

August 28, 2013

Mark Freedman
Senior Assistant General Counsel
Legal Services Corporation
3333 K Street NW
Washington, D.C. 20007

Via pairulemaking@lsc.gov

Re: Rulemaking Workshop on September 17, 2013

Private Attorney Involvement Rulemaking
45 CFR 1614 (in response to 78 FR 48848)
<https://federalregister.gov/a/2013-19383>

Dear Mr. Freedman,

I write to express my interest in participating as a panelist in the rulemaking workshop above. I would appreciate the opportunity to explain the reasons why I support the LSC Pro Bono Task Force's proposals being discussed as Topics 1 and Topic 2.

My views are informed by my organization's experiences in two areas: 1) short- and long-term legal relief efforts following disasters, including most recently Superstorm Sandy; and 2) technology-enabled service delivery to support pro bono engagement. This includes supporting a national network of statewide pro bono mobilization websites used by many LSC grantees to support tens of thousands of pro bono volunteers in more than 20 states; consulting with legal aid, bar and library partners in more than a dozen states that are providing real time chat assistance ("LiveHelp") to statewide legal aid website visitors, including through the use of law student and attorney volunteers; and running the national LawHelp Interactive system, which has a library of more than 4,000 online forms and creates more than 1,100 legal documents a day, many of which are used to support brief- and unbundled pro bono services.

Outline of Key Points

Topic 1:

Pro Bono Net supports counting resources spent supervising and training law students, law graduates, deferred associates, and others toward grantees' PAI obligations. The provision of legal assistance to those in need involves more than giving substantive legal advice. Non-lawyers perform a variety of tasks essential to legal services delivery, which include intake, triage, and providing legal information, allowing lawyers to practice at the top of their license and devote their valuable volunteer time to where they are most needed.

Topic 2:

Pro Bono Net supports the inclusion of screening, advice, and referral programs that incur as PAI expenditures, including necessary investments in the infrastructure to support this. Many legal clinics are held in exigent circumstances that do not allow for pre-screening of applicants —many of whom are LSC-eligible. Our experience with Superstorm Sandy and similar disaster response scenarios shows that not supporting such clinics risks missing eligible clients when their need for legal services is greatest.

Comments

Additional Question A: Scope of Part 1614

From Hurricanes like Katrina and Ike, to Superstorm Sandy, to the tornadoes that devastated Oklahoma earlier this year, natural disasters create diverse and substantial legal problems for those in their path. In the immediate aftermath, critical legal issues can include obtaining emergency shelter and food benefits. In the longer term, disputes over private insurance and government benefits for property loss, contractor fraud, and a litany of other issues can make a

return to normalcy for victims years away. Legal advocacy and assistance is essential, but that does not necessarily involve individual consultation with or representation by a lawyer.

After Superstorm Sandy, law students and pre-admission law graduates played an integral role in helping individuals to navigate the many bureaucracies they must interact with, in gathering facts and data that lawyers and policymakers need to make important decisions, and much more. This is critical assistance without which victims would not be able to assert their legal rights. While lawyers supervised these services, they did not directly provide them; however, it would be a mistake to say that they were not essential legal services.

Additionally, low-income individuals increasingly receive legal services through means of technology. In the disaster relief context, for example, Pro Bono Net and other groups developed FEMAAppeals.org, a website containing an interactive online interview that helps pro se individuals to draft their own FEMA appeal.

In the context of naturalization, the Immigration Advocates Network has developed similar resources such as CitizenshipWorks.org, which not only helps individuals assess whether they are eligible for U.S. citizenship, but also allows them to draft the necessary documents and have them reviewed by legal counsel. Tech-savvy law students and graduates are ideally suited to develop these and other technologies that will serve exponentially more low-income persons in need than an individual attorney could, and funding for such work is very much in the spirit of increasing the larger legal community's commitment to increasing access to justice.

Additional Question C: Support for Unscreened Work of Private Attorney Clinics

Along with increasing the numbers of those served and provided legal assistance, both the disaster relief and technology-enabled service delivery models illustrate the difficulty, and potential counter-productivity, of prescreening recipients for LSC eligibility and of only allowing those who meet LSC criteria to count as PAI cases. Those seeking legal help post-disaster or online are often persons who are most in need of assistance. For example, families whose homes and possessions have been destroyed are often incapable of documenting their LSC eligibility. In

their city or region if social services are unable to provide assistance due to the disaster then having access to online legal assistance to help them find their documents is key. Funding for projects to assist these individuals should not be contingent on those persons documenting their eligibility; in many cases, their inability to do so is precisely the reason they seek legal help.

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Requiring under PAI rules that only cases included in an LSC's grantee be counted as a PAI case, and that only cases screened by an LSC grantee be counted as PAI is significantly dampening the ability of the field to develop successful models for large group clinics and events coordinated with others in the access to justice continuum, as the staff resources and infrastructure developed to support those activities will not count under PAI. In a time of significant budget contractions, this exclusion makes a material difference and undermines LSC's full access goal.

PAI expenses should include resources invested to maintain and support intake, screening, and triage activities even if not all those screened turn out to be LSC eligible or end up as placements with a PAI lawyer. The identification of cases that are a good match for pro bono is an art and science that is time consuming and necessary. If a case is badly matched with a volunteer attorney, the attorney might stop volunteering with a program. If an attorney is not properly matched with the needs of the client, the representation might become problematic for the pro bono coordinator and the client. Current LSC PAI rules do not allow for taking into account the expense incurred to screen and triage cases for pro bono services, and require that the screening be done by the LSC grantee unless the case is placed with a lawyer. This could be modified to include intake and triage activities as an allowable PAI expense even when a group other than the LSC grantee does that intake/triage/referral.

Summary of Qualifications

Mark O'Brien is the co-founder and Executive Director of Pro Bono Net, a nonprofit organization that increases access to justice for the poor and other vulnerable populations through innovative uses of technology, increased participation by volunteers and better collaboration among nonprofit legal organizations working on similar issues. Founded in 1998, Pro Bono Net has built web platforms to support public interest lawyers and their clients throughout the United States: www.probono.net provides online tools to support both full-time poverty law advocates and pro bono attorneys; and www.lawhelp.org provides referrals to legal aid and public interest law offices, community legal education information, self-help and other resources directly to the public.

Prior to starting Pro Bono Net, Mr. O'Brien directed the pro bono program at Davis Polk and Wardwell from 1992 to 1999. During Mr. O'Brien's tenure, both he and the firm won numerous awards for contribution to pro bono issues. He has served on various New York State and City bar committees dealing with pro bono and legal services issues, and has served on the advisory boards of the University of Pennsylvania Law School Public Service Program and the Public Interest Law Alliance (Ireland). He is currently an Adjunct Professor of Law at Georgetown University Law Center.

Under Mr. O'Brien's leadership, Pro Bono Net has won numerous awards for its contributions to pro bono and legal services, including the NLADA Innovations in Equal Justice Award (for contributions to private bar mobilization in the wake of September 11th), the ABA's Gambrell Professionalism Award, the College of Law Practice Management's Innovaction Award, as well as multiple Webby Awards for Best Law Website. Mr. O'Brien was a 2012 "FastCase 50" honoree for his contributions

Checklist of Topics and Items to Be Addressed

I have attached the checklist of topics and items to be addressed.

Thank you for your consideration.

Sincerely,

Mark H. O'Brien

Mark O'Brien

Topic 1: LSC Pro Bono Task Force Recommendation 2(a) - Resources spent supervising and training law students, law graduates, deferred associates, and others should be counted toward grantees' PAI obligations, especially in "incubator" initiatives.

/	How are legal service providers engaging new categories of volunteers? What are the needs of these new categories of volunteers?
	What are the obstacles to LSC grant recipients' full use of these volunteers?
/	Should LSC implement conditions and guidelines to allow LSC recipients to claim PAI credit for the supervision and training of these volunteers?
	How can LSC ensure against fraud, waste, or abuse related to implementing this recommendation? What caution should LSC exercise to ensure against any unintended consequences?
	To the extent applicable, discuss how any approaches you recommend might be implemented.
	Other issues related to Topic 1

Topic 2: LSC Pro Bono Task Force Recommendation 2(b) - 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.

	How are recipients currently using integrated intake and referral systems?
	Do LSC's current PAI regulations inhibit full use of integrated intake and referral systems?
	Should LSC implement conditions and guidelines to allow LSC recipients to claim PAI credit for the resources used to create and staff integrated intake and referral systems?
	How can LSC ensure against fraud, waste or abuse related to implementing this recommendation? What caution should LSC exercise to ensure against any unintended consequences?
	To the extent applicable, discuss your organization's ability to execute any recommended approaches.
	Other issues related to Topic 2

Topic 3: LSC Pro Bono Task Force Recommendation 2(c) - LSC should reexamine the rule, as currently interpreted, 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.

/	How are recipients currently using or supporting pro bono volunteers in brief service clinics?
/	What are the obstacles to recipients' use of pro bono volunteers in brief service clinics?
	Should LSC implement conditions and guidelines to allow LSC recipients to claim PAI credit for the resources used to support volunteer attorneys staffing brief service clinics?
/	If LSC were to allow recipients to claim PAI credit for the resources used to support volunteer attorneys staffing brief service clinics under circumstances where the users of the clinics are not screened for LSC eligibility or accepted as clients of the recipient, how could that change be implemented in a manner that ensures compliance with legal restrictions on recipients' activities and uses of LSC funds?
	How can LSC ensure against fraud, waste or abuse related to implementing this recommendation? What caution should LSC exercise to ensure against any unintended consequences?
	To the extent applicable, discuss your organization's ability to execute any recommended approaches.
	Other issues related to Topic 3

A. Scope of Part 1614

Topic 1:

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

Topic 2:

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| | 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. |
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B. Tracking and Accounting for Part 1614 Work

Topics 2 and 3:

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

C. Support for Unscreened Work of Private Attorney Clinics

Topics 3:

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