



OFFICE OF LEGAL AFFAIRS

To: LSC Operations and Regulations Committee
Panelists for the September 2013 PAI Rulemaking Workshop

From: Ronald S. Flagg, General Counsel
Mark Freedman, Senior Assistant General Counsel

Date: September 9, 2013

Re: Panelists and Comments for the September 2013 PAI Rulemaking Workshop

LSC has selected six panelists for the September PAI rulemaking workshop. Each panelist submitted an application to participate on the panel and comments on some or all of the topics for discussion. LSC also received three other comments before the deadline for this workshop. This memo summarizes the main points of the materials submitted to LSC for this Workshop. Those materials, along with the materials for the first workshop are posted on the PAI rulemaking workshop webpage on www.lsc.gov at <http://bit.ly/PAIrulemakingdetails>.

The topics and related items for discussion are set forth in the Federal Register notice at 78 Fed. Reg. 27339 (May 10, 2013). Additional questions are set forth in the Federal Register notice at 78 Fed. Reg. 48848 (Aug. 12, 2013). Both notices are available at the webpage listed above. For reference, the three topics of discussion are as follows:

- 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.
- 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.
- 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.

Panelist	Topic 1	Topic 2	Topic 3
Mark O'Brien, Executive Director Pro Bono Net	X	X	X
Patricia Z. Risser, Attorney—Coordinator Volunteer Lawyers Project Legal Action of Wisconsin	X	X	X
Melissa Skilliter, Pro Bono Coordinator Ohio State Legal Services Association	X		X
David Udell, Executive Director National Center for Access to Justice	X		
Jennifer van Dulmen, President National Association of Pro Bono Professionals	X	X	X
John Whitfield, on behalf of NLADA Executive Director Blue Ridge Legal Services	X	X	X

Commenter	Topic 1	Topic 2	Topic 3
Bruce Courtade, President, The State Bar of Michigan	X	X	X
Terry Lawson, Senior Staff Attorney Legal Services of New York City	X		
David Ackerly, former Director of Private Attorney Involvement at the Legal Aid Foundation of Los Angeles	X		

COMMENTS FROM PANELISTS

Panelist: Mark O'Brien, Executive Director, Pro Bono Net

Mr. O'Brien is the Executive Director and co-founder of Pro Bono Net. Prior to starting Pro Bono Net, Mr. O'Brien directed the pro bono program at Davis Polk & Wardwell. Mr. O'Brien is an Adjunct Professor of Law at Georgetown University Law Center. Mr. O'Brien intends to address all of the topics for discussion. Pro Bono Net has extensive experience with technology used by LSC grantees and other legal aid programs for pro bono and pro se purposes. Pro Bono Net also has experience with disaster-related legal relief efforts. Mr. O'Brien will address all three topics.

Topic 1: Pro Bono Net supports expanding Part 1614 to include law students, law graduates, deferred associates and other non-lawyers whose work can enable lawyers to practice

at the top of their license. Pro Bono Net has experienced the value of law students and pre-admission law graduates in providing essential legal services in disaster relief and in developing pro se legal technologies.

Topics 2 and 3: Pro Bono Net supports including in Part 1614 screening, advice, and referral programs that may include ineligible individuals in order to reach eligible clients. In particular, victims of disasters may face difficulties documenting their eligibility.

Topic 3: Pro Bono Net recommends removing the requirement that PAI cases be included in the grantee's case management system.

Panelist: Patricia Z. Risser, Attorney—Coordinator, Volunteer Lawyers Project, Legal Action of Wisconsin

Legal Action of Wisconsin is an LSC grantee with a service area that includes 39 counties ranging from Milwaukee to several very rural counties. Ms. Risser has been the Attorney-Coordinator for Private Attorney Involvement activities for more than nine years. Prior to joining Legal Action, Ms. Risser spent 15 years in private practice in firms with five attorneys or less. Ms. Risser will address all three topics.

Legal Action generally supports the recommendations but is concerned about maintaining an emphasis on involving private lawyers in providing extended service to eligible clients. Legal Action recommends reconsidering the 12.5% requirement to provide more flexibility during years of funding fluctuations.

Topic 1: Legal Action supports adding law students, law graduates, deferred associates and others including paralegals to the scope of Part 1614. Legal Action notes that inactive lawyers can assist with both case evaluation and support to other volunteer lawyers. Legal Action also recommends considering addition of non-legal professionals such as accountants, vocational evaluators, and interpreters. In Wisconsin, there is consideration of permitting inactive or out-of-state lawyers to provide legal assistance under certain circumstances. Legal Action expressed concerns about treating underemployed lawyers differently than other lawyers.

Topic 2: Legal Action supports withdrawal of OLA legal opinion EX-2008-1001 to permit LSC grantees to spend PAI resources to work with other legal services providers, who do not screen for LSC eligibility, on screening, advice, and referral programs.

Topic 3: Legal Action recommends reconsidering the case-handling requirements for PAI cases and providing a means to obtain PAI credit for support work to volunteer lawyers affiliated with non-LSC providers. Legal Action recommends permitting some PAI credit for support for clinics that do not screen for LSC eligibility, including clinics sponsored by courts. Statistics or some other measurement could be used for apportioning PAI credit. Nonetheless, Legal Action recommends not allowing staffing or direct legal assistance for unscreened clinics. They recommend permitting PAI credit for training, manuals, and some consulting.

Panelist: Melissa Skilliter, Pro Bono Coordinator, Ohio State Legal Services Association

Ohio State Legal Services Association (OSLSA) is an LSC grantee serving low-income clients in 30 Ohio counties. Ms. Skilliter has served as the Pro Bono Coordinator since 2008 and

was previously a staff attorney. She oversees 16 brief advice clinics. Ms. Skilliter will address Topic 1 and Topic 3.

Topic 1: OLSA supports expanding Part 1614 to include law students, law graduates, deferred associates, and others including Certified Public Accountants.

Topic 3: OLSA recommends replacing the screening and case-handling requirements specified in EX-2008-1001. OLSA proposes permitting as PAI activities support for brief advice clinics with a primary purpose of delivering legal services to financially eligible persons under the LSC requirements. They describe their brief advice clinics as providing brief services with limited screening. They note that other sponsors of clinics have concerns about in-depth screening. They also recommend treating grantee support for brief advice by volunteer attorneys in these clinics as matters, rather than as grantee cases, because of conflicts concerns.

Panelist: David Udell, Executive Director, National Center for Access to Justice

David Udell is the Executive Director of the National Center for Access to Justice (NCAJ) and Visiting Professor from Practice at Cardozo Law School. Mr. Udell founded the Justice Program of the Brennan Center for Justice and was director of the Justice Program from September 1997 to August 2010. He has also held positions as a senior attorney at Legal Services for the Elderly and as a managing attorney at MFY Legal Services. Mr. Udell's recent work includes research, writing, and conferences regarding the justice gap, pro bono service, and pro bono involvement of law students. Mr. Udell will address Topic 1.

Topic 1: NCAJ supports expanding Part 1614 to include law students, law graduates, deferred associates and others. NCAJ's research and initiatives have found that law students and graduates provide valuable and dynamic responses to the justice gap. New York has adopted a 50-hour pro bono requirement for all applicants to the New York bar, which other states are considering. Lifelong commitments to legal services and pro bono can be formed through involvement of law students in legal services work. NCAJ recommends permitting LSC grantees discretion regarding when to count the services of law students and law graduates for Part 1614 purposes.

Panelist: Jennifer van Dulmen, President, National Association of Pro Bono Professionals

The National Association of Pro Bono Professionals (NAPBPro) is an independent organization of pro bono professionals from LSC and non-LSC legal services programs, stand-alone pro bono programs, bar associations, law firms, law schools, and state-wide access to justice organizations. Ms. van Dulman is the NAPBPro President and a Managing Attorney at Community Legal Aid Services in Ohio, where she manages the Access to Justice Team, including the Volunteer Legal Services Program and the HelpLine. Ms. van Dulmen will address all three topics.

NAPBPro's comments reflect the content of surveys of its members and information gathered from members throughout trainings and meetings. Generally NAPBPro supports the recommendations, but with a concern about diluting resources for pro bono. NAPBPro recommends that LSC condition these expansions on:

- each program having a strong pro bono program,
- each program having at least one full-time pro bono professional, and
- limiting the proportion of the 12.5% requirement that can be spent on the expanded pro bono services.

NAPBPro identifies four fundamental elements for a robust pro bono program that they recommend requiring of each LSC grantee prior to permitting the grantee to expand pro bono services under the recommendations. They also recommend compliance methods for verifying grantee's commitment to these elements. Additionally, NAPBPro provided these topic-specific comments:

Topic 1: NAPBPro supports expanding Part 1614 to include law students, law graduates, deferred associates, and others, but expressed concerns about diluting the existing requirements. They recommend that a majority of the Part 1614 funds be spent on involving licensed attorneys. They recommend broad definitions for law students and including accountants who assist clients with tax matters. NAPBPro does not recommend changing the current definition of a private attorney in Part 1614.

Topic 2: NAPBPro supports this recommendation, with a cap on the amount of Part 1614 funds that can be used for these screening, advice, and referral programs. They also recommend prohibiting use of Part 1614 funds for general intake screening. Rather, screening credit should be limited to situations involving screening by pro bono staff or at outreach clinics or pro bono events. They recommend tracking referrals to attorneys and whether service was provided.

Topic 3: NAPBPro supports this recommendation to reconsider LSC case-handling requirements for all Part 1614 cases. They recommend allowing Part 1614 credit only for clinics that are demonstrably designed to serve eligible clients, which should have at least limited screening.

Panelist: John Whitfield, on behalf of NLADA, Executive Director, Blue Ridge Legal Services

Mr. Whitfield has worked at Blue Ridge Legal Services since 1980 and has served as the executive director and general counsel since 1989. In April 2012, Mr. Whitfield was one of six legal aid directors invited to participate in the White House Forum on the State of Civil Legal Assistance. Mr. Whitfield will address all three topics on behalf of NLADA.

Mr. Whitfield will expand on the outline and comments that NLADA submitted on June 25 for the first workshop. Below is a summary of those materials. Mr. Whitfield will make specific comments on:

- the scope of Part 1614,
- tracking and accounting for Part 1614 work, and
- support for unscreened work of private attorney clinics.

On June 25, NLADA submitted an outline of key points and comments with copies of a 2011 NLADA memo to LSC requesting the withdrawal of OLA Opinion AO-2011-001 and a 2008 CLASP memo requesting reconsideration of OLA Opinion EX-2008-1001.

NLADA fully supports all three recommendations. NLADA encourages LSC to expand the examples of PAI activities in the regulation while providing flexibility to include creative and innovative approaches to PAI.

AO-2011-001 concluded that, under 45 C.F.R. § 1614 and LSC policy, intake, screening, and referral of applicants to pro bono programs are not allocable to an LSC grantee's PAI spending requirements when the grantee does not track these applicants as cases or determine whether any legal assistance was actually provided by a private attorney. The NLADA 2011 memo criticizes that opinion and policy determination as inconsistent with the requirements of Part 1614 and the goals stated in LSC Program Letter 07-02, which encouraged "effective, strategic, and creative engagement of private pro bono attorneys . . ." NLADA argues that intake, screening, and referral should be sufficient for the PAI requirements without follow-up or tracking as a grantee case.

EX-2008-1001 concluded that an LSC grantee could not count as a PAI activity its support for private attorney clinics providing legal assistance that were operated with other entities because the clinics did not screen applicants for eligibility and the legal assistance provided was not tracked as case services in the grantee's case management system. LSC applies these requirements to PAI activities that constitute direct delivery of legal assistance under 45 C.F.R. § 1614.3(a). The CLASP 2008 memo argues that these activities should qualify as permissible support activities to private attorneys under 45 C.F.R. § 1614.3(b) rather than as direct delivery activities. Furthermore, the CLASP memo argues that requiring the grantee to track this legal advice as grantee cases would unnecessarily raise conflicts issues that would limit access to legal assistance for some eligible clients.

OTHER COMMENTS

Bruce Courtade, President, The State Bar of Michigan

The State Bar of Michigan (Bar) supports all three recommendations of the PBTF. The Bar recommends that LSC encourage its programs to be part of larger, coordinated pro bono systems. Nonetheless, the Bar notes that the cases and matters referred by LSC programs must be LSC-permissible work. The Bar recommends encouraging flexibility and innovation and paying special attention to constraints on rural practitioners. The Bar recommends permitting a waiver of LSC's regulatory provisions for some private attorney involvement activities. The Bar also recommends permitting private attorney involvement activities without individual screening similar to the lack of a screening requirement for outreach and education activities. The Bar made the following specific comments on the three topics.

Topic 1. The Bar supports expanding Part 1614 to include law students, law graduates, deferred associates, and others. The Bar notes the active work of law schools in Michigan to engage law students in providing free legal services to people in need.

Topic 2. The Bar recommends overruling both AO-2009-1004 and AO-2011-001 and encouraging efficient intake systems that involve private attorneys in the intake process and that are integrated with pro bono referral programs.

Topic 3. The Bar recommends revising strict LSC case documentation and screening rules for Part 1614, as discussed in EX-2008-1001. Instead, the Bar recommends that LSC look at good-faith efforts by recipients to engage members of the private bar and expand services to eligible clients. The Bar notes that the Internet Representation Project of Legal Services of Northern Michigan faced Part 1614 barriers because of the lack of sufficient LSC screening.

Terry Lawson, Senior Staff Attorney, Legal Services of New York City

Legal Services of New York City (Legal Services NYC) is an LSC grantee serving all five boroughs of New York City through more than 50 neighborhood-based offices. Legal Services NYC submitted comments in support of the recommendation in Topic 1.

Legal Services NYC recommends counting for Part 1614 the hours spent on recruitment, training, and supervision of law students and law graduates.

Legal Services NYC recommends including in Part 1614 college students and volunteer paralegals, secretaries, and interpreters.

Legal Services NYC recommends permitting attorneys admitted in other states to qualify for Part 1614 even if they are not admitted in the same state as the recipient.

David Ackerly, former Director of Private Attorney Involvement at the Legal Aid Foundation of Los Angeles

Mr. Ackerly submitted comments on his own behalf based on his experience as a director of private attorney involvement for six years at the Legal Aid Foundation of Los Angeles (LAFLA). His comments do not necessarily reflect the views of LAFLA. Mr. Ackerly opposes the recommendation in Topic 1 regarding expanding Part 1614 to include law students and law graduates, but he supports including paralegals. He states that the emphasis should remain on full representation by private attorneys.

Mr. Ackerly notes that the 12.5% measure is based on burdens and not benefits. As such, it does not reward improvements when new cost savings result in a Part 1614 deficit that has to be filled. Furthermore, the amount spent on these activities is a poor measure of effectiveness.

Mr. Ackerly recommends reducing the requirement to 10% and keeping it limited to licensed attorneys with some specific adjustments. He recommends permitting attendance at trainings and conferences to count towards up to 2% of the requirement. He recommends including in Part 1614 inactive or otherwise unlicensed attorneys who are allowed to practice under emeritus, pro bono, or similar local rules. He also recommends an exception to the private attorney definition to permit PAI credit for payments of up to \$2000 to non-practicing attorneys who have no other income from the practice of law.

If there is great demand for including law students and graduates, then Mr. Ackerly proposes a separate 5% goal for including them, but he notes that rural programs may have great difficulty reaching that goal.

For paralegals, he proposes including them at 1/4 the value of attorney time and limiting the credit for paralegals to 20% of the total hours on a case or matter.