



National Legal Aid & Defender Association
Equal Justice. Of the People. For the People.

October 17, 2013

[Sent by email to PAIRULEMAKING@lsc.gov](mailto:PAIRULEMAKING@lsc.gov)

Mark Freedman
Senior Assistant General Counsel
Legal Services Corporation
3333 K St., N.W.
Washington, DC 20007

Re: Revisions to 45 CFR part 1614 to Respond to Recommendation No. 2 of the LSC Pro Bono Task Force Report

Dear Mr. Freedman:

The Regulations and Policies Committee of NLADA offers the following comments in response to notices published in the Federal Register (78 FR 27339; 78 FR 48848) by LSC requesting public comments on revising LSC's Private Attorney Involvement (PAI) rule consistent with Recommendation No. 2 of LSC's Pro Bono Task Force Report. These comments supplement those submitted in writing by NLADA on June 25, 2013.

As mentioned by Silvia Argueta, Chair of NLADA's Regulations and Policies Committee and Executive Director of the Legal Aid Foundation of Los Angeles at the July 23, 2013 Regulatory Workshop in Denver, and by John Whitfield, the Executive Director of Blue Ridge Legal Services, at the September 17, 2013 Regulatory Workshop in Washington DC, NLADA is fully supportive of Recommendation No. 2 of the Task Force.

NLADA supports a PAI regulatory architecture that allows LSC-funded programs maximum flexibility to leverage the resources of the legal community in a manner deemed most effective by the local program involved. The focus of a PAI program should be on expanding the availability of legal assistance for people living in poverty and legal information for the client community.

Scope of Part 1614

Topic 1: Resources spent supervising and training law students, law graduates, deferred associates, and others should be counted toward grantees' PAI obligations, especially in “incubator” initiatives

NLADA is fully supportive of allowing programs the flexibility to use resources expended supervising and training law students, law graduates, deferred associates, paralegals, lay advocates and others toward the PAI obligations. The focus of a PAI program should be on expanding the availability of legal assistance for people living in poverty and legal information for the client community by leveraging the work of others. Law students, law graduates, deferred associates, paralegals, lay advocates and others can offer a valuable contribution to that effort.

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

The key emphasis should be on expanding the availability of legal assistance for people living in poverty and legal information for the client community. If the work of law students, pre-admission law graduates, paralegals, law advocates and others is part of that effort, then any and all resources an LSC-funded program expends to support them should be included in the 12.5% obligation. The primary focus of a PAI program should not alone be on training law students.

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

Paralegals and lay advocates should be included. There are a variety of ways in which pro bono paralegals and lay advocates can be involved, including working with and under the supervision of attorneys on cases, providing support for the PAI program in clinics, training events, etc., represent clients in administrative proceedings where it is allowed under federal or state law. (For example, hearings before an Administrative Law Judge with the Social Security Administration or state unemployment insurance appeals).

3. 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.

Currently, there is no clear definition of “private attorney” except by exclusion. Under 1614.1(d), the attorney cannot be a “staff attorney” as defined in 1600.1 (“an attorney more than one half of whose annual professional income is derived from the proceeds of a grant from the Legal Services Corporation...”). “Attorney” is defined as “a person who provides legal assistance to eligible clients and who is authorized to practice law in the jurisdiction where assistance is rendered.” 1600.1.

The use of the word “private attorney” is misleading. LSC recognizes that attorneys working for the government, attorneys working as in-house counsel for a corporation and attorneys employed in law schools can be considered private attorneys for the purposes of 1614. LSC should consider changing “private attorney” to “attorney and other legal community volunteers”. The definition of “attorney” would include all attorneys, whether the attorney is private, works for the government, is employed by a corporation, teaches at a law school or is employed in a non-profit organization. The definition of “other legal community volunteers” would include law students, pre-admission law graduates, paralegals, lay advocates and others in the legal profession who volunteer as part of a program’s PAI effort.

Programs should be able to count time of staff whenever they are performing activities that support the provision of legal assistance for people living in poverty or legal information for the client community. LSC should not disqualify work spent by employees seeking pro bono assistance of non-attorney professionals in PAI cases.

Resources expended on screening and referring PAI cases to any attorney, providing training to the attorney, support for attorneys who provide legal information to the client community and other support, should be counted toward the program’s PAI obligations. This should be true whether the attorney is private, works for the government, is employed by a corporation, is a law professor or is employed in a non-profit organization.

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

The definition of private attorney should be broad enough to include attorneys who have little or no other income. The emphasis should be on expanding the availability of legal assistance to people living in poverty and the provision of legal information to the client community, not on the income of the attorneys a program seeks to recruit. To exclude an attorney who is a stay at home parent with no other

income from the program is counterproductive to the goal of expanding resources and leveraging the work of others.

- 5. 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.**

Attorneys not admitted in the jurisdiction where the program's service area is located, but who are licensed elsewhere, should be included in a program's PAI program. The focus of the PAI program should be on expanding legal resources for clients and the client community not to restrict available volunteers. These attorneys can provide assistance in a variety of ways, working with and under the supervision of admitted attorneys on cases, including providing support for the PAI program in clinics, training events, etc., represent clients in administrative proceedings where it is allowed under state or federal law (for example, hearings before an Administrative Law Judge with the Social Security Administration or state unemployment insurance appeals).

Topic 2: Grantees should be allowed to spend PAI resources to enhance their screening, advice, and referral programs that often attract pro bono volunteers while serving the needs of low-income clients

Resources expended by LSC-funded programs on screening and referring PAI cases to any attorney and other legal community volunteer or organized pro bono program, providing training to volunteers and providing other support, should be counted toward the LSC-funded program's PAI obligations.

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

Yes. LSC has long recognized that the definition of "private attorney" under 1614 includes attorneys working for the government, attorneys working as in-house counsel for a corporation, attorneys employed by law schools, attorneys employed by bar associations and attorneys employed by non-profit organizations. All these categories of attorneys should be eligible to engage in PAI activities with LSC grantees, whether these activities are pure pro bono or judicare.

LSC should not discriminate against some private attorneys based on their employment status. The test is whether the engagement of the private attorney increases the resources available to the client community and/or improves the quality of services to the client community. The key is whether there are "expanded resources to the community".

In LSC Advisory Opinion 2009-1004, three LSC grantees had a contract with a non-LSC funded, non-profit law firm to provide specialized hotline intake services in 10,000 cases a year. The opinion implicitly recognizes that this contract would be permissible if the firm were a for-profit firm. The result of the opinion is that LSC directed its grantees not to report 10,000 LSC-eligible cases per year. LSC should focus on the expansion of services to clients not the legal structure of the volunteer or judicare attorneys.

Topic 3: LSC should reexamine the rule that mandates adherence to LSC grantee case handling requirements including that matters be accepted as grantee cases in order for programs to count toward PAI requirements.

Tracking and Accounting for Part 1614 Work

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

Applying the CSR requirements to PAI activities has not been a good fit. In many ways it discourages the expansion of pro bono opportunities for programs. It is a very odd result to have LSC, in effect, prohibit PAI credit for a case that has been accepted for representation by a private lawyer merely because the referred person is not a client of the LSC-funded program. An important focus of PAI is to get attorneys to take cases as their own case, with professional responsibility for the case, while the LSC-funded program provides a certain amount of assistance with the process. The assistance provided by LSC-funded programs could include one or more of a variety of activities, including recruitment, training, referrals, substantive expertise and co-counseling arrangements.

There should be at least three approaches a program can take to report PAI case activity: (1) report PAI referred cases under the CSR system where the program still maintains some oversight and case reporting responsibility while the attorney accepting the referral handles the case, as is currently being done; (2) report PAI referred cases as other services, with the attorney accepting the referral thereafter

assuming all responsibility for handling the case; and (3) report the time expended in conducting PAI referrals. With the second and third options, there would be no requirement for detailed reporting of case data or outcomes.

Reporting of other PAI program activities continues as is currently done with the submission of a PAI plan to LSC and in applications for funding from LSC. PAI expenditures will continue to be audited yearly by an Independent Public Accountant as part of the preparation of a program's financial statements.

The regulation should insure that all activity in screening and referring of LSC-eligible persons, and activities in support of that effort, are countable to meet PAI obligations.

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

LSC-funded programs should be allowed to leverage the resources of the legal community, including bar association referral placement programs, in a manner deemed most effective by the local LSC-funded program involved. Resources expended by LSC-funded programs in referring cases to, working with, and in providing direct financial support to bar association referral placement programs should be counted towards the program's PAI obligations as long as the focus is on expanding the availability of legal assistance for people living in poverty and legal information for the client community.

3. Please identify how LSC recipients can account for and track PAI services while not creating conflicts for the recipient regarding future representation of clients, consistent with local bar rules.

A number of states provide that when a case is not accepted for legal assistance by a program, the gathering of information at intake by intake workers who subsequently refer the case to an attorney or organization outside the program does not create a conflict for the program. Reporting PAI referred cases as other services, with the attorney accepting the referral thereafter assuming all responsibility for handling the case is an option that can help avoid conflicts. With this option, there would be no requirement for gathering and reporting of detailed case data or outcomes.

Support for Unscreened Work of Private Attorney Clinics

1. 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.

Yes. If private attorneys are providing legal information at the clinics, all program resources in support of the clinics should be included in the 12.5% PAI obligation. Currently there is no requirement that all participants receiving legal information be LSC eligible in intake and referral activity, in courthouse legal information clinics and on websites including the use of automated legal forms. LSC funds can be expended in support of these activities. The same rationale should apply to a program's use of resources to support private attorney clinics.

If legal assistance is being provided by private attorneys at the clinics then a program should be required to utilize a mechanism to determine: (1) whether the clinic has as a principal activity the delivery of services to those persons in the community who would be eligible for LSC-funded legal assistance and the legal assistance sought relates to such activity (see 1611.6(a)(2) concerning financial eligibility of groups); and (2) whether persons provided legal assistance by the private attorneys are primarily individuals who would be eligible for LSC-funded legal assistance. (See 1611.6(a)(1)). The mechanisms employed by a program to determine (1) and (2) shall be established in a manner to collect information that reasonably demonstrates that the clinic and persons served other meets the LSC eligibility criteria. (See 1611.6(b)(2)).

Mechanisms employed by a program, may include the following: (a) limited screening of persons seeking legal assistance at the clinics for financial and alien status eligibility, with referral of persons who do not meet these eligibility requirements to the private attorneys in attendance but without any support provided by the program to the attorneys post referral; (b) periodic limited screening of persons seeking legal assistance at the clinics for financial and alien status eligibility to determine whether they are primarily individuals who meet the LSC eligibility criteria (i.e., limited screening every three or six months); or (c) any other mechanism for gathering information on financial and alien status eligibility for LSC-funded legal assistance which is geared to reasonably demonstrate that the clinics and persons provided legal assistance at the clinics meet LSC eligibility criteria.

2. 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.

See comments under No. 1, immediately above.

3. 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.

See comments under No. 1, immediately above.

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

Resources expended by a program for all activities that support a program's PAI efforts, including trainings, should be included in the 12.5% requirement, as long as the principal activity is focused on the delivery of services to those persons in the community who would be eligible for LSC-funded legal assistance. (See 1611.6(a)(2) concerning financial eligibility of groups).

Thank you for the opportunity to provide comments on Recommendation No. 2 of the Pro Bono Task Force.

Sincerely,

A handwritten signature in cursive script, appearing to read "Chuck Greenfield".

Chuck Greenfield
Chief Counsel for Civil Programs

