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MEMORANDUM

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SUBJECT: Comments concerning Possible Revisions to the Private Attorney Involvement Rule

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The Legal Services Corporation (LSC or the Corporation) Office of Inspector General (OIG) would like to thank the Board of Directors and the Operations and Regulations Committee for conducting two invaluable information-gathering workshops and providing this opportunity to comment on possible revisions to Part 1614, LSC's Private Attorney Involvement (PAI) rule. It is, however, somewhat difficult to offer comprehensive or conclusive comment on potential regulatory action affecting Part 1614 in the absence of a definite proposal with specific language, the likely effect of which is susceptible to analysis. Consequently, the OIG's comments must be provisional in nature: They are intended to bring several relevant considerations to the attention of the Board but they do not represent the final position of the OIG with respect to any proposed changes to Part 1614.

1. Fitting Proposed Revisions into the Purpose of the Rule

The OIG believes that the proposals in Report of the Pro Bono Task Force, the discussion in recent rulemaking workshops, and written comments received in response to the Corporation's Notice of Rulemaking Workshops should be evaluated in light of the underlying intention of Part 1614. In order to avoid an *ad hoc* regulatory process in which the outcome is dictated by the limited focus of the undertaking, it is important to determine the purpose of the Private Attorney Involvement (PAI) rule in its current form, to assess whether the proposals under consideration would advance that purpose, and if not, to consider whether the proposal is sufficiently meritorious to warrant a more fundamental change in the focus of the PAI rule. The OIG would hasten to add that it does not necessarily oppose a change in the focus or intention of the PAI rule if that is the outcome that ultimately proves desirable in the present circumstances, but it would urge the Board to make any such changes in a deliberate and open manner rather than by accretion. Recently conducted rulemaking workshops concerning the PAI rule represent a good first step in such a deliberative process. In the end, a deliberate approach to rulemaking is more apt to produce a clear, coherent final rule that is easily applied.

The text of LSC's PAI rule provides a succinct statement of the purpose it was intended to effect: "This part is designed to ensure that recipients … involve private attorneys in the delivery of legal assistance to eligible clients." 45 C.F.R. § 1614.1. The focus on involving private attorneys is not simply a policy judgment of the Corporation; committee reports in both the House of Representatives and Senate for FY 2013 and 2014 explicitly tie LSC's appropriations to the involvement of private attorneys. H. Rep. No. 463, 112th Cong., 2d Sess.,

at 82-83 (2012); H. Rep. No. 171, 113th Cong, 1st Sess., at 75 (2013); S. Rep. No. 158, 112 Cong., 2d Sess., at 116 (2012); S. Rep. No. 78, 113th Cong., 1st Sess., at 130 (2013).[1]

Statements in the Federal Register indicate that the PAI rule was formulated to ensure involvement of private attorneys because the Corporation believed that involvement of the private bar would have a number of beneficial effects for the client population:

> PAI, when effectively used, expands the base of attorneys representing the poor, increases the range of choices for clients, and ... affords viable, cost effective service.... Widespread use of PAI promises to make available to eligible clients a greater diversity of services and a higher degree of specialization that would be available through a necessarily limited number of staff attorneys.

Legal Services Corporation, *Private Attorney Involvement*, 50 Fed. Reg. 48586, 48587 (Nov. 26, 1985). In light of the policy judgments woven into the current version of the PAI rule, the Board should consider whether proposed changes to the PAI rule are calculated to result in increased involvement of private attorneys. Where a proposed change to the rule would not necessarily lead to increased involvement of private attorneys, as in the case of modifications to allow for the involvement of law students, law graduates, deferred associates, and others, the Committee should consider whether the new activities to be encouraged by the rule promise similar benefits, including for example, a wider range of choices for clients and some measure of increased specialization. To the extent that the Board opts to broaden the focus of the rule to include activities and service providers that do not fit the traditional understanding of the term private attorney involvement, it should explore a more systematic restructuring of the PAI rule to account for this change in focus.

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[1] As of the date of these comments, the appropriations act accompanying the cited FY 2014 reports, H. Rep. No. 171 and S. Rep. No. 78, has not been adopted.

2. Balancing *Pro Bono* and Compensated Legal Service

On its face, the current version of the PAI rule does not privilege *pro bono* involvement of private attorneys. Rather, it appears indifferent as between *pro bono* and compensated services provided by the private bar, adopting the general policy of encouraging "the involvement of private attorneys ... through both *pro bono* and compensated mechanisms." 45 C.F.R. § 1614.2(a) & 1614.3(a). House of Representatives Committee on Appropriations reports for FY 2013 and FY 2014 appear to endorse this approach when they cite the goal of "[o]btaining more services at no or low cost." H. Rep. No. 463 at 82-83; H. Rep. No. 171 at 75. To the extent that proposed changes to the PAI rule are intended to encourage *pro bono* activity, they may have the effect of shifting this balance by at least suggesting a preference for *pro bono* activity. If such a shift is intended, it should, for the sake of clarity, be made explicit in the resulting regulation. While not necessarily opposing such a shift, the OIG would note that in some circumstances it could conceivably lead to a reduction in private attorney involvement. Regulatory changes that free PAI resources to be used in support of new sorts of *pro bono* programs will divert some amount of PAI funding away from compensated services. To the extent that some private attorney involvement is undertaken on a compensated basis, direction of resources to *pro bono* efforts may result in some private attorneys withdrawing from the program. Before taking such a step, the committee should study the possible effects on compensated private attorney involvement, comparing any potential decrease of attorney involvement through that avenue to expected increases to be achieved through new *pro bono* activities.

3. Maintaining a Focus on Direct Legal Service to the Client Population

Significantly, the current PAI rule prioritizes support for direct delivery of legal services by private attorneys over support activities private attorneys might provide to recipients. The former are a required element of every grantee's PAI program while the latter are merely permitted. Within the meaning of the current rule, activities that support direct delivery of legal services include "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 and/or organized referral systems." 45 C.F.R. § 1614.3(a). Less favored support activities include "[s]upport provided by private attorneys to the recipient in [the recipient's] delivery of legal assistance to eligible clients" in the form of "community legal education, training, technical assistance, research, advice and counsel[,] co-counseling arrangements, or the use of private law firm facilities, libraries, computer-assisted legal research systems or other resources." 45 C.F.R. § 1614.3(b). Whatever modifications to the PAI rule the committee choses to purse, the OIG believes the Committee should take care to ensure that the resulting PAI rule maintains the current rule's focus on direct delivery of legal services to LSC eligible clients, which speaks to the core of LSC's mission.

4. Distinguishing between Staff Attorneys and Private Attorneys

Among other proposals of the Pro Bono Task Force, the Board is considering a proposal to revise the PAI rule to allow grantees to make PAI payments to former staff attorneys who are participating in incubator programs. To the extent that the Committee opts to act on this recommendation, the OIG advises that it give particular care and attention to crafting a rule that protects against the harm the Corporation sought to prevent when it formulated current restrictions on such payments.

The regulatory history of the current version of the PAI rule provides some useful insight into why the Corporation chose to preclude direct PAI payments to attorneys who had been staff attorneys "for any portion of the previous two years."[2] 45 C.F.R. § 1614.1(e). At the time of adoption, the Corporation justified these restrictions in terms of the problems it associated with payments to recently separated staff attorneys:

> "There is a reasonable fear that employees of a legal services program, when deciding what private attorney to use, would naturally favor those with whom they had been most recently acquainted. The Board was informed that in several cases attorneys have left a recipient's staff and then been awarded contracts to do the same work they had been doing previously. There are at least two problems with arrangements of this type. First, one of the purposes of PAI is to bring people who have not been involved before into the delivery of legal services to the poor. Second, these sorts of arrangements create an appearance of impropriety."

Private Attorney Involvement, 50 Fed. Reg. at 48587. In a later publication, the Corporation noted that it had been informed of "programs which had laid off staff attorneys and then contracted to pay them for services relating to the same matters they were involved with while on staff." Legal Services Corporation, *Private Attorney Involvement (Final Rule; amendment)*, 51 Fed. Reg. 21558, 21558 (June 13, 1986). It is these types of problematic arrangements that the restriction on direct PAI payments to recently separated staff attorneys was intended to prevent. Notably, the restriction does not limit PAI expenditures on "pro bono or judicare project[s]" in which former staff attorneys participate on the same terms as other private attorneys. 45 C.F.R. § 1614.1(e). Rather, the restriction appears intended to prevent former staff attorneys from getting an unfair advantage in securing compensated PAI contracts.

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[2] The term staff attorney is defined by 45 C.F.R. § 1600.1 to mean "an attorney more than one 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." *See* 45 C.F.R. § 1614.1(d); Advisory Opinion 2009-1007.

The OIG believes that the concerns expressed by the Corporation when it was formulating and adopting the current version of the PAI rule remain valid. Indeed, they may even have greater force since the adoption of funding restrictions in LSC's 1996 Appropriations Act and subsequent Acts, which have necessitated greater attention to the risk of subsidizing of restricted activities. In certain circumstances, PAI payments to former staff attorneys who continue to work in the poverty law field but as private attorneys that take on restricted activities could have the effect of subsidizing those restricted activities, particularly in light of the fact that PAI is exempted from 1610 program integrity rules.

For these reasons, the OIG would urge that the Board include in any revision of the PAI rule that makes direct payments available to recently separated staff attorneys a mechanism for addressing the concerns raised by the Corporation when it formulated the current version of the PAI rule.

5. Tracking Private Attorney Involvement and Reporting to Congress

The OIG is also concerned that some of the contemplated changes to the PAI rule could make it more difficult to track the output of the PAI program particularly insofar as the proposals before the committee would broaden the focus of the rule to include members of the legal services community who do not fit the traditional understanding of the term private attorneys. The House of Representatives committee report concerning LSC's FY2014 funding provides: "LSC shall report to the Committee annually in this area, including the number of Americans served by pro bono services as part of LSC's efforts." H. Rep. No. 171 at 75. Committee reports in both the House of Representatives and Senate for FY 2013 and 2014 make it clear that Congress is particularly interested in "measures aimed at increasing the involvement of private attorneys in the delivery of legal services to its clients." *Id.*; H. Rep. No. 463 at 82-83; S. Rep.

No. 158 at 116; S. Rep. No. 78 at 130. While involvement of law students, paralegals, and other professionals may have real benefits for the client population, the Corporation should not lose sight of the fact that Congress has retained its principal focus on legal services provided by private attorneys in its treatment of *pro bono* activities supported by LSC. Any changes to the PAI rule aimed at broadening participation beyond the private bar should be accompanied by accounting mechanisms that enable the Corporation to track the involvement of private attorneys in providing direct legal service to clients as a distinct category of involvement. Such a mechanism should be structured to avoid potentially misleading ambiguity in the measurement of legal services provided by the private bar on a *pro bono* or reduced fee basis.

6. Detecting and Preventing Noncompliance

In the OIG's opinion, the Committee should also be careful to ensure that changes to the PAI rule do not make it more difficult to prevent and detect noncompliance with LSC regulations and do not increase the risk that LSC funds will be used to subsidize, whether intentionally or not, restricted activity. For example, potential changes to case handling procedures under the PAI rule present a particular challenge. There is a suggestion in the Report of the Pro Bono Task Force that "strict guidelines about what cases [grantees] can and cannot handle" unduly limit *pro bono* activity because the current form of the PAI rule requires that grantees accept as their own cases all matters handled through PAI. Legal Services Corporation, *Report of the Pro Bono Task Force* 21 (2013). The OIG would, however, be concerned that a relaxation of case handling requirements might have the unintended effect of increasing subsidization of restricted activity. The fact that grantees must perform intake screening, assign cases appropriately, and exercise a measure of oversight to ensure timely disposition likely goes a long way to ensuring that PAI

expenditures are consistent with the restrictions that Congress has placed on LSC funding.[3] One might reasonably suppose that these case handling requirements reduce the likelihood that PAI funding will support services to ineligible clients, though data in the form of actual rates at which applicants for legal services are rejected on eligibility and/or case priority grounds would be helpful in confirming that supposition. At any rate, it appears that case the handling requirements of the PAI rule provided the Corporation the assurances it needed to relax its program integrity rule, 45 C.F.R. § 1610.8, as applied to PAI funding. The regulatory history of Part 1610 states: "It is clear in this paragraph and *under Part 1614* that no activities inconsistent with the conditions on the use of LSC funds may be attributed to a recipient's PAI requirement under part 1614." Legal Services Corporation, *Use of Non-LSC Funds*, 61 Fed. Reg. 63749, 63752 (Dec. 2, 1996) (emphasis added).

Proposed changes in case handling procedures are one example of an area where careful consideration should be given to compliance issues when modifying the PAI rule. The proposals

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[3] It may also be worth noting that the OIG is not convinced that the language of the PAI rule actually requires that the grantee accept matters referred to PAI attorneys as grantee cases. *But see* OLA External Opinion No. EX-208-1001at 2 ("Thus it has been the longstanding interpretation and practice of LSC that cases referred to private attorneys pursuant to a recipient's PAI program remain cases of the recipient and the clients in those cases remain clients of the recipient."). Rather, the PAI rule sets forth four specific case handling requirements: (1) there must be intake screening procedures that ensure clients are eligible for LSC services and their cases fit within the grantee's priorities; (2) case assignment procedures must ensure assignment of matters to appropriately skilled and experienced attorneys; (3) the grantee must exercise oversight to ensure timely disposition of matters referred to PAI attorneys; and (4) private attorneys must be provided access to grantee resources as well as "back-up on substantive and procedural issues." 45 C.F.R. § 1614.4(d). It may well be possible for a grantee to design a PAI system that satisfies these specific requirements without a taking on the majority of PAI cases as its own. This is not to say that the practice of requiring grantees to treat referred cases as their own does not have a salutary effect on compliance. It may, for example, prompt the grantees to exercise greater care in carrying out their intake and oversight responsibilities under the rule.

On the other hand, the OIG is not convinced that the practice of requiring grantees to accept PAI cases as their own would present a legal-ethical problem that necessitates amendment. It may well be that the term client has a different meaning for LSC case tracking purposes than it has for legal-ethical purposes, though the OIG admits that a more in depth analysis of the LSC's case handling terminology and applicable rules of legal ethic may prove otherwise. Suffice it to say for purposes of these provisional comments that the OIG is not aware of wide-spread ethical complaint triggered by the PAI rule's case handling requirements.

on the table may present other similar areas of concern, but in the absence of concrete regulatory text it is difficult to identify particular compliance risks. The OIG would be happy to provide further commentary on compliance risks associated with the particular language of proposed regulatory amendments if the Board decides to proceed with revisions to the PAI rule.

7. Allocating Limited PAI Resources

There does not appear to be any proposal to increase the level of required PAI spending beyond the current requirement of 12.5 percent. The committee should recognize the unfortunate reality that by making PAI resources more widely available to a broader pool of service providers, it will likely have the concomitant effect of diverting some level of resources away from private attorneys who participate in or would participate in PAI programs designed in accordance with current requirements. The benefits of such a change in focus may well outweigh the costs, but that is ultimately a policy judgment for the Board to make. When making its judgment, the Board should be mindful of the fact that in its current form the PAI rule does not prohibit the programs contemplated by the proposals under consideration; it "simply establishe[s]" that such programs "cannot be credited toward the PAI requirement." 51 Fed. Reg. 114, 21558, 21558 (June 13, 1986). In some instances, at least, these programs may still be undertaken by grantees with other funds, including LSC funds. To some extent, therefore, the question presented is whether the Corporation believes it will be beneficial to the client population to direct funds once reserved for private attorney involvement to newer programs that appear to hold more interest for some (perhaps even many) grantees. That is a policy judgment concerning which the OIG cannot express an opinion given the current state of the evidence available to it.

8. Conclusion

As mentioned above, these comments are intended to bring a number of relevant considerations to the attention of the Board. They seek to provide some context to assist the Board in evaluating the proposals before it. In part, they offer the Board a different perspective on the proposals it is now considering, but they are not intended to indicate conclusive support for or opposition to those proposals, which call for complex policy judgments. If the Committee decides to move forward with those proposals, the OIG would be pleased to supplement its comments with more detailed analysis of specific, proposed regulatory language.