

August 29, 2013

Mark Freedman
Senior Assistant General Counsel
Legal Services Corporation
3333 K Str. NW
Washington, DC 20007
via email: pairulemaking@lsc.gov

Re: Comments on proposed changes to 45 CFR Part 1614, Private Attorney Involvement

Dear Mr. Freedman:

LAF appreciates the opportunity to provide input to LSC on the important issue of Private Attorney Involvement. LAF is an LSC-grantee and the largest provider of free civil legal services in the Chicago area. We do this by providing direct representation, advice, and brief services from our staff, and by maintaining a robust pro bono program.

We are offering the following suggestions based on our experiences managing our pro bono program. Our comments are divided into sections as follows:

- General comments regarding amendment of the Part 1614
- Topic 1 – LSC Pro Bono Task Force Recommendation 2(a)
- Topic 2 – LSC Pro Bono Task Force Recommendation 2(b)
- Topic 3 – LSC Pro Bono Task Force Recommendation 2(c)
- Additional Questions – A. Scope of Part 1614
- Additional Questions – B. Tracking and Accounting for Part 1614 Work

GENERAL COMMENTS REGARDING AMENDMENT OF THE PART 1614

The need for legal services in our area has continued to expand in the last few years. Concurrently, the resources available to fund civil legal services to the poor have diminished. As a result, LAF has had to think strategically and creatively about how we will continue to serve our clients in a challenging funding climate. We view expanding our involvement with private attorneys, and other volunteers, as critical to maintaining our services to the poor. In the last two years, LAF has increased the number of extended representation cases handled by pro bono attorneys. In fact, we have increased the percentage of extended representation cases handled by pro bono attorneys from 13% in 2009 to 41% in 2012. We have devoted more internal resources to our pro bono programs and worked hard to collaborate with law firms

and other legal services agencies in our service area to build high-quality and effective pro bono projects.

Generally, LAF supports the ideas that have emerged in LSC's workshops on the PAI regulation (45 CFR § 1614), particularly allowing LSC grantees to work with (and count as PAI time and expense) deferred associates, law graduates, and law students; and to count the time we spend and the costs we incur to help private attorneys or other legal aid organizations screen and evaluate cases to meet the needs of poor people we cannot serve ourselves. If the aim of the PAI regulation is to expand the private resources that can be mustered to address the growing "justice gap" in this country, we should recognize that LSC grantees have a long and rich experience to share but that the gap itself transcends "LSC eligibility."

We also understand LSC's concerns that its grantees not engage in or subsidize improper or impermissible activities. But it seems to us that, rather than trying to craft bullet-proof regulatory language, a better way of addressing those concerns is to broaden the regulation while making use of the PAI plans all LSC grantees are required to submit annually to the Corporation. If these PAI plans were a vehicle to propose innovative pro bono projects with concrete goals and objectives, and then to report on whether those goals and objectives have been achieved, LSC would have a much better handle on what grantees are trying to accomplish and whether the activities they are undertaking are allowable or not. Making real use of grantee PAI plans would also allow grantees to tailor their pro bono efforts to their own particular environment, and not force all grantees (rural, urban, statewide, twinned, etc.) to follow a single model. If LSC has particular results it wants to track (number of cases per 10,000 poor people, number of extended representation cases per 10,000 poor people, results in particular areas of law, collaborations, etc.), it can articulate those desired results before PAI plans are submitted.

LAF strongly believes in the value of using pro bono attorneys and other volunteers to help us meet the vast demand for civil legal services among low-income individuals. But, as LSC knows, its grantees have to allocate resources to appropriately support private attorneys and volunteers in our work.

For that reason, we believe that LSC should make § 1614.4 a cornerstone to any efforts to improve § 1614 generally. If LSC is going to require recipients to submit annual PAI plans, LSC should use those plans to encourage innovation, compare results to goals, and generally address its concerns about whether our PAI activities are producing "improper activities" or improperly subsidizing "impermissible activities."

TOPIC 1 – LSC PRO BONO TASK FORCE RECOMMENDATION 2(A)

LAF believes that efforts expended by *any* non-staff (law students, law graduates, deferred associates, paralegals, and anyone else wishing to devote time to serving our clients) should be counted – be it in cases, outcomes or PAI spending. It is just as likely that this broader group of volunteers will become long-term supporters of legal aid, expand our visibility in the community, and support us financially as attorney volunteers do. LAF currently relies on many non-attorney volunteers to serve our clients in a variety of different ways. For example, we rely on pro bono financial experts to assist with our litigation cases in analyzing financial documents, doing forensic accounting and providing expert testimony and reports to the court. We also rely on pro bono medical experts, real estate professionals, litigation strategists and communications experts on individual matters and for broader training and support of our work. Under the current regulatory structure, we are not able to allocate PAI funds toward the supervision and time spent working with these professionals, nor are the cases eligible to be considered “PAI cases” under the regulations. If LSC’s goal is, as was stated at the first rule-making Workshop on July 23, 2013, at least partially, to “build community and integrate the grantee into the profession and the community,” excluding non-attorney volunteers runs counter to that goal.

RECOMMENDATION: LAF believes that a “private attorney” should be defined as broadly as possible. Recipients should be able to count the work done by lawyers not licensed to practice in our jurisdiction if a rule of the Illinois bar or a relevant court permits those attorneys to work with us. LAF encourages LSC to use a definition such as “any attorney not currently working full time at an LSC-funded organization, or at another legal services provider that is the recipient of LSC funds.” LAF also believes that resources spent supervising, training, and mentoring non-attorneys (including law students, paralegals, law graduates and anyone else) should count toward the PAI allocation.

TOPIC 2 – LSC PRO BONO TASK FORCE RECOMMENDATION 2(B)

LAF supports the use of PAI resources for screening, referral and advice. LAF currently staffs nine help desks and clinics that fit into this model. Some of them are run with support from or in collaboration with state and federal courts which forbid us from screening individuals for income or other eligibility requirements. Many of these clinics and help desks rely on the support of private attorneys who assist in advising individuals in these forums. We engage in these efforts because they serve large populations of individuals (most of whom we believe to be LSC-eligible) on legal issues that are not otherwise addressed or in locations where there is no other help. LAF supports the idea that some PAI resources could be

devoted to these efforts, even if the individuals served do not become official LAF clients or are not otherwise LSC-eligible.

RECOMMENDATION: We recommend that all the time of LAF staff that goes into training, screening, and supporting these clinics and help desks be allocable to PAI. We also recommend the use of an additional descriptor to identify and track cases that do not go through the full LSC-eligibility screening process.

TOPIC 3 – LSC PRO BONO TASK FORCE RECOMMENDATION 2(C)

LAF supports the use of private attorneys and other volunteers in our brief services and advice clinics. Recently, the Illinois Supreme Court amended its Rules to allow for brief advice and services to be provided without the need for a full conflicts check. This change has made it easier for volunteer attorneys to provide assistance in our clinics and help desks, and increased the willingness of volunteer attorneys to do both.

As stated above, LAF currently staffs nine help desks and clinics that fall into this model. In many of these environments, it is difficult if not impossible or inappropriate, to obtain a retainer and citizenship attestation.

Additionally, LAF would like to refer more cases to private attorneys in areas that are ancillary to or outside of our priorities, but provide a valuable service to clients that we are already serving. For example, we have recently become inundated with requests for simple wills at some of our neighborhood legal clinics that are staffed with attorneys from partner private law firms. The private bar has the capacity and desire to assist these clients, but under the current regulations, if the private attorneys take on these simple wills, LAF may not count these cases as PAI cases because they are outside of our priorities. Nonetheless, this is important work for our clients, facilitated by our partnerships with the private bar.

RECOMMENDATION: We recommend that the regulation be changed to include language that allows grantees to report and count cases that are outside priorities if those cases derived from a grantee’s pro bono-staffed clinics or help desks.

ADDITIONAL QUESTIONS

A. Scope of Part 1614

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

ANSWER: As stated above in our response to Topic 1, LAF believes that efforts expended by *any* non-staff (law students, law graduates, deferred associates, and anyone else wishing to devote time to serving our clients) should be counted – be it

in cases, outcomes or PAI spending. LAF currently relies on many such individuals to serve our clients in a variety of different ways. For example, we rely on pro bono financial experts to assist with our litigation cases in analyzing financial documents, doing forensic accounting and providing expert testimony and reports to the Court.

QUESTION: If you recommend changing the definition of a 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.

ANSWER: LAF encourages LSC to use a definition such as “any attorney not currently employed full-time by an LSC-funded organization, or by another legal services provider that is the recipient of LSC funds.”

This broader definition will allow programs more flexibility to promote pro bono opportunities to attorneys across the legal community. For example, LAF has a number of part-time attorneys that work at help desks or in positions that do not require direct, extended representation of clients. Should those attorneys wish to take on an individual client – to expand access to justice while maintaining their litigation skills – and the work is done when they are not being paid by LAF, LAF should be about to count time spent supervising them as well as potentially marking the case as a PAI case for reporting purposes.

QUESTION: Please provide specific suggestions relating 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.

ANSWER: As stated above, LAF strongly supports a change that would allow us to count the work done by lawyers not licensed to practice in our jurisdiction if a rule of the Illinois bar or a relevant court permits those attorneys to practice with us – e.g., S. Ct. Rule 717, a successful motion for pro hac vice admission, etc. We are thankful that Illinois has recently amended its rules to allow attorneys licensed in other states to provide pro bono legal services to our clients and believe that we should be able to count this work.

C. Support for Unscreened Work of Private Attorney Clinics

QUESTION: Should LSC permit LSC recipients to obtain some credit under Part 1614 for support for these clinics if they do not screen for LSC eligibility and the clinics may provide services to both eligible and ineligible clients? Please provide specifics about screening concerns and methods to address them.

ANSWER: Yes. LSC should permit LSC recipients to obtain credit for these clinics, even if they provide services to both eligible and ineligible clients. As stated above in Topic 3, we recommend the use of an additional descriptor to identify and track these cases that is distinct from the term used to refer to cases that have been strictly screened for LSC-eligibility.

QUESTION: Should eligibility screening in these clinics for Part 1614 be the same as regular intake screening for LSC recipients or different? If different, then please identify methods or criteria for screening.

ANSWER: The LSC screening requirements should be significantly relaxed in settings where a lengthy eligibility screening would impede the overall goal of the project, such as a quick-advice help desk where there are often many "customers" waiting for long periods of time to be served. LSC should not impose additional screening beyond that required by the co-sponsor or primary funder, but in those circumstances, the cases can be given a descriptor indicating that the grantee believes that the preponderance of clients served by the project are LSC-eligible, but a full screening has not been conducted.

QUESTION: Please identify methods or criteria for LSC to ensure that LSC recipients providing support to these clinics, if permitted, are not improperly subsidizing either services to ineligible individuals or impermissible activities.

ANSWER: As stated above, it is reasonable for LSC to require grantees to affirmatively state their belief that the preponderance of clients served in these programs are LSC-eligible clients. This belief can be gleaned from pre-existing participation of staff in the program (not funded by LSC), or from Memoranda of Understanding with partner organizations stating that the purpose of the project is to serve low-income individuals.

With regard to ensuring that impermissible activities are not undertaken, grantees should formalize relationships with co-sponsors and partners and exclude impermissible activities from the project.

There are, however, situations where the grantee cannot entirely control who seeks services. For example, LAF currently partners with the private law firm of Katten Muchin Rosenman LLP to run a legal clinic in a local public elementary school. LAF serves as a technical consultant to the project and provides training and ongoing supervision of Katten attorneys in their representation of LSC-eligible clients. Since the clinic allows walk-in clients, those individuals who are ineligible for LAF services or who present a matter that is impermissible are handled exclusively by Katten. Once LAF rejects the matter, a Katten attorney is still able to assist the individual. LAF should be able to get credit for the infrastructural support we provide to the

clinic, even when there are occasionally clients who are not eligible for our services because we must be there to assist in providing services to the eligible clients.

QUESTION: Please identify methods or criteria to distinguish between permissible activities supporting other entities and attorneys, such as general trainings, and impermissible subsidization.

ANSWER: As described above in our General Comments, LAF strongly believes that strict regulation in this area may, in fact, stymie innovation. In other words, we feel it would be very difficult to draft regulation that would comprehensively address the concern about impermissible subsidization in a way that allows recipients to implement programs that best suit their communities. LSC should use PAI plans as a meaningful tool for LSC to ensure compliance and recipients to ensure that their innovative approaches are appropriate uses of LSC funds.

Thank you for your consideration of these comments. If you have any questions, please feel free to contact me at 312-347-8360.

Sincerely,



Mara Block
Pro Bono Project Staff Attorney
mblock@lafchicago.org