



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

Advisory Opinion # AO – 2011-001

**SUBJ:** PAI Allocability of Costs Related to Intake and Referral of Applicants To Certain Pro Bono Volunteer Lawyer Programs  
**DATE:** May 2, 2011

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***Question Presented***

Whether a recipient may count towards its Private Attorney Involvement (PAI) spending requirement the value of time spent in intake, screening and referral time related to LSC-eligible applicants whom the recipient refers to pro bono volunteer lawyer programs in which the recipient does not consider the persons referred clients, does not count the cases as PAI cases for CSR purposes and does not follow up to determine the disposition of the referrals.

***Brief Answer***

No, the dollar value of the time spent on screening and referring of eligible applicants to direct delivery systems that do not meet the criteria set forth in 45 CFR §1614.3(d) for direct delivery systems described in 45 CFR §1614.3(a) is not allocable to a recipient's required PAI expenditures.

***Background***

*The PAI Requirement*

Under LSC's Private Attorney Involvement (PAI) regulation at 45 CFR Part 1614, recipients are required to expend an amount equal to 12.5% of the annualized basic field grant on activities designed to involve private attorneys in the delivery of legal assistance to eligible clients. 45 CFR §1614.1. This raises the question of what costs incurred by recipients may be deemed allocable to the 12.5% spending requirement. Section 1614.3 sets forth a list of the "range of activities" that may be undertaken to "meet the requirements of this part." See, 45 CFR §§1614.3(a) and (b). Although §§1614.3(a) and (b) are not written in express terms of allocability of costs, it follows that if a recipient engages in activities that are permissible under §1614.3 as part of its PAI program, the costs of those activities are allocable to its 12.5% spending requirement. Moreover, paragraph (e) of §1614.3 discusses the requirements for demonstrating compliance with Part 1614 by "utilizing financial systems and procedures and

maintaining supporting documentation to identify and account separately for costs related to the PAI effort.”<sup>1</sup>

### Direct Delivery of Legal Assistance to Eligible Clients

The first broad category of activities to which recipients may allocate PAI costs is “the direct delivery of legal assistance to eligible clients.” 45 CFR §1614.3(a). “Direct delivery” activities are, as the term implies, those intended to result in the direct provision of legal services by a private attorney to an eligible client, including “organized *pro bono* plans, reduced fee plans, *judicare* panels, private attorney contracts, or modified *pro bono* plans that provide for the payment of nominal fees by eligible clients and/or organized referral systems.”<sup>2</sup> *Id.* “Direct delivery” activities must also meet the requirements set forth in §1614.3(d). Section 1614.3(d) provides that “direct delivery” systems must include four components. These components are: intake and case acceptance procedures consistent with the program’s priorities; case assignments that ensure that the cases are assigned to private attorneys with the requisite skills and experience to handle them; case oversight by the recipient; and access by private attorneys to recipient resources that provide back-up on substantive and procedural issues of the law.<sup>3</sup> *Id.*

### Support Activities

In addition to the “direct delivery” activities which must be a part of each recipient’s PAI program, some other activities are also considered part of the permissible range of activities for the purpose of the regulation. These activities are themselves further divided into two categories, as set forth in §1614.3(b). One category is support provided by private attorneys to recipients and the other is support provided by recipients to private attorneys. *Id.*

Under §1614.3(b)(1), support by private attorneys to recipients in the recipients’ delivery of legal assistance to eligible clients can be in the form of direct legal assistance to eligible clients, or in the form of providing community legal education, training, technical assistance, research, advice and counsel, or co-counseling arrangements. Private attorneys may also provide

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<sup>1</sup> Section 1614.3(c) of the regulation addresses five factors a recipient must consider in selecting which specific methods, from among the range of permissible activities set forth in §1614.3, it will include in its PAI program. If a recipient failed to consider these factors in selecting which specific activities to include in its PAI program, the costs related to those activities could potentially be found to be not allocable to its 12.5% funding requirement even if the activities otherwise appeared to comply with the rest of §1614.3. For the purposes of this Advisory Opinion there is no reason to believe the recipient was not in compliance §1614.3(c) and this issue is not considered further.

<sup>2</sup> Revolving litigation fund systems, however, are expressly excluded. *Id.* See §1614.5 for a description of revolving litigation funds.

<sup>3</sup> For the purposes of this Advisory Opinion, such direct delivery systems shall be referred to hereafter as “1614 compliant” and direct delivery systems which do not comply with these requirements shall be referred to as “1614 non-compliant” direct delivery systems. It is important to note that the use of the term “1614 non-compliant” should not be interpreted as making any value judgment on the adequacy of the services provided by the attorneys participating in those programs, nor as suggesting that such programs are not valuable to the overall delivery of legal assistance to low income persons in the service area. Rather, it is intended to denote only that the volunteer lawyer programs to which the recipient is referring applicants fall outside the scope of direct delivery systems required by Part 1614.

in-kind support to recipients through permitting the use of the private attorneys' facilities, libraries, computer-assisted legal research systems or other resources. *Id.*

Under §1614.3(b)(2), support by recipients to private attorneys "in furtherance of activities undertaken pursuant to this section" may include person-to-person services, such as the provision of training, technical assistance, research and advice and counsel, or in-kind services, such as use of recipient facilities, libraries, computer-assisted legal research systems or other resources

### *The Recipient's Intake and Referral Activities*

This question arises out of a situation in which the recipient participates in a system with a number of volunteer lawyer programs in its service area.<sup>4</sup> The recipient serves as the centralized point of intake for these volunteer lawyer programs. The recipient screens applicants for eligibility for its own services. Some eligible applicants are referred to these volunteer lawyer programs for service. The volunteer lawyer programs to which the recipient refers cases do not necessarily have case acceptance criteria that are consistent with the program's priorities. After the referral is made, the recipient has no further involvement. The recipient does not consider these applicants as clients accepted for service by the recipient and provides no oversight over the cases, and does not track whether the applicant is ultimately provided any service through the referral. As such, the volunteer lawyer programs to which the recipient makes referrals are 1614 non-compliant direct delivery systems. The recipient desires to count the value of its staff time in screening and referring the LSC-eligible applicants towards its PAI spending requirement.<sup>5</sup>

### *Analysis*

The question presented is whether the recipient's work in performing intake and screening and referral of LSC-eligible applicants to a "1614 non-compliant" direct delivery system is within the range of permissible activities contemplated by §1614.3 for meeting the PAI requirement. If it is, the value of the recipient's time in performing such work would generally be allocable to the recipient's PAI spending requirements. If not, however, the dollar value of the recipient's work on these activities would not be allocable to the recipient's PAI spending requirement.

The first possibility to consider is whether such activities are permissible under §1614.3(a). For "1614 compliant" direct delivery systems contemplated by §1614.3(a) the legal services being provided to eligible clients is being provided by private attorneys, the allocable costs for such direct delivery systems are the costs the recipient bears for the activities it undertakes in connection with such systems. As such, the value of a recipient's time spent on administrative activities, such as intake, eligibility screening and referral activities in connection

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<sup>4</sup> The recipient also participates in a "1614 compliant" direct delivery system, which is not at issue in this Opinion.

<sup>5</sup> Applicants who are not eligible for the recipient's services are referred to other potentially suitable providers. Some applicants who are eligible for service are served directly by the recipient. The recipient does not seek to count any time spent in screening or referring these applicants towards its PAI spending requirement.

with “1614 compliant” direct delivery systems, must necessarily be considered §1614.3(a) activities. However, as noted above, the direct delivery systems described in §1614.3(a) are only those which comply with the requirements of §1614.3(d). The direct delivery systems at issue here are “1614 non-compliant” direct delivery systems. Therefore, the intake, screening and referral activities at issue here cannot be considered §1614.3(a) activities because these activities are undertaken in connection with a “1614 non-compliant” direct delivery system.

The next possibility is whether the activities may be considered permissible within the parameters of §1614.3(b). The structure of the regulation sets up a clear distinction between direct delivery activities and other, non-direct delivery activities. The activities listed in subsections (b)(1) and (2) do not include any sort of direct “client” services. Rather, they are generally services provided by the recipient to the private attorney or the private attorney to the recipient. The provision of community legal education is as close to a “client” service as appears to be contemplated. Even that is not the delivery of legal assistance to clients in individual cases in the sense clearly contemplated by §1614.3(a). Rather, community legal education is the provision of legal information to persons who are not, and might never become, “clients.” Moreover, the use of the word “support” in both of the subparagraphs and the types of activities which delineated by the regulation suggests that the “not limited to” language in the introductory clause of the section was intended to allow for activities not necessarily already listed but which comprise other than direct delivery activities. In addition, because “1614 compliant” direct delivery systems are the only required part of each recipient’s PAI activities and, as such, are expected to be at the core of each recipient’s PAI program, the best reading of the regulation may be to expect that all direct delivery activities meet the standards in §1614.3(d) and that a recipient’s activities undertaken in connection with “1614 non-compliant” direct delivery systems are not within the range of permissible activities contemplated by the regulation, such that the costs associated with these activities are not allocable to the spending requirement.

On the other hand, it could also be argued that the language of §1614.3(b) does not expressly exclude activities related to “1614 non-compliant” direct delivery activities. The word “support” is used in subsections (b)(1) and (b)(2), but not in the introductory language of (b) itself. Rather, that language states: “Activities undertaken by recipients to meet the requirements of this part, may also include, but are not limited to:[...]”. This might suggest that “activities” under (b) generally is broader than only “support” activities of the types listed in the subsections. However, one basic principle of regulatory construction is that specific terms override general ones. With this in mind, the repeated use of the word “support” in each subsection, and the fact that each example contained in the regulation used is an activity that does not provide any direct client legal services (advice or representation) suggest that the better reading of the introductory clause of §1614.3(b) is that it is not intended to allow for activities beyond a range of non-direct delivery support activities contemplated by the more specific subsections.

On the whole, although there may be alternative permissible readings of the regulation, the better reading appears to be that a recipient’s work in performing intake and screening and referral of LSC-eligible applicants to a “1614 non-compliant” direct delivery system is not within the range of permissible activities contemplated by §1614.3(b). To the extent that there remains an open legal question, the OLA determination rests on whether there is an LSC policy on the issue. In this instance, LSC has, *as a matter of policy*, determined that such activities are

not appropriately allocated toward a recipient's PAI spending requirements because LSC cannot be assured that such activities appropriately effectuate the purpose of the regulation to ensure that recipients involve private attorneys in the delivery of legal assistance to eligible clients. As noted herein, the recipient admits that it has no knowledge about whether anyone referred to the volunteer lawyer systems is eventually served and what the outcome of such service might be. Under such circumstances, without the recipient involvement and oversight required by "1614 compliant" direct delivery systems, LSC cannot be assured that such systems "generate the most possible legal services for eligible clients from available, but limited, resources." 45 CFR §1614.1(c). In light of this policy determination, OLA finds that the proposed activities are not allocable to the recipient's PAI spending requirement.

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Mattie Cohan  
Senior Assistant General Counsel

A handwritten signature in black ink, appearing to read "Victor M. Fortuno", with a horizontal line extending to the right.

Victor M. Fortuno  
Vice President & General Counsel