Lisa Wood (ABA SCLAID)

Outline of ABA Presentation

General Observations/Introduction

Private bar is an important partner with LSC in providing services

ABA has encouraged pro bono service through a variety of programs and policy statements

Providing grantees with flexibility will be critical in enabling the programs to develop creative and collaborative approaches for engaging pro bono volunteers

Examples:

- Dealing with partner organizations
- Addressing intake and priority variations
- Finding ways to utilize volunteers in innovative capacities

LSC must take care to avoid providing too much specificity in the revisions

Potential to inhibit new approaches essential for increasing pro bono opportunities

Topic 1: Should resources spent supervising and training law students, law graduates, deferred associates, and others be counted toward grantees' PAI obligations, especially in "incubator" initiatives?

Law Students, Law Graduates, Deferred Associates and Others

Law students, law graduates, deferred associates and others play an important role in assisting to provide legal services to the poor - to conduct intake interviews, gather documents, engage in research, and draft documents such as simple wills and pleadings

Budget cuts have forced programs to reduce staff - the ability to utilize these volunteers has been of enormous benefit

LSC recipients benefit in less tangible ways - many of law students, law graduates and deferred associates will become dedicated pro bono attorneys through exposure they receive to the critical legal needs of the poor; some will become leaders within the legal community and will become strong advocates on behalf of the program.

Utilizing these volunteers requires a substantial dedication of time and resources by the LSC recipients.

The interpretation of the PAI rule in External Opinion #EX-2005-1001 had a negative impact on the willingness of some programs to fully utilize volunteers

The ABA believes LSC recipients should be able to receive PAI credit for training and supervising these volunteers.

"Incubator" Initiatives

As a result of recent retrenchment in the legal industry, some law schools and bar associations have created incubator programs to assist new attorneys in establishing their practices. Some LSC recipients have been asked by law schools or bar associations to become a partner in these efforts.

Under Advisory Opinion # AO- 2009-1007, any attorney participating in an incubator program who earns more than one half of his or her professional salary from a recipient is considered a "staff attorney" under 45 CFR Part 1600. Pursuant to 45 CFR 1614.1(e), the recipient is not permitted to count as PAI any payment made to an attorney who is considered a staff attorney for two years after the attorney no longer serves in that capacity with the recipient.

New attorneys who are just beginning a practice will not know if more than 50% of their income in the first year or two will come from the LSC recipient through the referral of clients. And even if they did, the best policy would be to make an exception to the current restriction at least for lawyers who interned through an incubator program with an LSC grantee.

The ABA recommends that the PAI Rule be amended to permit LSC recipients to receive PAI credit when they refer cases on contract to attorneys who are participating in incubator programs affiliated with the recipients, even if those contracts represent more than 50% of an attorney's income in the first two years of practice. This will make maximum use of needed and available resources within the spirit of the PAI rule.

Topic 2: Should grantees 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?

There are several models of integrated intake and referral systems utilized by LSC recipients. Pro bono programs and volunteers that participate in integrated screening and referral systems benefit by receiving carefully screened cases, saving both time and resources.

LSC has encouraged its grantees to collaborate with pro bono programs and to integrate them fully into the statewide delivery system. Integrated intake and referral systems are an excellent example of how grantees have heeded that call.

Advisory Opinion #AO 2011-001 set forth an interpretation of Part 1614 that severely inhibits LSC recipients from participating in such systems, because they cannot count towards PAI the value of the time spent in intake, screening and referral of LSC-eligible clients unless they counted the case as their own and engaged in oversight and follow-up.

Oversight and follow-up on cases referred to pro bono attorneys is essential for quality assurance, but that is not a function that has to be carried out by the LSC recipient.

The ABA supports an interpretation of 45 CFR 1614 or its amendment, if necessary, to enable LSC recipients to count towards their PAI spending requirement the time spent to: create an integrated intake and referral system; conduct intake; screen callers; and refer eligible clients to private attorneys regardless of whether the recipient considers the case to be its own or provides oversight or follow-up to the volunteer attorney who accepts it.

Topic 3: Should LSC 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?

There are a wide range of brief service approaches that have been developed over the past few years that use volunteer lawyers.

Many are sponsored by bar associations, community groups or the local courts.
Some focus on a specific group such as veterans or battered spouses
Others focus on a specific area of the law such as divorces or evictions.
Many are held in locations that are convenient for clients such as community centers, schools or churches, as well as at times (evenings and weekends) that respond to the needs of working people

These approaches can be popular with volunteer lawyers because they may limit the scope of work and time commitment required.

LSC grantees often play an important roles in assuring the success of these brief service approaches; this enables LSC grantees to work collaboratively with the bar, the courts and community groups to extend needed legal help

To the extent that eligible clients are being assisted through such approaches, LSC grantees should receive PAI credit for any support they provide

Because these approaches sometimes do not include client eligibility screening, the question of PAI credit becomes much more complex. We want to participate in discussions as a part of these regulatory workshops to see if we can collaborate on developing reasonable approaches that do not run afoul of the purpose or letter of the law governing LSC.

Name	Lisa Wood, Chair, ABA Standing Committee on Legal Aid and Indigent Defendants
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.	
X	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?
X	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.
X	Other issues related to Topic 1 (please specify in your submitted outline).
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.	
X	How are recipients currently using integrated intake and referral systems?
X	Do LSC's current PAI regulations inhibit full use of integrated intake and referral systems?
X	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.
X	Other issues related to Topic 2 (please specify in your submitted outline).
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.	
X	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?
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?
	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 (please specify in your submitted outline).

Lisa Wood
Bio and Qualifications

Lisa is the Chair of the ABA Standing Committee on Legal Aid and Indigent Defendants, having served in that post since 2012. She previously served 2 years as a member of the Committee.

Lisa is a partner and Chair of the Litigation Department at Foley Hoag LLP in Boston, where she handles complex litigation matters involving accounting, securities and antitrust issues. Throughout her 29 years of practice, Lisa has been active in access to justice issues. Lisa served as a member of LSC's Pro Bono Task Force. Lisa served as Chair of the Massachusetts IOLTA Committee for the past 6 years, and served as a member of that Committee for four years previous to that. She has served as a Trustee and Grant Committee Member of the Boston Bar Foundation, one of the charities to whom the Massachusetts IOLTA Committee disburses funds for grant making purposes. Lisa has also served on the Board of the Volunteer Lawyers Project for 25 years, including three years as its Chair. VLP is currently the largest LSC recipient in Massachusetts, and was one of the first organized pro bono programs in the United States (funded in its early years by an ABA start-up grant). Lisa has also been active in access to justice issues through the local chapter of NCCJ and the Boston Bar Association.

Lisa has served in the Leadership of the ABA's Sections of Litigation and Antitrust for more than 15 years. She currently pens a regular column in the Antitrust Section's Magazine called, "Notes from the Field" which addresses practical litigation issues. For the Litigation Section, Lisa has focused her leadership efforts on access to justice issues, previously chairing the Section's Access to Justice and Pro Bono and Public Interest Committees , and serving as a Litigation Section liaison to the ABA Civil Right to Counsel Working Group. Early in her Section leadership years, Lisa founded and oversaw the Section's annual in-house counsel pro bono award.

Foley Hoag has an exemplary pro bono program of which Lisa is very proud. Lisa has focused her pro bono case work on child abuse cases involving special needs children.

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June 21, 2013

Mr. Mark Freedman
Senior Assistant General Counsel
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Via e-mail to: PAIRULEMAKING@lsc.gov

Re: Comments on Revising the LSC Private Attorney Involvement (PAI) Rule, 45 CFR Part 1614

Dear Mr. Freedman:

The American Bar Association, through its Standing Committee on Legal Aid Aid and Indigent Defendants (SCLAID) and with substantial input from its Standing Committee on Pro Bono and Public Service (Pro Bono Committee), submits these comments regarding possible revisions to the Legal Services Corporation's (LSC) PAI requirement.

In addition to its longstanding support for ongoing federal funding of LSC, the ABA has a strong commitment to and keen interest in the full and robust involvement of the private bar in the delivery of legal services to the poor. While recognizing that pro bono volunteers can never replace the vital services provided by LSC grantees, the ABA views the private bar as an important partner with LSC in providing much needed services to those who cannot otherwise afford legal assistance.

The ABA has encouraged pro bono service through a variety of programs and policy statements for more than a century. The ABA Canons of Professional Ethics, adopted in 1908, as well as the ABA Model Code of Professional Conduct, adopted in 1969 both addressed the issue.[1] The ABA Private Bar Involvement Project (now known as the Center for Pro Bono) was established in 1979 to assist with the creation and development of pro bono programs.

In more recent times, the ABA adopted Model Rule of Professional Conduct 6.1 in 1983, which urged lawyers to "render public interest legal services." In 1993,

[1] Canon 4 of the ABA Canons of Professional Ethics provided that "a lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason and should always exert his best efforts on his behalf." EC2-25 of the Model Code of Professional Conduct stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer…. Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged."

the ABA amended MRPC 6.1 to define pro bono in a multi-tiered and prioritized way, placing emphasis on the representation of low income people with no cost to the client.

The ABA has also been at the forefront of establishing criteria for effective pro bono programs. In 1996, the ABA adopted *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means* (*Pro Bono Standards*) to provide guidance regarding the most effective and efficient ways for pro bono programs to operate. The ABA is in the process now of revising the *Pro Bono Standards*, and the revised version is scheduled to be considered by the ABA House of Delegates at its Annual Meeting in August.

Several compelling reasons led to the revision of the *Pro Bono Standards* including new forms of delivery of pro bono legal services that were not prevalent in 1996, such as limited scope representation, assisted pro se models, and neighborhood and court-based clinics. In addition, the use and availability of technology by pro bono programs have grown exponentially since the adoption of the original *Standards.* Furthermore, as pro bono has become increasingly integrated into access to justice and legal aid initiatives, the need to provide adequate resources and infrastructure to support pro bono activities has expanded. Some of these same factors are no doubt influencing LSC's decision to consider amending its PAI Rule at this time.

As LSC moves forward with this process, providing its grantees with flexibility will be critical in enabling the programs to develop effective approaches for engaging more pro bono volunteers. As a result, LSC must take care to avoid providing too much specificity in the revisions. Otherwise, there is the potential to inhibit new approaches that may be developed in the future, thereby stifling the creativity and collaboration that is essential for increasing pro bono opportunities for volunteers.

Below are the ABA's comments on the specific topics regarding the PAI Rule for which LSC requested input in the Federal Register Notice of May 10, 2013:

Topic 1: Should resources spent supervising and training law students, law graduates, deferred associates, and others be counted toward grantees' PAI obligations, especially in "incubator" initiatives?

Response: The ABA, for the reasons stated below, recommends that the resources spent by LSC grantees supervising and training law students, law graduates and deferred associates be counted towards fulfilling the PAI requirements. In addition, the ABA recommends for the reasons stated below that the PAI Rule be amended to permit LSC recipients to receive PAI credit when they refer cases on contract to attorneys who are participating in incubator programs affiliated with the recipients, even if those contracts represent more than 50% of an attorney's income in the first two years of practice.

A. Law Students, Law Graduates, and Deferred Associates

Law students, law graduates, and deferred associates play an important role in assisting LSC funded programs to provide legal services to the poor. LSC recipients have utilized these groups of volunteers in a variety of ways including to conduct intake interviews, gather documents,

engage in research, and draft documents such as simple wills and pleadings. Given that a number of programs have had to reduce staff due to cuts in LSC and other funding sources, the ability to utilize these volunteers has been of enormous benefit to those programs.

LSC recipients benefit from the use of these volunteers in other, less tangible ways, as well. Due to the exposure that the law students, law graduates, and deferred associates receive to the critical legal needs of the poor, as well as to the excellent service provided by the LSC program's staff, many will become dedicated pro bono attorneys with the program, as well as financial supporters, once they are engaged in private practice. In addition, some will become leaders within the legal community and the community at large and based on their experience will become strong advocates on behalf of the program.

Utilizing these volunteers is not without a substantial dedication of time and resources by the LSC recipients. The volunteers require training in a wide range of areas including client interview skills, substantive areas of the law, and the workings of various governmental agencies with which clients interact. These volunteers also need to be closely supervised so that there is no doubt that clients are receiving the high level of service they deserve.

Currently, as interpreted by External Opinion #EX-2005-1001, the PAI Rule does not permit the time spent by program staff training or supervising law students or law graduates who are not yet members of the bar to count towards LSC grantees' PAI requirements. This interpretation has had a negative impact on the willingness of some programs to utilize these categories of volunteers. Given the time and effort that is needed to fully utilize law students, law graduates, and deferred associates, as well as their potential to become long term volunteers and supporters of LSC programs, the ABA believes LSC recipients should be able to receive PAI credit for training and supervising these volunteers.[2]

We recognize that the term private "attorney" is used in the title and throughout 45 CFR Part 1614. While not defined in that regulation, 45 CFR 1600.1 states that "[a]ttorney means a person who provides legal assistance to eligible clients and who is authorized to practice law in the jurisdiction where the assistance is rendered." As a result, it likely will be necessary for LSC to change the name of the rule and the terminology used throughout or otherwise amend its regulations to enable law students, law graduates, deferred associates, and other volunteers to be included. The ABA urges LSC to use whatever terminology it deems appropriate to ensure that grantees can count these groups of volunteers towards fulfilling the PAI requirement.

B. "Incubator" Initiatives

It is well known that as a result of the financial crisis of 2008, many law firms cut back substantially on new hires. Many newly admitted attorneys found themselves without employment and decided to start a solo practice, but lacked the practice skills or substantive expertise needed to do so successfully. Recognizing the needs of these new attorneys, some law schools and bar associations have created incubator programs to assist these attorneys in

[2] For many of the same reasons outlined above, the ABA recommends that LSC recipients receive PAI credit for training and supervising other categories of volunteers including paralegals and in-house counsel licensed to practice in another jurisdiction.

establishing their practices. In some cases, LSC recipients have been asked by law schools or bar associations in their areas to become a partner in these efforts.

Under Advisory Opinion # AO- 2009-1007, any attorney participating in an incubator program who earns more than one half of his or her professional salary from a recipient is considered a "staff attorney" under 45 CFR Part 1600. Pursuant to 45 CFR 1614.1(e), the recipient is not permitted to count as PAI any payment made to an attorney who is considered a staff attorney for two years after the attorney no longer serves in that capacity with the recipient.[3]

New attorneys who are just beginning a practice will not know if more than 50% of their income in the first year or two will come from the LSC recipient through the referral of clients. And even if they did, the best policy would be to make an exception to the current restriction at least for lawyers who interned through an incubator program with an LSC grantee. They have been trained specifically in issues of poverty law and are committed to serving the low income community. Few members of the private bar are thus better positioned to provide needed services to the clients that LSC recipients will be referring on a low-fee contract basis.[4] As a result, the ABA recommends that the PAI Rule be amended to permit LSC recipients to receive PAI credit when they refer cases on contract to attorneys who are participating in incubator programs affiliated with the recipients, even if those contracts represent more than 50% of an attorney's income in the first two years of practice.

Topic 2: Should grantees 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?

Response: The ABA, for the reasons stated below, fully supports an interpretation of 45 CFR 1614 or its amendment, if necessary, to enable LSC recipients to count towards their PAI spending requirement the time spent to: create an integrated intake and referral system; conduct intake; screen callers; and refer eligible clients to private attorneys, regardless of whether the recipient considers the case to be its own or provides oversight and follow-up to the volunteer attorney who accepts it.

There are several models of integrated intake and referral systems utilized by LSC recipients. In some geographical areas (cities, counties, or states) there is one number that is called by anyone seeking free legal services. Staff screen the calls for income and other eligibility criteria, obtain pertinent facts and then determine to which legal aid or pro bono program the case should be referred. In some cases, this type of intake system also includes brief advice for those eligible

[3] Under the envisioned incubator program that was the subject of # AO 2009-1007, new attorneys would serve three or four internships for the LSC recipient for which they would be paid. Following that period of employment with the recipient, the attorneys might have other internships with other organizations. Once the internships were completed, the attorneys were expected to establish an independent private practice providing legal services to low income persons in the community. During the following internships and once the practice was established, the recipient wanted to be able to refer eligible clients to the attorneys for which the attorneys would be paid a low fee and the LSC recipient would count those towards the PAI requirement.

[4] The same logic applies to former LSC staff attorneys who leave the program to begin a private practice. As a result, the ABA recommends that as LSC reviews the entire PAI Rule, it consider eliminating the policy set forth in 45 CFR 1416(e).

clients for whom brief services suffice. Another integrated intake and referral system is one that is specific to a given LSC recipient. In that case, the LSC recipient conducts intake and screening and then determines if the eligible client matter is one that should remain in-house or be referred to the pro bono volunteer lawyer program in the service area. In either type of integrated screening and referral system, pro bono programs and the volunteer lawyers that participate in them benefit by receiving carefully screened cases, saving both time and resources.

LSC has encouraged its grantees to collaborate with pro bono programs and to integrate them fully into the statewide delivery system. Integrated intake and referral systems are an excellent example of how grantees have heeded that call. However, given the views expressed in Advisory Opinion #AO 2011-001, some LSC recipients likely will reconsider the value of expending their resources on these systems, and others that may have considered taking part may reconsider participating. This is the case because under that opinion, recipients cannot count towards PAI the value of the time spent in intake, screening, and referral of LSC-eligible clients unless they counted the case as their own and engaged in oversight and follow-up.

In a memorandum to Victor Fortuno dated July 14, 2011, Robert Stein and A. Michael Pratt, the then chairs of SCLAID and the Pro Bono Committee, respectively, requested that the opinion be withdrawn because it "…. misrepresents 45 CFR 1614, makes broad statements that are likely to be misread, and inappropriately relies upon poorly conceived and otherwise unarticulated policy. The overall impact of the opinion will be to discourage and impede the delivery of pro bono legal services by pro bono lawyers, at a time when Congress and others are calling for an increase in such services." The memo contains a detailed analysis of the problems with the opinion and why it should be withdrawn. A copy of the memorandum is attached.

There is no doubt that providing oversight and follow-up on cases referred to pro bono attorneys is valuable for quality assurance purposes, but that is not a function that has to be carried out by the LSC recipient. The ABA believes that most pro bono programs that refer cases to members of the private bar engage in these practices, as recommended in the *Pro Bono Standards*. Specifically, *Pro Bono Standard 4.5-Tracking and Oversight* provides that "A pro bono program should establish a system for obtaining information regarding the progress of matters placed with volunteers. Based upon the information received, the program should provide the assistance required, subject to any limitations imposed by rules of professional conduct."[5]

The ABA fully supports an interpretation of 45 CFR 1614 or its amendment, if necessary, to enable LSC recipients to count towards their PAI spending requirement the time spent to: create an integrated intake and referral system; conduct intake; screen callers; and refer eligible clients to private attorneys. That is our position regardless of whether the recipient considers the case to be its own or provides oversight or follow-up to the volunteer attorney who accepts it.

[5] *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means*, American Bar Association (1996).

Topic 3: Should LSC 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?

Response: The ABA recommends that LSC re-examine said rule, as currently interpreted, but recognizes this topic involves nuances and requires more detailed analysis as set forth below.

Our response to Topic 2 above also contains our response to the question posed by this topic as it pertains to integrated intake and referral systems in which eligible clients are referred to pro bono programs. However, based upon the items for discussion listed under this topic in the Federal Register Notice of May 10, 2013, it appears that the emphasis here is on brief service clinics, which will be discussed below.

There are a wide range of brief service clinics that have been developed over the past few years that are sponsored by bar associations, community groups, or the local courts. Some focus on a specific group such as veterans or battered spouses; others focus on a specific area of the law such as divorces or evictions. Many are held in locations that are convenient for clients such as community centers, schools or churches, as well as at times (evenings and weekends) that respond to the needs of working people.

These clinics are often popular with lawyers because they are for a discrete period of time (an evening or an afternoon) and a discrete matter. In addition, some of the clinics focus in an area of the law that lawyers have expertise in, such as wills or divorce, rather than an area of the law for which specialized knowledge of poverty law is required.

A number of LSC grantees have played important roles in assuring the success of these brief service clinics in a variety of ways including taking part in the clinic's development, providing training of staff and volunteer lawyers who staff them and being available for consultations onsite, as needed. This involvement has enabled LSC grantees to work collaboratively with the bar, the courts and community groups to extend needed legal help to those who cannot otherwise afford it.

The ABA believes that to the extent that eligible clients are being assisted at these clinics, LSC grantees should receive PAI credit for any support they provide to the brief service clinics under the same reasoning expressed in response to Issue 2 above. As to permitting LSC recipients to obtain PAI credit for assistance provided to brief service clinics that do not engage in client eligibility screening, the ABA plans to study the issue further and provide comments at a later date. While we are supportive of the development of these clinics and view them as an innovative approach to engaging pro bono lawyers and serving the low-income community, we also recognize the complexities of permitting LSC recipients to count them as PAI, due to a number of considerations, including possible statutory constraints. Hearing the views of others during the Regulatory Workshop to be held in Denver on July 23, 2013, will help to inform the ABA's views, which will be provided to LSC at a later date.

The ABA appreciates the opportunity to present these comments and looks forward to participating in the upcoming Regulatory Workshops at which these issues will be further explored.

Sincerely,

Lisa C. Wood

Attachment

cc: Laurel Bellows, ABA President

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MEMORANDUM

To: Victor M. Fortuno, General Counsel, Legal Services Corporation

Cc: James M. Sandman, President, Legal Services Corporation

From: Robert E. Stein, Chair, ABA Standing Committee on Legal Aid and Indigent Defendants
A. Michael Pratt, Chair, ABA Standing Committee on Pro Bono and Public Service

Re: Advisory Opinion # AO – 2011-001

Date: July 14, 2011

We write on behalf of the ABA Standing Committees on Legal Aid and Indigent Defendants (SCLAID) and on Pro Bono and Public Service (the Pro Bono Committee) to request withdrawal of LSC Office of Legal Affairs Advisory Opinion # AO – 2011-001. We believe that the opinion misinterprets 45 CFR 1614, makes broad statements that are likely to be misread, and inappropriately relies upon poorly conceived and otherwise unarticulated policy. The overall impact of the opinion will be to discourage and impede the delivery of pro bono legal services by private lawyers, at a time when Congress and others are calling for an increase in such services.

At the outset, we want to emphasize that the ABA fully supports an effective, but flexible, system for involving private lawyers in the delivery of legal services to the poor. To achieve this goal, LSC must allow recipients of its funding the ability to innovate and adopt creative approaches. The applicable regulations should be interpreted to permit flexibility in program design, so long as good-faith efforts are made to involve private lawyers with reasonable assurances of quality service for clients.

The situation described in the opinion constitutes a direct delivery system that complies with the regulation, and therefore recipient expenditures in connection with participation in that system are properly included within the recipient's PAI requirement.

The opinion, on page three, describes "a situation in which the recipient participates in a system with a number of volunteer lawyer programs in its service area." It provides some details of how that system operated. It states that:

> "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…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."

We do not believe that the facts recited are sufficient to establish that the system described is "1614 non compliant." 45 CFR 1614.3 (a) specifically contemplates that the requirements of the regulation may be met by activities that will be considered "direct delivery" if they are programs "…such as organized *pro bono* plans…and/or organized referral systems." (emphasis added). Part 1614.3(d) establishes minimum necessary components required for a system to be considered a direct service system, including intake and case acceptance procedures consistent with the recipient's priorities, and elements necessary to assure quality control and support for private attorney volunteers. Notably, this subsection of the regulation does not require that the recipient itself must provide these components. Nor does it require that the clients referred must be considered clients of the recipient. Clearly, the regulation contemplates that a recipient may participate in a system, and receive PAI credit for the costs of such participation, so long as the system as a whole (both those portions of it undertaken directly by the recipient, and those portions of it that are undertaken by organizations receiving referrals) includes the necessary components.

The facts recited in this opinion merely state that the case intake and acceptance procedures of the volunteer lawyer programs "are not necessarily consistent" with the recipient's priorities. There is no specific finding that these procedures were inconsistent. And there are no findings that the volunteer lawyer programs fail to meet the other requirements of Part 1614.3(d). Therefore, the bald statement in the advisory opinion that the volunteer lawyer programs are "1614 non-compliant direct delivery systems" is unsupported and should be reconsidered.

Moreover, the implications of this portion of the opinion will have serious consequences for many, many pro bono delivery systems across the nation. The opinion can be read to imply that persons served must be considered clients of the recipient if the recipient is to consider the costs of referring those clients within its PAI requirement.1 The opinion can also be read to require the recipient to itself conduct all the other quality assurance components set forth in Part 1614.3(d), when this is not in fact required by the regulation and is not practical.2 This opinion, by its terms and by the implications it suggests, will put into doubt the regulatory validity of a substantial number of legitimate PAI programs nationwide.

1 In fact, LSC External Opinion EX-2008-1001 takes exactly this position in a similar context, and we find that aspect of the earlier opinion to be equally troubling and inconsistent with the regulation.
2 What is considered a "case" or "client" for purposes of recipient reporting via the CSR system should be differentiated from the requirements of Part 1614.

Alternatively, the recipient's participation in the referral system is a valid activity within Part 1614.3(b), and therefore costs of such participation are properly included within recipient's PAI requirement.

The opinion gives a very narrow and confusing interpretation to Part 1614.3(b) that is inconsistent with the plain language of the regulation and the policy the regulation is designed to achieve. On page 4, the opinion suggests that this subsection does not contemplate any activity that might result in direct client services and that it only authorizes activities similar to "support." We believe that this is an unfortunate and restrictive reading of the regulation that violates both the plain language and purpose of the regulation.

The opinion states that since the word "support" is used in subsections 1614.3 (b)(1) and (2), that word must be intended to be used in connection with all the activities contemplated within 1614.3(b). This is not the case. Principles of regulatory construction do not require that specific words used in subsections must then be read into all portions of the general section of the regulation. The introductory portion of 1614.3(b) specifically says "Activities … may also include, but are not limited to…:" (emphasis added). The construction adopted by the opinion flies in the face of these words, and adopts the view that indeed the activities are "limited to." The preamble to the regulation clearly contemplated a broader approach, stating that "Under new paragraph (b), at the option of recipients, PAI programs may also include support activities and other forms of indirect delivery of service." (emphasis added).

Further, Part 1614.3(b)(2) authorizes PAI credit for "Support...in furtherance of activities undertaken pursuant to this Section including …technical assistance,…use of recipient facilities…" There is no reason that recipient activity to refer a case to private attorneys could not be considered to be either "technical assistance" or "use of recipient facilities." Also, it can be argued that intake and referral are similar in nature to the other "support" activities described, so may well be considered to be within the activities contemplated by the word "including."

Lastly, the statement in the opinion that subsection (b) "…is not intended to allow for activities beyond a range of non-direct delivery support activities…" is inconsistent with the very examples given in subsections (1) and (2), as many of those examples do involve elements of direct delivery such as research and advice and counsel.

The opinion inappropriately states, and relies upon, an otherwise unarticulated LSC policy that some types of referral activities are not appropriately allocated toward a recipient's PAI requirement.

LSC policy is expressed through its published regulations, as well as through other publicly available written documents such as program letters and board adopted protocols.. We are unaware of a set of additional unwritten policies that may affect the assessment of recipients. To the extent that such policies exist, they are inconsistent with requirements of government transparency and accountability expressed in the Sunshine Act and other sources. If a regulation is extremely unclear or ambiguous, the solution is to engage in public rulemaking to clarify the language and, in the process, to seek input on what the policy determination ought to be. In the

meantime, the language of the regulation should be enforced as written, and not as interpreted based on an otherwise unarticulated LSC "policy" as announced in an advisory opinion by the Office of Legal Affairs, particularly when that policy is inconsistent with the regulatory language and its purpose.

SCLAID and the Pro Bono Committee believe that there are both tangible and intangible benefits that result from the involvement of private attorneys in the work of legal aid programs. The activities of recipients to involve private attorneys must certainly be consistent with the clear requirements of the regulation, and should be in pursuit of the goal of quality service to clients. But local programs and governing boards should be allowed extensive flexibility in designing good-faith approaches to PAI.[3] The approach should not be one based on an enforcement ideology that asks "can LSC be assured that such activities" effectuate the regulation. Instead, interpretation of Part 1614 should examine whether an activity that has been conducted in a good-faith effort to involve private attorneys and is consistent with the purposes of the regulation, is permitted by the plain language of the regulation. Moreover, this regulation should not be interpreted and applied in a manner that is inconsistent with its plain language and purpose.

For all the reasons set forth above, we urge that Advisory Opinion # AO – 2011-001 be withdrawn.

Thank you for your consideration.

3 See Part 1614.3(c), stating "The specific methods to be undertaken by a recipient to involve private attorneys in the provision of legal assistance to eligible clients <u>will be determined by the recipient</u>'s taking into account the following factors…" (emphasis added)