

# LEGAL SERVICES ASSOCIATION OF MICHIGAN

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Mark Freedman  
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**Kenneth Penokie**

Secretary/Treasurer

Re: Proposed revisions to 45 CFR 1614

Dear Mr. Freedman,

We are writing to comment on this proposed rule. We are submitting these comments on behalf of the Legal Services Association of Michigan (LSAM). LSAM is a non-profit corporation created in 1982 whose members are the largest 12 civil legal services providers in Michigan. LSAM's membership includes all six of Michigan's LSC grantees and six non-LSC-funded providers.

We have reviewed the comments submitted by Bruce Courtade on behalf of the State Bar of Michigan (SBM). We appreciate the Bar's longstanding support of access to justice and pro bono. LSAM supports all the recommendations in Mr. Courtade's letter. We're writing to address the supplemental questions posed by LSC on August 12, 2013.

**LSAM's suggested approach to pro bono.** LSAM fully supports the SBM comment that "successful pro bono programs are built on flexibility and innovation". We urge LSC to re-design 1614 to emphasize these values.

We think that it is important that both LSC and its grantees be permitted to report and receive credit for all the work grantees are doing in our communities. We believe that LSC and its grantees must educate funders and the public so that these groups appreciate the breadth and the impact of the services to the community provided by LSC-funded programs. PAI programs expand the resources available to the poor through private sector donations; many pro bono programs are excellent examples of private—non-profit partnerships.

LSAM discussed the proposed regulation at its September 11 meeting. At that meeting, every LSC-funded program reported that its pro bono program (i.e., how it relates to the private bar; what it reports to the state funder) is much larger than the limited PAI activities that LSC permits programs to report. These programs include law student programs; clinic programs; bulk referral programs; specialized intake programs; self-help center programs; and internet-based programs. We believe that LSC is missing a tremendous opportunity by failing to recognize and celebrate these amazing partnerships and the services they provide. We urge LSC to adopt a flexible

approach to pro bono—so that LSC and its grantees can more effectively discuss the full array of innovative and inspiring pro bono programs.

LSC currently approaches PAI as a Case Services Reporting (CSR) compliance issue. The result of this frame is that anything that doesn't meet full CSR compliance isn't recognized as pro bono. We urge LSC to take a different approach. Pro bono attorneys are volunteers. While comprehensive compliance systems are appropriate for grantees, they are neither appropriate nor workable for volunteer programs.

There are many circumstances where LSC encourages programs to provide services without documenting CSR compliance for every person benefitted. These circumstances include the entire TIG program (and especially LSC's approach to state wide websites); and community legal education activities. Even LSC's approach to group representation regulation (45 CFR 1611.6) adopts a more flexible standard. Our point is that in several instances, LSC has determined that an individualized verification of financial eligibility interferes with the effective and efficient delivery of services. In the PAI area, LSC's focus on strict regulatory compliance has created tremendous barriers to the breadth and quality of services provided by its grantees.

We encourage LSC to adopt the test suggested by Mr. Courtade: "a good faith effort to engage members of the private bar...and to expand services to clients"; we encourage LSC to consider a "PAI matters" approach, so that the full range of grantees' pro bono work can be reported to LSC and presented to Congress and other funders.

**Comments on the supplemental questions.** We urge LSC to move away from a regulatory compliance approach and to evaluate PAI activities based on the extent to which these programs utilize private attorneys to expand resources available to eligible clients and/or to improve the quality of services to eligible clients. To do this, LSC's approach must be inclusive, not limiting.

LSC should define "private attorney" to include any person authorized to provide legal services who is not an employee of an LSC grantee. This is the basic framework of the current definition (45 CFR 1614.1(d)), but the current definition should be expanded to include law students and recent law graduates. We do not disagree with the gloss on the definition adopted in OLA 2003-1004. See OLA 2005-1001 (at FN 2).<sup>1</sup>

**Comments on OLA 2009-1004.** One of the specific areas where LSC asked for comments in the August 12 Federal Register posting had to do with the status of attorneys who work for non-LSC funded non-profits. In OLA 2009-1004, LSC ruled that such lawyers are not "private attorneys" so that their pro bono work could not be counted or reported by LSC grantees. The effect of this rule is to prohibit grantees from reporting pro bono work for LSC-eligible clients performed by these lawyers. Under OLA 2009-1004, thousands of lawyers, including all clinical

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<sup>1</sup>We do disagree with the further gloss on the regulatory definition stated in OLA 2009-1004. See discussion, *infra*. We also note that LSC's opinions repeatedly redefine "private attorney" to limit the pool of attorneys available to programs, e.g., by limiting activities to "legal assistance to eligible clients" and by requiring attorneys to be authorized to practice in the jurisdiction where the services are provided. See the current LSC definition published by LSC in the Federal Register on 8/12/13.

law teachers, are not “private attorneys” for PAI purposes. Because the issue addressed in OLA 2009-1004 arose in Michigan and involved four LSAM members, we will comment on this question in some detail.

In OLA 2009-1004, LSC ruled that three Michigan grantees could not report to LSC (and LSC could not report to Congress) 10,000 cases each year that are funded by LSC grantee programs and served LSC-eligible clients. These clients received services through the Counsel and Advocacy Law Line (CALL) a hotline providing intake, counsel and advice and brief services in 71 of Michigan’s 83 counties.

Since 2003, three of Michigan’s five LSC grantees have used the CALL hotline and reported those cases to LSC. LSC’s OCE visited these programs and reviewed these cases for CSR compliance on numerous occasions between 2003 and 2007 and found the CALL system fully CSR compliant. In 2008, LSC changed its interpretation of the CSR Handbook and directed grantees not to count these cases.

OLA 2009-1004 involved a disagreement about the interpretation of CSR Handbook sections 4.3 and 4.4. Section 4.3 generally requires grantees to count in-house cases for CSR purposes even if there is no LSC funding supporting that case work. Section 4.4 requires grantees to report LSC subgrant cases (a) if the subgrant is LSC funded; or (b) if the cases are PAI cases, whether funded by LSC or non-LSC funds. However, this section prohibits grantees from reporting non-LSC-funded subgrant, non-PAI cases to LSC.

Despite the fact that the grantees provide extensive support for these cases using LSC funds<sup>2</sup>, LSC determined that these cases could not be counted under Section 4.3. In OLA 2009-1004, LSC went on to rule that these cases were not PAI cases because a “staff model legal services provider” cannot be a “private attorney”. The LSC distinction is based on “the general understanding of the distinction between staff model legal services providers and more conventional market rate private attorneys”, OLA 2009-1004 at p. 3.

LSAM urges LSC to reverse this opinion for the following reasons.<sup>3</sup>

First, the result of the opinion is to under-report the true work of LSC and its grantees. Both LSC and its grantees have an interest in reporting all their best work to Congress and other funders. LSC should have a goal of aligning its reporting systems with those of the major state funders to the greatest extent possible. The CALL hotline was developed as a best practices hotline with funding from the Michigan State Bar Foundation to respond the LSC Program Letter 02-04, Characteristics of a Telephone Intake, Advice, and Referral System. Grantees are required to report these cases to the state funder.

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<sup>2</sup>Two of the three LSC grantees pre-screened the cases before referring the to CALL. All three of the grantees accepted many referrals of priority cases back from CALL.

<sup>3</sup>As further legal background, we are subming some of the documents provided to LSC on behalf of the programs in 2009---see Memo to Karen Sarjeant from Linda Perle and Bob Gillett (April 28, 2009); see e-mail from Bob Gillett to Karen Sarjeant (August 6, 2009).

Second, neither OLA 2009-1004 nor any other LSC document of which we are aware provides any policy justification for this rule—LSC recognizes these cases as CSR compliant cases for fully-documented, LSC-eligible clients. Under CSR Handbook Section 4.3, grantees would be required to count these cases if they were handled in house. The “rule” upon which the interpretation is based—CSR Handbook Section 4.4—is an internal LSC rule, not a directive from Congress<sup>4</sup>.

Third, the definition adopted by LSC in 2009-1004 adds language to the regulation that is simply not present in the regulation. The program letter creates from whole cloth the distinction between a “private attorney” and an attorney at a “staff model legal services program”. The letter does not define this new term—it simply states that staff model programs “primarily provide legal assistance to low income persons”.

Fourth, many long-standing pro bono programs fail the definition in the letter. Almost every clinical law professor is a “staff attorney” at a “staff model provider” in a program that “primarily provides legal assistance to low income persons”—so is not a “private attorney” as defined by OLA 2009-1004. Yet OLA 2005-1001 specifically recognizes attorneys employed by law schools as private attorneys. Almost every pro bono program housed in a bar association uses “staff attorneys” who “primarily provide legal assistance to the poor”. Most corporations hire “staff attorneys”—i.e., attorneys whose work is salaried work for a corporate entity; attorneys who are not “conventional market rate private attorneys”.

It is also worth noting that the “50% rule” stated in OLA 2009-1004 refers to the percentage of income paid to the attorney **by the staff model provider**—not the percentage of income paid by **the contract with the LSC grantee**. So every employee of a staff model provider is now considered a “staff attorney”—even if the provider only receives a \$100 contract from the LSC grantee.

OLA 2009-1004 is based on LSC’s desire to discriminate against some “private attorneys” and in favor of others. Under LSC’s rules, private attorneys who are employed by “staff model providers”—law schools, non-profit organizations, religious organizations, etc. are not real “private attorneys”. Their service should not be counted.

As noted earlier, we submit that the test of pro bono should be from the clients’ perspective—is a given pro bono program a good faith effort to expand the resources available to clients and/or to improve the quality of resources available to clients? Under the logic of OLA 209-1004, an identical contract for identical services between the LSC grantees and a private law firm would have been a permissible PAI subcontract. LSC should focus on services to clients—not on

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<sup>4</sup>To the extent that LSC offers a justification, it is based on OLA’s “practical experience” regarding how these “definitions have been understood and applied”. The letter asserts that “LSC recipients have not, to OLA’s knowledge, subgranted LSC funds to other staff-delivery model legal services providers for the provision of legal assistance to clients by attorneys of the provider and sought to consider the attorneys providing those services as ‘private attorneys’ or classify such activities as PAI activities,” OLA 2009-1004 at p.3. This statement is simply inaccurate. For many years, Legal Services of Northern Michigan had an LSC PAI subgrant to Third Level Crisis Intervention Center in Traverse City; as the providers pointed out to OLA in 2009, LSC itself awarded a PAI research grant to a non-profit, staff model legal services provider in Washtenaw County Michigan.

corporate status of the non-LSC provider.

**Conclusion.** LSAM strongly supports the recommendations of the LSC Pro Bono task Force and urges the LSC Board to adopt all three Task Force recommendations. LSAM urges the Board to revise the regulation to adopt a more flexible approach to pro bono—an approach that focuses on partnerships with a broadest possible range of private attorneys; the expansion and improvement of services to clients; and encouraging innovation.

Respectfully submitted,



Ann Routt  
President



Michael Chielens  
President

# CLASP

CENTER FOR LAW AND SOCIAL POLICY

To: Karen Sarjeant  
From: Linda Perle, Bob Gillett  
Re: LSC CSR Issues and Michigan's Lakeshore Legal Aid Contracts  
Date: April 28, 2009

**Introduction.** First we want to express our appreciation for the time you and your staff spent discussing these issues with us and for conveying LSC's analysis of the "CALL PAI Contract" option. We now have a somewhat better understanding of your view. Thank you for inviting us to provide you with the additional information and analysis that are the subjects of this memorandum.

**Background.** Three of the five Michigan LSC grantees utilize the Counsel and Advocacy Law Line ("CALL") hotline as a component of their intake systems. CALL is an office of Lakeshore Legal Aid ("LLA") which receives no LSC funds. All of the funds provided to LLA for the CALL hotline by the five Michigan LSC grantees come originally from the Michigan State Bar Foundation ("MSBF"), which is the state funder for the state of Michigan. The MSBF manages the IOLTA and Filing Fees grant programs, which provide over \$9 million per year in base funding to Michigan legal services programs. In addition, the MSBF administers a number of discretionary grant pools that provide additional support for legal services and other access to justice purposes.

The LLA/CALL contracts cover about 10,000 cases for LSC-eligible clients each year. Although CALL is not the main intake system in every county, the CALL partner programs (LLA, Legal Aid of Western Michigan ("LAWM"), Legal Services of Northern Michigan ("LSNM"), and Legal Services of South Central Michigan ("LSSCM")) provide services in 82 of Michigan's 83 counties. The CALL Hotline is the primary intake system for the state's legal services system in 71 counties.

The CALL hotline grew out of LSC's state planning and hotline initiatives. The CALL hotline is widely viewed as a model hotline in terms of quality of service and compliance systems. CALL is an important part of the state's efforts to create an integrated delivery system.

Although no LSC funds are used to directly support CALL, CALL cases have always been seen as indirectly LSC-supported. Until the policy change reflected in Section 4.4 of the 2008 LSC CSR Handbook,<sup>1</sup> these cases were reported to LSC on the annual CSR

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<sup>1</sup> Section 4.4 of the new CSR Handbook states that: "Recipients shall report only cases closed by subrecipients as defined by 45 CFR §1627.2 that are supported in whole or in part with LSC funds."

reports from LAWM, LSNM, and LSSCM. CALL cases have been part of each of the LSC programs' CSR self-inspection. CALL has been visited on-site several times by OCE staff as part of compliance and quality visits, and until recently OCE has never questioned the appropriateness of including CALL cases in recipients' CSR cases. In each LSC recipient program, CALL is integrated into the program's intake system, such that every case is "touched" in some significant way by LSC-supported staff (e.g., at LSSCM, the client initially calls one of the LSSCM offices; either LSSCM does an intake at that time or it transfers the case to the CALL hotline). In addition to the initial screening, LSC programs also "touch" CALL cases in a variety of other ways, including consulting with CALL on cases or having the cases re-referred from CALL for extended services.

**Concerns Regarding Change in LSC Policy.** We are concerned about the change in policy in the 2008 CSR handbook for two main reasons:

1. The change will result in a reduction in the LSC case count in Michigan by about 10,000 cases per year.
2. It is very possible that, when directed not to count these cases, one or more of the CALL LSC recipient partners will decide not to continue participating in the hotline project<sup>2</sup>. If the hotline project were to be reduced, fragmented or ended, this would have a severe negative impact on the state's efforts to create an integrated delivery system in the state.

We believe that both LSC and the programs want an accurate case count and that, as long as it is accurate, a higher count that includes CALL cases is a better reflection of actual LSC-supported case work in Michigan. A higher, but accurate, number is helpful to everyone (for example, in discussions with legislators about LSC funding), and both LSC and its recipients want to maintain an integrated state systems.

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Organizations receiving transfers of only non-LSC funds from a recipient are not subrecipients under 45 CFR Part 1627 and none of their cases may be reported to LSC. However, recipients using non-LSC funds to meet the LSC PAI requirement through arrangements with another organization may report the non-LSC funded PAI cases closed by that organization if such cases meet the definitions and requirements of this Handbook.”

<sup>2</sup> In discussions with the partners, concerns have been raised that LSC's rejection of these contracts represents a decision by LSC that these services should not be considered part of the state delivery system. Concerns have also been raised that, from LSC's perspective, the programs' cost per case will increase dramatically. Programs are aware that LSC evaluates program productivity in its site visits—programs are very concerned that they will appear as unproductive programs to LSC, since thousands of counsel and advice cases for LSC-eligible clients will disappear from their case counts. All LSC funds are awarded through a competitive bid process—concerns were raised that low case counts could make the partner programs vulnerable to competition. Finally, in the recent past, LSC has urged smaller programs to consider merger or consolidation—partners have expressed concern that significantly reduced case counts could cause a future LSC to question the viability of the programs. The question for each of the partners is whether to continue this service or whether to use the resources currently devoted to the CALL contract to bring some or all intake functions in house so that the cases can be counted as LSC cases.

Our ideal solution is that these cases be counted as LSC field cases.<sup>3</sup> Alternatively, we would choose to modify our LLA contract to transform it into a PAI contract.<sup>4</sup> In our March 18, 2009 call, we agreed to focus initially on the legal analysis of the PAI approach discussed below. If we are unable to resolve the issue based on that approach, we agreed to return to a discussion of the CSR handbook issues.

**The program contracts with LLA meet the definition of private attorney contracts under 45 CFR 1614.**

**Private Attorneys.** In June of 2008, Legal Services of South Central Michigan (“LSSCM”) asked LSC if it could restructure its contract with LLA as a private attorney contract under 45 CFR 1614.

45 CFR 1614 requires LSC grantees to “involve private attorneys in the delivery of legal services to eligible clients” (45 CFR 1614.1(a)). The regulation recognizes a broad range of program activities that can meet this requirement (45 CFR 1614.3). These activities “must include the direct delivery of legal services to eligible clients through programs such as organized pro bono plans, reduced fee plans, judicare panels, private attorney contracts, or those modified pro bono plans which provide for the payment of nominal fees by eligible clients...”(45 CFR 1614.3). Nevertheless, under 45 CFR 1614.2(c) and 1614.3(c), the regulation is clear that the decision on how to specifically meet the requirement to involve private attorneys in the provision of legal services is a decision that is to be made by the recipient, subject to review and evaluation by LSC, and taking into account a series of factors that are set out in the rule.

Thus, it is our understanding of the regulations that, if LSSCM determines that its eligible clients are best served through a private attorney contract with LLA, it is free enter into such a contract. Nevertheless, LSC has tentatively determined that LSSCM cannot allocate the costs of such a contract to PAI because, under its analysis, attorneys employed by LLA are considered to be “staff attorneys” under 45 CFR 1600.

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<sup>3</sup> We are not sure why LSC is reluctant to count these cases—which are all for fully-documented, LSC-eligible clients and which are funded through contracts with LSC grantees. We have suggested a number of ways that LSC could permit Michigan programs to count these cases without sacrificing the integrity of the CSR process. These suggestions include:

- a. LSC could write a letter saying that LSC has determined that the LLA contract cases are so much embedded in the LSC system in Michigan that they can be counted for CSR purposes. (This would not change the handbook or affect any non-Michigan program.)
- b. LSC could adopt a minor revision to the CSR handbook that would address this issue. See attachment A as one example of how the Handbook could be modified.
- c. The LLA contracts could be modified to be PAI contracts and the CALL cases could be counted as PAI cases.

<sup>4</sup> LSSCM is proud of its current PAI programs. In contemplating this contract, LSSCM is intending this to be an expansion of its PAI programs, not a re-allocation of the resources currently committed to PAI. We understand that LAWM and LSNM would also use these contracts to expand, not replace, current PAI activities.



Under 45 CFR 1614.1(d), a “private attorney” for PAI purposes is “an attorney who is not a staff attorney as defined in section 1600.1 of these regulations.” 45 CFR 1600 provides that “staff attorney” means “an attorney more than half of whose annual professional income is derived from the proceeds of a grant from the Legal Services Corporation or is received from a recipient, subrecipient, grantee or contractor that limits its activities to providing legal assistance to clients eligible for assistance under the act.” LLA is not an LSC recipient, and since it receives no LSC funds, it is not a subrecipient under Part 1627.<sup>5</sup>

We provided LSC with LLA’s most recent annual report. That report indicates that LLA received no LSC funds in 2007. LLA’s total revenues for the year were \$1,669,262; of this amount \$344,683 (20%) were non-LSC revenues from the contracts with the LSC-funded partner programs. LLA does not “limit its activities to providing legal assistance to clients eligible for assistance under the act.” LLA’s overall funding includes: (a) IOLTA and Filing Fee funds, which are subject to state restrictions but not the federal income or other restrictions contained in the LSC Act; (b) United Way and foundation funding that is not subject to the income or other restrictions in the LSC Act; (c) Title III-B funding which is also not subject to means testing or other LSC Act restrictions; (d) private donations and other unrestricted funding<sup>6</sup>.

**Staff Attorneys.** During our March 18 call, LSC staff indicated that they had determined that all attorneys working for LLA were considered to be “staff attorneys” under 45 CFR 1600. Although we were not provided with a written draft of LSC’s opinion, we understand the LSC argument to be as follows:

(a) 45 CFR 1600 includes as staff attorneys lawyers “half of whose professional income is derived from a ...subrecipient...;”

(b) for purposes of 45 CFR 1614, LSC considers both LSC funds and non LSC funds in determining whether a program’s PAI obligation has been met and, as a result, LSC has decided that non-LSC funds used to meet a recipient’s PAI requirement should be treated as though they were LSC funds, subject to the same requirements;

(c) therefore, even though all of the funds provided to LLA by the five LSC recipient programs are non-LSC funds, for purposes of determining whether LLA’s attorneys are staff attorneys, LLA should be considered to be a subrecipient of LSC funds.

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<sup>5</sup> Section 1627.2(b)(1) defines a “subrecipient” as “...any entity that accepts *Corporation funds* from a recipient under a grant or contract to conduct certain activities specified by or supported by the recipient related to the recipient’s programmatic activities.” (Emphasis added). In addition, Section 4.4. of the 2008 Handbook notes that “organizations receiving transfers of only non-LSC funds from a recipient are not subrecipients under 45 CFR Part 1627....”

<sup>6</sup> LLA’s funding in prior years included Department of Justice (“DOJ”) Violence Against Women Act (“VAWA”) funding that included targeted outreach to immigrants.

(d) since LLA is a subrecipient, all of the attorneys employed by LLA are “staff attorneys” under 45 CFR 1600, and the LLA contract cannot be part of an LSC recipient’s PAI program<sup>7</sup>.

We respectfully disagree with this analysis on several grounds.

First, the LSC argument is circular, in that says since the non-LSC funds contracted to LLA are to be used for PAI purposes, they are to be treated as LSC funds, and LLA is subject to the subgrant rule, so LLA’s attorneys are all staff attorneys and staff attorneys cannot do PAI, *ergo*, LLA cannot be a PAI contractor. This reasoning is totally circular and does not make logical sense.

Second, it ignores the plain language of and the intent of 45 CFR 1627. Section 1627.1 explicitly governs “...the rules under which *Corporation funds* may be transferred by recipients to other organizations...” (Emphasis added). 45 CFR 1627.2(b)(1) defines “subrecipient” as “any entity that accepts *Corporation funds* from a recipient under a grant, contract, or agreement...” (Emphasis added.)

Third, it ignores the plain language of 45 CFR 1600, which provides that the “staff attorney” must derive over half of his/her annual income “from a ... subrecipient, grantee, or contractor *that limits its activities to providing legal assistance to clients eligible for assistance under the act.*” (Emphasis added.)

The interpretation of 45 CFR 1614 suggested by LSC staff in our March 18 call would be a major change in LSC policy which could radically change PAI as it is understood today. Under the LSC analysis as we understand it, any lawyer employed by any organization,<sup>8</sup> including a law firm, that receives a contract from an LSC-funded program is to be considered a “staff attorney”. Therefore, under LSC’s interpretation, no cases handled by that organization or law firm can be counted as PAI cases. When read in this way, the LSC interpretation could significantly undermine the current PAI program.

So, for example, if an LSC recipient contracted with a pre-paid legal services plan that employed lawyers on its staff to provide legal services to a group of eligible clients, the recipient could not treat the contract as part of its PAI program, even though, in common understanding, the attorneys employed by the pre-paid plan are clearly private attorneys.

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<sup>7</sup> It was not clear to us whether LSC is making a distinction between a “subrecipient” and a “contractor”. In our call, we understood that LSC had determined that LLA was a “subrecipient” of the LSC programs. It is possible that LSC considers LLA not a “subrecipient” but a “contractor that limits its activities to providing legal assistance to clients eligible for assistance under the Act,” 45 CFR 1600. Since LLA does not “limit its activities to providing legal assistance to clients eligible for assistance under the Act,” the “contractor” portion of the definition does not apply to LLA. See discussion *infra*.

<sup>8</sup> Part 1614 explicitly recognizes that “private attorneys” include “individuals or organizations” other than law firms that receive “contractual payments” to “undertake administrative, support, and/or direct services to eligible clients on behalf of the recipient consistent with the provisions of this part.”(45 CFR 1614.3((e)(1)(iii))).

Also, under the LSC interpretation, if a private, non-profit organization employed attorneys to provide public defender services, LSC's interpretation would prevent LSC recipient from contracting with that public defender program to provide legal services to eligible clients in mental health commitment proceedings or parental rights termination cases as part of its PAI program because its attorneys would be deemed to be "staff attorneys."

As another example, if a legal services program has a contract with a bar association to administer a pro bono panel, that bar association's attorney employees would now be considered to be "staff attorneys" and the cases they report can no longer be counted as LSC-PAI cases.

Finally, it seems that there is no reason to distinguish between LSC's treatment of attorneys employed by law firms<sup>9</sup> from those employed by non-profit organizations (or, for that matter, by a law school, a government agency, a corporate counsel's office, or a completely non-legal institution). Part 1614 treats all "private attorneys" in the same way, regardless of whether they are employed by a private law firm or a non-profit, as long as the employer is not an LSC recipient.<sup>10</sup> Thus, under LSC's interpretation, if a legal services program had an otherwise proper contract with a private law firm to handle a volume of cases (and that contract exceeded \$25,000 per year), the lawyers working for that law firm would now be considered to be "staff attorneys," and that otherwise-proper contract would no longer be a valid PAI expenditure (and those cases could no longer be counted as LSC cases).<sup>11</sup> Clearly, this is not what was intended under Part 1614, but is the logical result of LSC's interpretation.

**OLA External Opinion 2003-1004.** During our call, staff suggested that OLA External Opinion 2003-1004 required a finding that all LLA attorneys be determined to be "staff attorneys" under 45 CFR 1600. We again respectfully disagree.

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<sup>9</sup> In fact, many law firms employ attorneys who are not associates or partners and whose positions are denominated as "staff attorney," but they clearly are private attorneys and any cases that they undertake for LSC grantees under PAI arrangements should certainly "count" as LSC/CSR cases as long as they are for eligible clients and fully documented.

<sup>10</sup> The definition of "staff attorney" was inserted into the final version of Part 1614 that was published in the Federal Register on November 26, 1985 (50 FR 48586) for the specific purpose of preventing recipients from contracting with former staff attorneys who were laid off as a result of cuts in LSC funding (50 FR at 48587). Part 1614 was further amended in June, 1986 to prevent PAI payments to former staff attorneys for two years after they had worked for the program (51 FR 21558). The rule was explicit that anyone who was not a "staff" attorney was considered to be a "private attorney" regardless of where the attorney worked or who his/her employer was.

<sup>11</sup> This example illustrates how inconsistent LSC's proposed interpretation is with the plain meaning of the regulations. Under 1614 and 1627, read together, programs are free to have judicare contracts exceeding \$25,000 in LSC funds, but, if those programs choose to enter into such contracts, then those (valid) judicare contracts (under 45 CFR 1614) are treated as subgrants under 45 CFR 1627. The LSC staff interpretation would invalidate all such contracts (since the contracts would no longer be contracts with private attorneys under 45 CFR 1614.1(d))—and contradicts the language of 45 CFR 1627.2(b)(1), which recognizes the validity of such contracts but requires that they be subject to additional regulatory oversight.

In this opinion, an employee of an LSC grantee asked if he could run for political office without violating 45 CFR 1608. OLA determined that an attorney employed full time by an LSC basic field program is a “staff attorney” under 45 CFR 1600. The opinion concludes that every basic field program that is directly funded by LSC is deemed to “limit its activities to providing legal assistance to clients eligible...under the Act” 45 CFR 1600.1, and that every attorney who receives more than one half of his or her salary from an LSC recipient is a staff attorney and subject to the restrictions of 45 CFR 1608 on candidacy for political office. Nothing in the opinion suggests that the analysis of the opinion should be applied in any situation other than the context in which the question was asked, i.e., may an attorney employed full time by an LSC recipient run for partisan political office.

Without expressing agreement or disagreement with that opinion<sup>12</sup>, we can say that 2003-1004 does not require or support a finding that LLA attorneys are “staff attorneys” under 45 CFR 1600. The program in the opinion, Warren County Legal Services (“WCLS”), was an LSC recipient. LLA is not; it receives no LSC funds, either directly or indirectly. Nothing in 2003-1004 suggests that its expansive interpretation of the phrase “limits activities to providing legal assistance to clients eligible...under the [LSC]Act” should be extended beyond LSC basic field programs.

We understand why LSC might determine that full time employees of its recipients are “staff attorneys”. We are not questioning that the attorneys employed by LSSCM, LAW, and LSNM are “staff attorneys” under 45 CFR 1600—because all of these programs are fully subject to LSC’s oversight and regulation and, to that extent, all of their activities must be permissible under the LSC Act. However, LLA is not so regulated. LLA explicitly seeks to serve clients who are ineligible under the LSC restrictions. LLA is not required by law to “limit its activities to providing legal assistance to clients eligible for legal assistance under the [LSC] Act” and, in fact, does not so limit its activities.<sup>13</sup>

If 2003-1004 were extended to include LLA attorneys as staff attorneys, then they would be subject to other LSC regulations regarding “staff attorneys” e.g., they would be prohibited from running for elective office, see 45 CFR 1608.5(c). Indeed, private attorneys who were employed by law firms who received contracts from LSC-funded programs would arguably be subject to regulation by LSC.<sup>14</sup>

**Conclusion.** In conclusion, we believe that the PAI contract approach suggested by LSSCM is fully permissible under the regulations.

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<sup>12</sup> OLA EX-2003-1004 overruled long-settled LSC opinions in this area. There are ten separate opinions listed as “overruled” by 2003-1004.

<sup>13</sup> Nothing prohibits LLA from accepting criminal cases or over-income clients; or establishing a sliding scale fee program; or spinning off a for-profit subsidiary.

<sup>14</sup> We don’t think LSC can make a distinction between “attorneys employed by non-profits” [and assume that they are regulated] and “private attorneys” [and assume that they are not regulated]. We are aware of no support for this distinction in the Act or regulations.

We believe that the arguments outlined by LSC staff in our call are not consistent with the regulations—indeed, these arguments can only be made if LSC ignores the plain language of the regulations, and will lead to unanticipated and unsupportable results.

We believe these arguments are internally contradictory: (a) first, LSC says that the cases being handled through the contracts with LLA (all for fully LSC-eligible clients) cannot be counted in the LSC CSR as field cases—because they are not sufficiently supported by LSC funds; (b) then LSC says these same cases cannot be counted as PAI cases—because the attorneys handling them are LSC “staff attorneys”.

Finally, there is no compelling policy support for the LSC analysis—the result of this interpretation is to undercount the LSC-eligible clients served by LSC grantees by thousands each year and to disrupt one of the state’s primary efforts towards collaboration and service integration.

If you have any questions about this memo or would like to meet to discuss this further, please contact any of us.

Cc: Delphia Simpson  
Linda Rexer  
Janet LaBella  
Danilo Cardona  
Mattie Cohan

## ATTACHMENT A

### **Inclusion of Certain Subrecipient Cases**

Recipients shall report cases closed by subrecipients as defined by 45 CFR §1627.2 that are supported in whole or in part with LSC funds. Organizations receiving transfers of only non-LSC funds from a recipient are not subrecipients under 45 CFR Part 1627. Cases for these organizations may be counted only if they are supported by LSC funds—e.g., they are part of a comprehensive and coordinated intake system that is funded in whole or in part by LSC funds. Also, recipients using non-LSC funds to meet the LSC PAI requirement through arrangements with another organization may report the non-LSC funded PAI cases closed by that organization if such cases meet the definitions and requirements of this Handbook.

**Subject:** Re: Memo regarding Proposed LLA PAI Contract

**From:** Bob Gillett <rgillett@umich.edu>

**Date:** 8/6/2009 10:08 AM

**To:** KAREN SARJEANT <ksarjeant@lsc.gov>

**CC:** Linda Perle <lperle@clasp.org>, Linda Rexer <Linda@msbf.org>, DANILO CARDONA <cardonad@lsc.gov>, MATTIE COHAN <mcohan@lsc.gov>, VICTOR FORTUNO <fortunov@lsc.gov>, "Routt,Ann" <aroutt@umich.edu>

**BCC:** Steve Gottlieb <sgottlieb\_alas@yahoo.com>, Jon Asher <jasher@colegalserv.org>

Karen-- We've received the opinion and, other than to express our disappointment, have just a few comments.

1. Our group (LSSCM, Bar Foundation, CLASP) has reviewed the opinion and these comments are on behalf of all of us. We are very appreciative of the time you've spent on this and your efforts to engage in a dialog on these issues. However, since this is the first time we've actually seen the opinion, we do want to share some of our specific reactions to the opinion and outline some areas of ongoing disagreement.

2. At page 3, the opinion states that OLA reached this conclusion because "...that is how the definitions have been understood and applied; LSC programs have not, to OLA's knowledge, subgranted LSC funds to other staff-delivery model legal services providers for the provision of legal assistance to clients by attorneys of the provider and sought to consider the attorneys providing those services "private attorneys" or classify such activities as PAI activities."

In fact, LSC has approved and funded such contracts. LSSCM's PAI programs have primarily been pro bono programs. However, in 1985, LSSCM (through its predecessor entity, Legal Services of South Eastern Michigan (LSSEM)) was chosen by the Corporation as the site for one of its Private Law Firm Project (PLFP) grants. The PLFP was meant to test whether private attorneys could handle bulk cases more efficiently than LSC programs. In the project undertaken with LSSEM, LSC approved two contracts-- one to a private firm and the other to a non-profit staff attorney delivery program, the Family Law Project (FLP). I'm attaching the LSC publication announcing the award. We'd point out that LSC chose FLP in a competitive bid process over other local private law firms.

So, we believe that the common understanding of the regulations-- in 1985 when the regulations were relatively new and continuing until today-- was that non-profit law firms are private lawyers for purposes of judicare contracts under 45 CFR 1614.

As a side note (to demonstrate FLP's bona fides as a staff model program) FLP and LSSEM merged in 1992. FLP continues as a staffed LSSCM office at the current time.

3. As we read the regulations and the opinion, we don't see a distinction between the role of "staff attorneys" in judicare programs versus the role of "staff attorneys" in pro bono programs. We don't see how a lawyer could be a staff attorney in relation to a proposed judicare program without also being a staff attorney in the context of a pro bono program. However, LSC has clearly recognized (and celebrated!) the role of lawyers employed by non-profits in a staff attorney delivery setting in providing pro bono services. See for example, Program Letter 07-02 (Guidance to Programs for the Development of Enhanced Private Attorney Involvement). Among other examples, the program letter features the services provided for LSSCM by the University of Michigan Law School Clinical Law Program (UMCLP). UMCLP, like Lakeshore Legal Aid, employs attorneys on a salaried

basis to provide direct legal services, primarily to LSC-eligible individuals.

To us, Program Letter 07-02 is another example of the common understanding of the regulations-- and this common understanding has been based on the distinction between programs that do or do not receive LSC funding [as grantees or through LSC subgrants]-- not (as the opinion suggests) on the lawyer's status as an employee of a "[non-LSC-funded] staff attorney delivery model legal services provider". If LSC intends through this letter to radically shift in how it defines pro bono, it should clarify that for the field. If I'm misreading the memo, and there is a distinction in the regulations between the definition of a "judicare staff attorney" and the definition of a "pro bono staff attorney" it would be helpful to us if OLA clarified that distinction.

4. As you know, the real issue here is whether the Michigan programs can count about 10,000 cases each year-- cases for clearly LSC-eligible clients that are substantially supported by LSC funded programs. This issue arose when LSC directed LSSCM not to count these cases. We're again asking for technical assistance to see if LSC can suggest any way that we can count these cases. If you have any suggestions in this regard, please let us know.

Thanks again,

Bob Gillett  
734-665-6181

KAREN SARJEANT wrote:

Thanks Bob - I know that this has taken a long time and that there have been bumps along the way but we too appreciate your willingness to continue talking so that we can all at least clearly understand each position - even if for a variety of reasons, we need to disagree on them.

I will ask OLA to go ahead and finalize the Opinion. Again, I appreciate that it is difficult not to be able to see the draft Opinion but I am sure that you understand our need to only have the LSC final official Opinions in circulation.

I know this point has been made several times but I wanted to say again - even though the LSC application of our Handbook means that the cases cannot be reported for LSC purposes, I would assume that you can still count them for your state funding purposes. And yes - I hope you will always feel that LSC is willing to listen and work with you and others to ensure that integrated legal services delivery can be achieved.

We'll talk soon. Take care. It is almost football season!

Karen

-----Original Message-----

From: Bob Gillett [<mailto:rgillett@umich.edu>] Sent: Wednesday, June 17, 2009 1:56 PM

To: KAREN SARJEANT

Cc: Linda Perle; Linda Rexer; DANILO CARDONA; MATTIE COHAN; VICTOR FORTUNO; Routt, Ann

Subject: Re: Memo regarding Proposed LLA PAI Contract



# PROGRAM NOTES



LEGAL SERVICES CORPORATION • 733 Fifteenth Street, N.W., Washington, D.C. 20005 • (202) 272-4030 •

DATE: August 26, 1985

TO: Program Directors, Managing Attorneys,  
Program Board of Directors

FROM: Legal Services Corporation

SUBJECT: 1. Mini-Grant Awards  
2. Reggie Training  
3. New Orleans Area Contract Awards  
4. Ann Arbor Area Contract Awards  
5. ABA Standards  
6. September Board Meeting  
7. Mary Ellen Hamilton

## LSC TO AWARD \$151,924 IN MINI-GRANTS

The Legal Services Corporation (LSC) announced the intention to award on September 6 after the public comment period, \$151,924 in sixteen mini-grants to supplement funds of training activities of field programs, national and state support units, bar associations, law schools and other interested parties. The grants range in size from \$29,000 to \$2,300.

Recipients to receive the mini-grants are:

National Consumer Law Center, Boston Massachusetts  
Monroe County Legal Assistance Corporation, Rochester, New York  
National Veterans Legal Services, Washington, D.C.  
Community Legal Services Clinic, (George Washington University)  
Legal Aid Society of Charleston, Charleston, South Carolina  
Legal Aid Society of Dayton, Dayton, Ohio  
Virginia Poverty Law Center, Richmond, Virginia  
New Orleans Legal Assistance Corporation, New Orleans, Louisiana  
Atlanta Bar Association, Atlanta, Georgia  
South Mississippi Legal Services Corporation, Biloxi, Mississippi  
South Carolina Legal Services Association, Columbia, South Carolina  
Louisiana Legal Consortium, New Orleans, Louisiana  
Florida Legal Services, Barstow, Florida  
Texas Legal Services Center, Austin, Texas  
Arizona Statewide Legal Services, Phoenix, Arizona

LSC Board member Basile Joseph Uddo represented the Corporation at the ceremony which was held at the NOLAC office. Congresswoman Lindy Boggs, Louisiana 2nd District, and Thomas Heitman, Office Manager for Congressman Robert Livingston, Louisiana 1st District, attended the ceremony along with representatives of the State and local bar associations and the Louis Martinet Society. Both Uddo and Joseph Thomas, Chairman of the NOLAC's Board of Director's, addressed the group.

Contracts were given to the New Orleans firms of Ronald J. Scholes, Attorney at Law; Kim A. Gandy, Attorney at Law; Aaron & Aaron; Vernon Thomas and Charles Grady, Attorneys at Law.

Jefferson Parish firms receiving contracts were Robert Ahrens, Attorney at Law; W. Paul Weidig, Attorney at Law; and to Kenneth Kirchem, Attorney at Law.

LEGAL SERVICES CORPORATION \$39,760 PLFP  
EMERGENCY SPOUSE ABUSE PROJECT

The Legal Services of Southeastern Michigan and LSC co-hosted on August 13 a contract awards ceremony for an Emergency Spouse Abuse Project with a Ypsilanti law firm, Eaglin and Drukis, and the Family Law Project of Ann Arbor. The firms are participating in a \$39,760 PLFP research project with LSC.

William Clark Durant III, Chairman of the Board of Directors of LSC, spoke to the group and moderated a discussion on the involvement of individuals and organizations in the project. The Emergency Spouse Abuse project was developed and designed for Washtenaw County in conjunction with Legal Services of Southeastern Michigan and its director, Robert Gillett.

Congressman Carl Pursell, Michigan 2nd District, was represented by Connie Gearino, Chief Caseworker and Senior Citizen Liaison, and Congressman William D. Ford, Michigan 15th District, was represented by Dee Dogan, Staff Assistant. Members of the Washtenaw County Bar Association and of domestic violence projects in the Ann Arbor area also attended the ceremony.