well as whether such engagement improves the quality of services. He strongly recommended that the PAI rule should be revised to overturn Advisory Opinion 2009-1001, which did not permit PAI allocation for activities of a hotline operated by a legal aid program. He stated that LSC should focus on the expansion of services to clients rather than whether the provider was a nonprofit or for-profit entity. He would include attorneys at other nonprofits and public interest law firms in the definition of a private attorney.

Using an “expansion of services” test, Mr. Whitfield would include collaboration with a public interest law firm or organization like the ACLU when they bring new resources to assisting low-income civil legal needs. He would not include as PAI work collaboration with another legal aid society handling exactly the same work as the LSC grantee because it already provides its resources to the client community.

Mr. Whitfield responded to a public question from Ken Penokie, Legal Services of Northern Michigan, regarding the prohibition on PAI allocation of fees paid to an attorney who worked at a grantee within the last two years and who is not part of a regular PAI-fee program. He supported adjusting the rule to provide an exception to the prohibition that would apply to recently laid-off attorneys who have needed expertise.

Mr. Whitfield supported flexibility for grantees to determine the best balance of brief services and extended services to maximize the resources available to help clients.

Regarding screening for LSC eligibility, Mr. Whitfield distinguished between PAI case services, for which all of the LSC requirements would apply, and other PAI services such as legal information for which screening is not normally required. He discussed screening more extensively in response to Topic 3.

Regarding tracking of PAI work, Mr. Whitfield noted that PAI attorneys bridle at reporting requirements. He did not recommend reporting requirements for non-case work.

#### ADDITIONAL PUBLIC COMMENT: TOPIC 2

Virginia Martin, Director of the New Hampshire Bar’s legal services programs and past NAPBPro president.

Ms. Martin discussed the tension between providing hotline or advice/brief services work, which is easier for volunteers, and extended representation work. She noted the need to be cautious about making sure that volunteer attorneys are available for extended services work and not entirely used up by briefer services.

Mary Ryan, ABA Standing Committee on Pro Bono and Public Service

Ms. Ryan commented that she supported the NAPBPro standards, but that she does not think that the PAI rule should use them as a threshold for existing or new PAI activities.

#### PANEL DISCUSSION: TOPIC 3

John Whitfield, NLADA

Mr. Whitfield favored the adoption of Recommendation 2(c). He discussed the many PAI activities that are non-case work that consequently does not require application of the case-handling requirements. Regarding case work, he supported PAI allocation for grantee work associated with clinics in which private attorneys provide legal advice but cannot conveniently

provide screening, such as at courthouses. He acknowledged that these clients are not screened and some could be LSC-ineligible. Nonetheless, he suggested a test of whether the activity is designed to benefit, and is targeted to, eligible clients, even if the grantee cannot know whether every person assisted would be eligible.

He compared legal advice clinics to providing legal information on websites for which screening for eligibility is not required. For instance, posting information about waiver of filing fees due to poverty would be acceptable, while posting information about one's rights as an undocumented alien would usually not relate to eligible clients. Similarly, he argued that support for PAI activities, including legal advice clinics involving private attorneys, that are designed to help the LSC client population should be permitted even if some ineligible clients receive assistance.

Committee Chairman Keckler asked about limited screening to document who is served by the clinic, even without full LSC screening. Mr. Whitfield, speaking for himself and not for NLADA, thought that limited screening or sampling could be used.

Patricia Zeeh Risser, Legal Action of Wisconsin Volunteer Lawyers Project

Ms. Risser stated that Recommendation 2(c) is an opportunity to reexamine case handling requirements as applied to the PAI rule, and determine which of them are really essential. At the top of her list was alienage, followed closely by income qualification. She focused her comments on providing support to activities that serve unscreened people. She discussed developing training manuals and providing trainings regarding poverty law to attorneys regardless of whether those attorneys would represent screened clients of her program. These trainings help them partner with others in the legal services community. She supports counting screening and referral by itself as a PAI activity.

Regarding EX-2008-1001, she explained that it had a chilling effect on two very important projects. In one, her program was the lead in establishing a self-help clinic that involved the court and a child support agency, neither of which would do screening. Her program provided support services, training, scheduling, and infrastructure. Because of EX-2008-1001, the program withdrew that support and the Milwaukee Bar Association took the lead. In the other, the program was involved in working at a homeless center near a veterans' hospital. Many volunteer lawyers were interested in working there, but not in screening. They changed the program to a hybrid clinic with a staff attorney providing screening and some services. In both cases the changes were not easy and endangered the program.

Ms. Risser explained that screening requirements can pull back grantees from doing good work that would have a greater impact in communities where there is less access to assistance, such as in rural areas where the local bar association is the only available sponsor. Volunteer attorneys do not want to turn people away, especially due to income. She noted that alienage was different and had a higher importance.

Mark O'Brien, Pro Bono Net

Mr. O'Brien echoed Ms. Risser's comments and stated that Recommendation 2(c) is a chance to reflect on LSC's overall goals. If the goal is full access to justice, the committee needs to think about how to encourage grantees to structure programs that best serve that goal in their service areas. There is not much sense, he said, in distinguishing between CSR-compliant cases and non-compliant cases within private attorney clinics supported by LSC grantees. He noted that it is demoralizing for clinic volunteers to have to screen people who are in desperate situations, especially after natural disasters. He advocated incentivizing programs to provide broad support to the bar and other legal services entities while maintaining strict adherence to the regulations for cases handled on behalf of the grantee. Mr. O'Brien also suggested data collection to evaluate the effectiveness of PAI programs.

Jennifer van Dulmen, NAPBPro

Unlike the other recommendations, Ms. van Dulmen favored the adoption of Recommendation 2(c) without conditions. NAPBPro strongly supports this recommendation. She asked that the committee look at CSR requirements from the potential client's perspective. The outreach clinic may be the potential client's only remaining option. The volunteer attorney, she emphasized, wants to serve the community with pro bono work, not to turn people away, especially ones who are poor, but not poor enough. She also noted that the vast majority of people at outreach clinics are LSC eligible.

Melissa Skilliter, Ohio State Legal Services Association

OSLSA is the organization that was at issue in Advisory Opinion 2008-1001, which recommendation 2(c) contemplates LSC withdrawing. PAI projects for OSLSA, she said, are by necessity collaborations with firms and local bar associations, because the service area is so rural with no other legal aid program and no bar referral programs. As a result, OSLSA does not have 100% control over these clinics. Yet this is not a detriment, she said, because co-sponsorship can be why attorneys show up to volunteer—to help out their local bar. Thus, OSLSA has resisted full screening and CSR requirements because they can push volunteers away due to additional hassle and the appearance of unnecessary control over a community project. Additionally, full screening and reporting would require dedicating more OSLSA staff time when there is less time and staff available (especially due to the loss of almost one-third of OSLSA staff). Worse, there would likely be fewer potential clients at a clinic if they all have to be fully screened. The grantee would either have to screen people ahead of time, defeating the purpose of many brief service clinics, or clients would have a longer wait time, which few of them can afford. OSLSA currently does not treat clinic clients as OSLSA clients, which enables OSLSA to direct people to these clinics when OSLSA cannot serve them due to a conflict. Conversely, if clinic clients were handled as OSLSA clients then many more conflicts would arise for OSLSA going forward, even though OSLSA attorneys never directly provided legal services.

It is an odd result of the PAI rule, Ms. Skilliter noted, that the greater success an organization has in making a program into a collaborative community project, the more difficult it is to count it towards PAI requirements. She discussed a community clinic they support that has strong support from the local attorneys, courts, and legislature. They have a volunteer



handling limited financial screening and another volunteer for recruiting. A staff person helps run the clinic and support the volunteer attorneys. To make such projects count under the current rule would require telling volunteers that they have to do something they do not like as much, and possibly to tell clients that they will get less help. The clinics could fully screen and reject some people or limit themselves to legal information. OSLSA could also withdraw from the clinics entirely. It is very detrimental to grantees to have a regulation that interferes with their ability to help clients and to work with community partners.

Regarding eligibility, Ms. Skilliter compared clinic work to group representation in which LSC looks at the primary purpose of the group organization. Similarly she suggested looking at the primary purpose of the clinic.

In response to Committee Chairman Keckler's question about limited screening, Ms. Skilliter stated that they do that kind of limited screening and it is not too onerous. She also recommended flexibility regarding serving people who are over-income for LSC services.

#### ADDITIONAL PUBLIC COMMENT: TOPIC 3

Virginia Martin, Director of the New Hampshire Bar's legal services programs and past NAPBPro president

Ms. Martin added that it would be helpful to permit PAI subgrantees to minimize unnecessary conflicts by not requiring the subgrantee PAI cases to also become cases, and clients, of the primary grantee.

Ken Penokie, Legal Services of Northern Michigan

Mr. Penokie noted that they have an internet project and a Traverse City clinic that both collect full screening information except for client names and addresses. This approach permits them to avoid conflicts due to people served in those projects while still collecting screening information. He further noted that the concern about private attorneys providing legal advice to unscreened people is less than the concern that an LSC grantee does so.

#### ADDITIONAL MATTERS

Board Chairman Levi suggested considering pilot projects, if possible without a rule change, and he reported that many people have asked him about changing the name of the rule. Mr. Whitfield suggested Involvement of the Legal Profession (ILP).