

# LEGAL SERVICES OF NORTHERN MICHIGAN, INC.

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May 9, 2013

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

RE: Rule making workshops July 23, 2013 & September 17, 2013

Mr. Freedman:

I would like to express my interest in participating as a panalist for either or both of the rule making workshops listed above. Legal Services of Northern Michigan has been a pioneer in using the internet to allow private attorneys to provide counsel and advice services to low income individuals (IRP project). LSNM's IRP project went live in June of 2006 and since then the private attorneys servicing the site have responded to question from 3,706 low income individuals. Several other programs have replicated LSNM's project, but the project and the replication are being restrained by LSC's current interpretation of 45 CFR 1614.

In addition to my involvement with the internet based delivery, I am intimately familiar with the unique challenges faced by rural programs in establishing pro bono delivery models. LSNM is a program that covers 36 counties in Michigan and it is exclusively rural. I have been with the program for 34 years (15 as a staff attorney) and am a life time resident of the region so I have experienced the issues and attitudes of the private bar regarding pro bono services. LSNM is involved in several different PAI models which include; contract attorneys, a traditional clinic program, how to work shops and old fashion local arm twisting. Many of these efforts go unreported under present day LSC rules.

Please consider me as a panalist for the upcoming workshops. I believe I can provide a unique and informed prospective on the issues surrounding PAI delivery and reporting rules.

Sincerely,

Kenneth Penokie  
LSNM Director



Funded in part by the Legal Services Corporation, Michigan  
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# LSC PAI Workshop

## Key Points

### Topic 1

In rural communities there are several obstacles to the recruitment of pro bono legal services that are missed by the Report of the Pro Bono Task Force. Some of these are:

A. Conflict of Interest. Start with an understanding that rural communities have few attorneys.<sup>1</sup> The firms are small and have modest incomes. These firms/sole practitioners are very concerned that they will lose cases because they are handling a pro bono case which conflicts them from taking a paying case. In addition, the very same attorneys who are willing to do pro bono will be opposing parties in cases handled by the legal services program.

B. Limiting exposure. Traditionally we think of an attorney's exposure in terms of the time required to handle a case or legal issue. That exposure is limited by a careful screening and selection of cases referred. However, in rural areas exposure also includes "becoming the town's free attorney" and the "attorney for life" syndrome. Once a rural attorney handles one or two pro bono cases in an effective matter, word of mouth spreads throughout the area and s/he receives a torrent of requests for free work. The exposure is not just during work hours, but at community and social events. In addition, because the communities are small the client who was assisted will treat the attorney as his/her personal attorney (and for that of his/her friends) for life.<sup>2</sup>

C. Record keeping. If rural attorneys take pro bono cases, they don't want to be bothered by a lot of follow-up work, phone calls or other paper work. They just want to do the case and not be bothered. Amazingly, our experience is that most claim not to want public thanks or acknowledgment of their good work. Perhaps this is because of the factor listed above.

D. Accounts receivable. The prevalent feeling among small firms and solo practitioners in rural areas is that their accounts receivables are their pro bono work. Most attorneys practicing in rural areas struggle to make a modest living. Their clients are likewise struggling and are sometimes unable to pay their bills fully. These factors taint the waters for pro bono recruitment. State Bar Associations work hard to encourage pro bono and to dispel the notion that accounts receivables meet pro bono standards, but the fact is the attitude persists.

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<sup>1</sup>33 of LSNM's 36 counties have between 10 and 25 attorneys. Of those only about 2/3's would be available for pro bono.

<sup>2</sup>. LSNM's Board Chair assisted one client in his early days of practice and has received four or five requests for help from her each year for the past 40 years.

There is an adage that all pro bono is local. No where is that more true than in rural areas. Most of the pro bono case placement within our service area is accomplished by local staff attorneys because of their relationship with local bar members. The same goes for recruiting attorneys to assist with clinics or similar efforts. The recruitment requires an understanding of the limitations of rural practice and the ask must have built in safe-guards for the attorneys.

### Topic 3

Current rule interpretations place some troubling hurdles to the implementation of pro bono services. Most of the hurdles surround the collection of data and reporting requirements. It is noted above that conflict of interest is a potential obstacle for private attorneys when considering pro bono legal work. It is also a serious issue for legal service programs.

**Conflict:** To be able to count a case under 45 CFR 1614 the current interpretation of the regulations require a program to perform a full intake on the potential pro bono client and to maintain that information in a case management system data base. These intakes include, income and asset information and issue identification information. Many bar associations deem this information confidential and enough to create a conflict if an opposing party were to contact the program for services. In full service, rural legal services programs, this conflict can cause a major problem with the delivery of core priority legal representation. The most obvious example is with domestic violence cases. Many programs, such as LSNM, have the protection of domestic violence victims as a top priority. However, if that program is involved in a clinic program with the required screening and data collection, it can easily be conflicted by the abuser's attendance at the clinic. In urban areas this might not be an issue as there are various alternative programs to assist domestic violence victims. In rural areas, the LSC funded legal aid program is often the only alternative.<sup>3</sup> A pro bono effort that allows core priorities to be exposed to a conflict of interest is one that is defeating the purpose of adding resources for the low income community.

Avoidance of conflicts are not difficult. With a clinical program, necessary data can be collected in a data base accessible only to the clinic and reporting can be stripped of identifying information (unique numerical identifiers used instead of names etc...). Online services can likewise be set up to preserve anonymity while still collecting necessary reporting data.

**Cost:** The current paradigm is for a legal services program to completely own anything that is reported as pro bono case. Owning the case includes a full intake with income, asset and subject matter screening, targeted referrals, regular follow-up, timely closing and outcome measures. There should also be good stories collected. As noted above this paradigm limits a programs range of pro bono involvement because of potential conflicts. It is also true that the paradigm is expensive requiring an extensive investment of program capital. The more capital

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<sup>3</sup>It should be noted that, because of the time consuming and difficult nature of domestic violence cases, they are very difficult to place with pro bono attorneys.

invested in the pro bono, the less is available for staff who perform core services. The steeper the cost/benefit curve the less valuable the pro bono services.

The question with many of the issues identified is what is required by 45 CFR 1614. Sections 2(a), 3(c), and 4(a)(2) all require the plan and delivery system to meet the clients needs in an “effective”, “efficient” and “economical” manner. Section 19(c) specifically requires: recipients should attempt to assure that the market value of PAI activities substantially exceeds the direct and indirect costs being allocated to meet the requirements of this Part.

The directives of 1614 should then be overlaid on top of 45 CFR 1611.7 which requires that “a recipient shall make reasonable inquiry regarding sources of the applicant’s income, income prospects and assets.” The question then is: What is reasonable in light of the resources being utilized in a particular pro bono “case”? If a case is being directed to a private attorney for service, the legal services community is not providing any “legal service” to that client. So the risk under any particular pro bono delivery model is that a person who is not financially qualified may get free advice from a private attorney. The exposure is much less than the same client being seen in-house by a program attorney. Since the exposure is less it would follow that a “reasonable” screening process could be less robust and more cost effective.

We are well into the digital age and technology exists to screen potential “clients” for eligibility and placement with a pro bono attorney without the necessity of costly personnel. While it is true that these systems cannot detect every nuance in an answer or potential prevarication, it is also true that they are not subject to human error. Given the very small amount of program investment for these electronic dating systems, electronic screening does represent a “reasonable inquiry.” Especially if they are coupled with some basic instructions to the pro bono lawyers to flag irregularities.

Name	Kenneth Penokie, Director Legal Services of Northern Michigan
<b>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.</b>	
	How are legal service providers engaging new categories of volunteers? What are the needs of these new categories of volunteers?
X	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 (please specify in your submitted outline).
<b>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.</b>	
	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 (please specify in your submitted outline).
<b>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.</b>	
X	How are recipients currently using or supporting pro bono volunteers in brief service clinics?
X	What are the obstacles to recipients' use of pro bono volunteers in brief service clinics?
X	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?
X	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?
X	To the extent applicable, discuss your organization's ability to execute any recommended approaches.
	Other issues related to Topic 3 (please specify in your submitted outline).

## Summary of Qualifications

### For LSC PAI Workshop

#### Kenneth Penokie

Director of Legal Services of Northern Michigan since 2001.

Deputy Director of Legal Services of Northern Michigan from 1994 to 2001.

Staff attorney in an office mostly staffed by one attorney and responsible for three to five counties from 1979 to 1994.

Legal Services of Northern Michigan service area is exclusively rural and contains over 60% of the land mass of Michigan. The area contains over 27,000 square miles of mixed agricultural and forest land and extends almost 500 miles from one end to the other. The entire service area has less than 2,000 licensed attorneys. Despite these challenges, LSNM has an effective and diverse pro bono component. LSNM's pro bono component includes:

- A weekly walk-in clinical program
- Pro se family law clinics
- Paid PAI contract attorneys
- A reduced fee referral program
- An internet based pro bono counsel and advice program (Pioneered and developed by LSNM)
- Informal case referrals

In addition to LSNM's in-house pro bono efforts I have been involved in various efforts spearheaded by the State Bar of Michigan.

In short I have knowledge, based upon many years of experience, of what pro bono efforts work and what doesn't work in rural areas. The diversity of experience and the years of interaction with LSC PAI rules give me an intimate understanding of the issues surrounding PAI reporting.