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Re: Additional Comments on Revising the LSC Private Attorney Involvement (PAI) Rule, 45 CFR Part 1614

Dear Mr. Freedman,

The American Bar Association, through its Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and with substantial input from its Standing Committee on Pro Bono and Public Service (Pro Bono Committee), submits these additional comments regarding possible revisions to the Legal Services Corporation's (LSC) PAI requirement, supplementing comments previously filed on June 21, 2013. Since those initial comments were filed, additional questions on the topic were posed by LSC in the Federal Register Notice of August 12, 2013, many of which will be addressed below in Sections II, III and IV. Initially, however, we will focus on several issues regarding the purpose of the regulation that were not raised by LSC but that we believe are worthy of comment.<sup>1</sup>

### I. Purpose of Part 1614

Currently, 45 CFR 1614.1 provides in part that the PAI requirement was enacted to ensure the involvement of private attorneys in the delivery of legal assistance to eligible clients. Further, it requires that 12.5 % of the recipient's annualized LSC basic field award be devoted to PAI.

The ABA recommends that in stating the purpose of the regulation, LSC emphasize the goal of expanding the provision of legal services to the poor and legal education to the low-income community by leveraging the resources of the entire legal community. The ABA believes that the language of the regulation could emphasize more fully that expanding service is a core purpose. In addition, the term "private attorneys" does not adequately reflect the range of members of the legal community who either have in the past or could in the future assist in expanding services and whose efforts should, therefore, be included within Part 1614. This would be consistent with trends in private practice of utilizing

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<sup>1</sup>The term "LSC recipient" as used below throughout these comments includes "LSC sub-recipients" to the extent that to meet the 12.5% requirement, a LSC recipient has entered into a contract with a pro bono provider and that provider becomes a LSC sub-recipient.

non-lawyer professionals, as well as with new forms of pro bono delivery that were not prevalent at the time that Part 1614 was adopted.

The ABA also recommends that the 12.5% requirement remain in place. A specific requirement has existed since the regulation was promulgated and has served to actively engage lawyers who are not employees of an LSC grantee in the delivery of legal services to the poor. In many cases, such engagement has had the added positive impact of gaining financial and political support for LSC from various sectors of the legal community, based on their exposure to the expertise, quality legal work and commitment of LSC recipients' staff. Given the more expansive approach regarding what qualifies towards meeting the 12.5% requirement that is being contemplated by LSC and endorsed by the ABA, we believe that those programs that experienced difficulty in meeting the requirement in the past will no longer be in that position. And, while we recognize that LSC recipients are coping with reduced budgets due to sequestration and other cuts to their funding, we believe that to reduce or eliminate the 12.5% requirement at this time would send the wrong message regarding the value of engaging the entire legal community in efforts to meet the legal needs of the low-income community.

## **II. Scope of Part 1614**

- 1. Please provide specific suggestions for the definitions, limits, or guidelines related to the potential addition of law students, pre-admission law graduates or paralegals to the scope of Part 1614 activities*

As articulated in the comments of June 21, 2013, the ABA fully supports expanding the scope of Part 1614 to include law students, pre-admission law graduates and paralegals. As long as their work is furthering the purpose of expanding the provision of legal services to the poor and legal education to the low-income community, and they are receiving proper supervision, their involvement should be included towards meeting the 12.5% requirement.<sup>2</sup>

Although the ABA supports encompassing many more members of the legal community within Part 1614, we assume that LSC recipients will understand the value of having lawyers play a central role in providing or assisting in the provision of legal services and education to the low income community. As a result, we recommend that LSC encourage its recipients to adopt this approach, while recognizing that the ultimate decision regarding which members of the legal community to engage in expanding services in a given service area must be left with the recipient.

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<sup>2</sup> Model Rule of Professional Conduct 6.1 defines "core" (also known as "Tier 1") pro bono services as direct, uncompensated service to the poor and their communities, and recommends that a substantial majority of pro bono service be provided in this manner. As such, paid internships and internships for credit are not considered to be core pro bono. However, they may fit within the "Tier 2" definition, which includes delivery of legal services at substantially reduced fee to persons of limited means. As a result, just as low fee contracts are included within Part 1614 activities, so should paid internships and internships for credit.

2. *Are there any other categories of non-lawyers whose work should be considered for inclusion in Part 1614?*

There are many other categories of volunteers who can be helpful to LSC recipients in providing services to their clients, and recipients should be encouraged to engage them. However, because the purpose of the regulation is to expand the provision of legal services, the ABA recommends that the scope not be expanded beyond members of the legal community – lawyers, law graduates, law students and paralegals.

3. *If you recommend changing the definition of private attorney, then please provide specific recommendations addressing the scope of the definition and how the proposed definition relates to the purpose of the rule.*

The ABA recommends that rather than calling the regulation Private Attorney Involvement (PAI), it be called Legal Community Involvement (LCI). This new terminology will better encompass the additional categories of non-lawyer members of the legal community to be included (law graduates, law students and paralegals). In addition, it better describes the various types of lawyers who can and have provided service in the past (e.g. government lawyers), as well as new categories of lawyers who have not been included in the past, but that the ABA recommends be included in the future.

Specifically, the ABA recommends that the term “LCI” include paralegals, law students, and law graduates who are receiving proper supervision, as well as the following categories of lawyers:

- a. Lawyers engaged in private practice who are licensed in the jurisdiction in which legal services and/or legal information are being provided
- b. Lawyers employed by corporations, government or other entities, who are licensed in the jurisdiction in which the legal services and/or legal information are being rendered, but excluding those employed by a staff model legal aid organization, unless the staff lawyer is engaged in Part 1614 activities in addition to his/her duties at the staff model legal aid program
- c. Lawyers who are not licensed in the jurisdiction but who are authorized by court rule to provide pro bono service<sup>3</sup>
- d. Lawyers who are not licensed or authorized to practice law in the jurisdiction where the program is located, but who are providing legal information or are providing legal services that are authorized by state or federal law, or by local bar rules

Consistent with its comments provided on June 21, 2013, the ABA recommends that this

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<sup>3</sup> These include emeritus lawyers and corporate lawyers. For a listing of state emeritus pro bono practice rules go to: <http://www.americanbar.org/content/dam/aba/migrated/legalservices/probono/emeritus.authcheckdam.pdf><http://www.americanbar.org/content/dam/aba/migrated/legalservices/probono/emeritus.authcheckdam.pdf>. For information on corporate attorneys not licensed in a jurisdiction but authorized to engage in pro bono legal services, go to <http://www.cpbo.org/initiatives/multijurisdictional-practice/interactivemap/>

definition clarify that participation by the following types of lawyers is no longer excluded from qualifying as Part 1614 activities:

- a. Lawyers who are earning a substantial portion of their income from reduced fee contracts that may be their primary professional income (e.g. those participating in incubator programs, those who are stay-at-home parents)
- b. Lawyers who are former employees of an LSC recipient regardless of how recently he or she was employed by the LSC recipient (eliminating two year waiting period that currently exists)

As mentioned in response to Question 1 above, the ABA recommends that even with these changes, LSC encourage its recipients to have lawyers continue to play a central role in providing or assisting in the provision of legal services and education to the low income community. However, the decision regarding which members of the legal community to engage in expanding services in a given service area must ultimately be left with the recipient.

4. *Please provide specific suggestions relating to the potential inclusion in Part 1614 of underemployed attorneys receiving reduced fees (e.g. "incubator projects") that may be their primary professional income.*

The ABA recommends that LSC recipients be provided with flexibility in determining how and to what extent to utilize lawyers involved in incubator projects in providing legal services that qualify towards the 12.5% requirement. The percentage of their income that originates from LSC should not be an issue. Particularly when these lawyers have served internships with the LSC recipients and therefore are specifically trained in issues of poverty law, they are well positioned to provide needed services to the clients that LSC recipients will refer to them on a low-fee contract basis.<sup>4</sup> In some communities, particularly those in rural areas, this may be the best method for meeting the 12.5% requirement.

There are other types of lawyers for whom reduced fee contracts may be their primary professional income, such as those re-entering the workforce and stay-at-home parents. If a LSC recipient determines that such a lawyer is qualified to handle cases, and such referrals are the best way to fulfill in whole or in part the 12.5% requirement, the ABA believes the recipient should be given the latitude to do so.

5. *Please provide specific suggestions related to the potential inclusion in Part 1614 of attorneys who are not authorized to practice law in the jurisdiction of the LSC recipient but who may provide legal information or other Part 1614 services if permitted under local bar rules.*

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<sup>4</sup>This same reasoning applies to lawyers who are former employees of a LSC recipient, and for that reason, the ABA recommends that the current prohibition on entering into low-fee contracts with them within two years of their employment with an LSC recipient be lifted.

As indicated above, there are various types of lawyers who may not be licensed in a jurisdiction, but who are nevertheless authorized by court rule to provide pro bono legal services. For those lawyers who are not otherwise authorized to practice law, the ABA believes there are still many ways in which they can provide assistance to LSC recipients in expanding the provision of legal services to the poor or legal education to the low income community. These include providing legal education to the client community, providing training, and taking part in intake and screening functions that may otherwise be handled by a non-lawyer. In addition, there are areas of administrative law in which a person who is not a lawyer is permitted to represent clients under state and federal law, such as at social security hearings, unemployment compensation hearings and public aid hearings. In such instances, there is no doubt that these lawyers would be expanding the provision of legal services or legal education. As a result, their participation should be included within Part 1614 activities.

- 6. Should Part 1614 include the use of non-LSC funds as a subgrant to provide support to attorneys working at a staff-attorney model legal aid program that receives no LSC funds? This question specifically addresses the situation in Advisory Opinion 2009-1004. Please identify how involving attorneys at non-LSC, staff-attorney model legal aid programs relates to the purposes of Part 1614.*

As indicated in response to Question 3 above, the ABA does not support expanding Part 1614 activities to attorneys working at a staff-attorney model legal aid program. Because these lawyers are already serving the low-income community, extending the definition to include them would not be fulfilling one of the major purposes of Part 1614 – expanding the provision of legal services to the poor. However, if in addition to working as a lawyer at a non-LSC staff-model legal aid program, the lawyer is engaging in pro bono activities through the LSC recipient, expenditures by the recipient in fostering such activities should qualify towards meeting the 12.5% requirement.

### **III. Tracking and Accounting for Part 1614 Work**

- 1. What criteria and methods should LSC recipients use to identify and track Part 1614 services to provide sufficient information for reporting and accountability purposes about attempts to place eligible clients with private attorneys and others, and the outcome of those efforts*

As discussed in our June 21, 2013 comments, the ABA believes that LSC recipients should receive credit under Part 1614 for the screening and referral of matters to pro bono lawyers, without those matters needing to be considered “cases” of the recipient. Often, the recipient does not want to take responsibility for the case or determine its outcome, to avoid creating any conflict with the representation of future clients. However, being able to account for the number of individuals or groups that are screened and referred will greatly aid LSC in demonstrating to Congress and the public the extent to which it is engaging the legal community in serving the low-income community. Under the current interpretation, a matter is included in LSC’s statistics

only if it is considered a case. It would seem that LSC could develop a system that would enable these referrals to be “counted” as important services delivered to eligible clients in the statistical reports submitted by its recipients, even though they are not technically the recipients’ cases. The ABA believes that the exact method and approach for accomplishing this result is better left to the expertise of LSC with input from its recipients.

2. *Please identify what criteria should apply to referral placement organizations, such as bar association programs, for them to qualify for Part 1614*

The ABA believes that LSC recipients, who are dedicated to providing quality legal services to members of the low-income community, are in the best position to judge if a particular pro bono program or project located in its service area is one to which referrals should be made. As a result, we recommend that the recipients be provided with the discretion to determine to which entities it will refer individuals to for pro bono advice or representation, rather than imposing any national standards.

It should be noted that the ABA recently adopted revisions to its *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means*. While the ABA promotes the use of the *Standards* by recipients to understand best practices, it is important to recognize that they “.....serve solely as guidelines and are not intended to create any mandatory requirements or minimum standards for performance.”<sup>5</sup> As a result, the ABA recommends that the *Standards* not be used to determine whether a pro bono program or project qualifies for referrals under Part 1614.

#### **IV. Support for Unscreened Work of Private Attorney Clinics**

LSC recipients provided compelling testimony at the July and September PAI Workshops regarding the vital services provided by clinics that do not engage in screening. It was reported that in many rural communities, these clinics are the only means of providing pro bono assistance. It was also revealed that because the clinics are often collaborative efforts with local bars or courts, the LSC recipient is one partner among many and therefore, may not be able to control whether screening occurs, particularly if it is perceived as a lengthy process that will prevent people from receiving needed assistance. These clinics serve many people who have nowhere else to turn. If LSC recipients do not participate in them, they may either cease to exist or have to provide service without the highly valued expertise and input of the LSC recipients, with the potential of lowering the quality of service provided. Another consequence of not allowing programs to count involvement in such programs towards the 12.5% requirement is inefficiency. Having two clinics that handle the same types of cases, one with a full screening program and one without, would be a waste of valuable administrative resources, which should be avoided, particularly in these challenging economic times.

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<sup>5</sup> *Standards for the Provision of Pro Bono Legal Services to Persons of Limited Means* (American Bar Association 2013), pg. 2.

*Mr. Mark Freedman*

*October 11, 2013*

*Page 7*

The ABA is keenly aware of the requirements under which LSC operates regarding income eligibility for service, as well as the prohibition on representing aliens. As a result, the ABA believes that some limited screening as to these two issues will be needed for activities such as screening and referring matters, and training and support of clinic volunteers to qualify as Part 1614 activities. Assuming that the sponsoring entities can be persuaded by LSC recipients to engage in some sort of limited screening regarding these two issues, the ABA believes that the various ways in which LSC recipients engage with the clinics could count toward the 12.5% requirement. We will rely upon the expertise of LSC with input from its recipients for development of the best methods for actualizing this approach.

The ABA appreciates the opportunity to present these additional comments and hopes that these observations and recommendations will assist the Corporation in drafting amendments to Part 1614.

Sincerely,



Lisa C. Wood

cc: James R. Silkenat, ABA President