



Northwest Justice Project

Toll Free 1-888-201-1012
www.nwjustice.org

César E. Torres
Executive Director

September 17, 2013

Mr. James Sandman, President
National Legal Services Corporation
3333 K Street, NW Third Floor
Washington, D.C. 200007-3522

Re: Comments in Response to Questions Posed on August 12, 2013
<https://www.federalregister.gov/articles/2013/08/12/2013-19383/private-attorney-involvement>

Dear President Sandman:

The Northwest Justice Project (NJP) has a significant interest in the Pro Bono Task Force's recommendations for changes in the Private Attorney Involvement regulation, 45 CFR Part 1614. In an effort to assist LSC in the process of adopting a regulation to implement the recommendations, NJP submits the below comments and suggestions:

A. Scope - Topic Nos. 1-6

Definitions of who is covered by the regulation: As currently written, 45 CFR §§ 1614.1(d) and (e) limit the use of PAI funds to private attorneys who have not been employed as a staff attorney for any portion of the prior two years, and who, per the definition of "staff attorney" in 45 CFR § 1600.1, has not derived more than half of his or her professional income from the proceeds of an LSC grant. The regulation now precludes the use of PAI funds to pay an attorney, who may not otherwise be engaged in the full-time practice of law, to handle cases for eligible clients at a highly discounted rate. As a result, this precludes stay-at-home lawyer parents, retired lawyers, or lawyers who otherwise have stopped practicing law full-time, from being able handle eligible client cases under a PAI contract arrangement. It also precludes recently employed former staff attorneys who may have significant expertise in the issues that impact program clients. The rationale for these limitations is unclear.

Also, Washington state has recently adopted a Limited Licensed Legal Technician (LLLT) rule (APR 28), which authorizes certain non-lawyers to practice law within a defined limited scope. To date, the Washington Supreme Court has authorized LLLTs to practice within the area of family law, the area of highest demand for free legal services in Washington. LLLTs will one day prove to be a critical source of legal help for low to moderate income persons in Washington. In order to capture this resource, and to address the limitations of the existing

rule, we recommend that the language of Part 1614 be changed to allow for use of PAI funds to support the work of “*any person licensed to practice law in the jurisdiction of the LSC recipient’s service area, who is not then otherwise employed by the recipient.*”

NJP supports including within the PAI rule attorneys who may be licensed in the jurisdiction, as a student attorney (APR 8(d)), emeritus attorney (APR 8(e)), or attorney who is licensed in a foreign jurisdiction and providing indigent representation (APR 8(c)). NJP does not support extending the scope of the PAI rule to include persons who are not authorized to practice law under an appropriate rule of admission. NJP expresses no opinion on whether PAI should include attorneys who work full-time as staff attorneys in other non-profit organizations that receive no LSC funds.

B- Tracking and Accounting for Part 1614 Work-Topic 2, Nos. 1-3

Criteria and Methods to Track PAI Services: NJP strongly supports the recommendation that PAI services not be tied to Case Statistical Reporting (CSR) requirements applicable to LSC recipient cases. In NJP’s experience, it is extremely difficult to get private attorneys who agree to accept cases through volunteer lawyer programs (VLPs) external to NJP, to comply with all of the CSR specific requirements. However, the local VLPs are highly successful in encouraging private attorneys to participate in *their* programs, due in significant part to their partnership with NJP. NJP provides well-screened referrals through NJP’s CLEAR (Coordinated Legal Education, Advice and Referral) “hotline” system. The referral is transferred electronically to the VLP; the VLP notifies NJP if the case is accepted for placement and/or services; and, at closing, the nature of the private attorney service provided. NJP is thus able to track the referral and has confirmation when a private attorney has provided some level of service, but does not maintain ongoing oversight of the case.

Even though NJP has customized its case management system to track the referrals in this manner, this should not be required to enable all LSC recipients to allocate PAI funds to support the referral activities. Not every LSC recipient has the same electronic transfer and referral capacity as has been developed by NJP. Moreover, currently PAI funds are allowed to be used to support an unsuccessful referral through an in-house volunteer attorney program. There seems little reason to distinguish between time allocated to support an unsuccessful referral through an in-house program and time allocated to support a successful referral to an external VLP. The time needed for the referral is the same.

Question no. 3 assumes that the PAI allocation is done on a “per case” basis, whereas the allocation to PAI for services in support of private attorney involvement is and should be based on staff and advocate time. The eligibility for time to count as PAI should be based on documented referral intake, PAI support and other referral activities by program staff in addition to time expended by dedicated PAI program staff. The resulting allocation of the costs to PAI should be based on reasonable, rational and consistent cost allocation supported by the time records and as verified as reasonable by the recipient’s Independent Auditor through the normal annual audit process.

Conflicts: Some recipients are legitimately concerned about creating conflicts if all PAI referrals are to be tracked through a case management system. Ultimately, this will depend on the conflicts rules of each jurisdiction. However, no conflicts should be created by virtue of only allocating time to referral services. ABA Model Rule of Professional Conduct 6.5 expressly exempts from conflict rules lawyers who provide limited legal assistance (*e.g.*, a referral for services). Washington RPC 6.5 goes further as the Washington Supreme Court modified the Model Rule to expressly exempt lawyers from conflict rules when “providing limited legal assistance sufficient only to determine eligibility of the client for assistance by the program and to make an appropriate referral to the client of another program.” This modification was expressly intended to cover NJP’s CLEAR lawyers. *See* Comment [6]. Finally, while the Rules of Professional Conduct may preclude conflicts for future representation, LSC should leave compliance with the ethical rules to the disciplinary authorities in each jurisdiction, and not try to legislate for each jurisdiction within the context of the PAI rule. LSC’s goal should be to allow for maximum flexibility within the constraints of differential rules that apply in each jurisdiction.

C. Support for Unscreened Work of Private Attorney Clinics, Topic 3, Nos. 1-4

PAI Support for Clinics: NJP expresses no opinion on whether LSC should allow recipients to include time for support of non-program clinics that provide services to persons without regard to LSC eligibility. NJP’s CLEAR system *does* screen for LSC eligibility. While NJP provides information and referral to other providers as appropriate to low-income persons who call CLEAR, NJP seeks to record time and allocate costs to PAI based upon the time spent on substantive screening and referral to volunteer attorney programs of LSC *eligible* clients. Assuming programs do screen for eligibility and allocate accordingly, any concern regarding support for the clinics that provide legal assistance to both eligible and ineligible persons, or subsidizing their work for ineligible persons, should not be a basis to deny PAI supported referral services for those clinics. NJP offers no opinion as to questions 2 and 3 under this topic.

Distinguishing Permissible Activities: Question No. 4 concerns how to identify private support activities that are permissible under LSC restrictions from those that are not permissible. NJP attorneys work closely with VLPs and bar associations to conduct continuing legal education (CLE) trainings and presentations on legal topics that are specifically relevant to low-income persons. Examples include Landlord-Tenant Law, Debtor’s Law, Special Education for Children with Disabilities Law, Medicaid/Medicare and Elder Law issues, professional ethics, and trial advocacy skills. These presentations and trainings are done generally as part of a VLP or bar sponsored CLE program to encourage attorneys to participate in and take cases referred from the VLP. Often the lawyer receives CLE credits for free in exchange for the lawyer agreeing to accept pro bono cases in the subject area. Attendance is open to all attorneys regardless of whom the lawyer ultimately serves. The time and effort expended by the NJP lawyer to prepare and present the CLE in support of the VLP’s effort, should be allocable to PAI, as it is fundamentally done to encourage and support private attorneys in doing pro bono work. Supporting private attorneys in their efforts to do pro bono work is a critical goal of PAI.

These activities can logically be distinguished from supporting a training program related to restricted activities and arguably should not be supported by the LSC recipient in any event. The time spent on conducting the wholly allowable activities can be tracked through “other matters” timekeeping in our timekeeping system.

Thank you for the opportunity to submit these comments in support of implementation of the Task Force recommendations.

Sincerely,



Deborah Perluss
Director of Advocacy/General Counsel

C César E. Torres, NJP Exec. Director