



OFFICE OF LEGAL AFFAIRS

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

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

Date: July 8, 2013

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

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LSC has selected six panelists for the July 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 panelist applications or comments from six other people, five of whom also submitted comments, and some of whom may be invited to participate in the second workshop to be held on September 17, 2013. This memo summarizes all of the materials submitted to LSC. The background information about the panelists and their comments are reprinted in the July board books and are posted on the PAI rulemaking workshop webpage on [www.lsc.gov](http://www.lsc.gov) at <http://bit.ly/PAIrulemakingdetails>. Please contact Mark Freedman, [mfreedman@lsc.gov](mailto:mfreedman@lsc.gov), 202-295-1623, if you would like to have the set of materials sent to you via email or as a printed binder.

The topics and related items for discussion are set forth in the Federal Register notice at 78 Fed. Reg. 27339 (May 10, 2013), which is included in the board books. 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	Organization	Topic 1	Topic 2	Topic 3	Other
Silvia Argueta	National Legal Aid and Defender Association (NLADA)	X	X	X	X
Steve Gottlieb	Atlanta Legal Aid Society	X	X	X	
Judge Mary Katherine Huffman	Greater Dayton Volunteer Lawyers Project	X	X		
Joan Kleinberg	Northwest Justice Project (Wash.)		X	X	
Kenneth Penokie	Legal Services of Northern Michigan	X		X	
Lisa Wood	ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID)	X	X	X	X

Commenter	Organization	Topic 1	Topic 2	Topic 3	Other
Janice Chiaretto	Statewide Legal Services of Connecticut				X
Lynda Krupp	Legal Aid and Defender Association (Mich.)	X	X	X	X
Linda Warren Seely	Memphis Area Legal Services	X			
William Tanner	Legal Aid Society of Orange County (Calif.)	X			
David Udell	National Center for Access to Justice	X			

### COMMENTS FROM PANELISTS

#### Panelist: Silvia Argueta, NLADA

Silvia Argueta is the Chair of the Regulations and Policies Committee of the National Legal Aid and Defender Association (NLADA) and Executive Director of the Legal Aid Foundation of Los Angeles. Ms. Argueta intends to address all of the topics for discussion.

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 encourages "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.

Panelist: Steve Gottlieb, Atlanta Legal Aid Society

Steve Gottlieb is the executive director of the Atlanta Legal Aid Society, an LSC grantee. Mr. Gottlieb intends to address all of the items for discussion. Atlanta Legal Aid encourages a less restrictive and more long-term view of private attorney involvement than the present regulation permits.

- Topic 1: Atlanta Legal Aid supports inclusion of law students, law graduates, and deferred associates in the PAI rule.
- Topic 2: Atlanta Legal Aid encourages methods of involving private attorneys in more limited capacities than full client representation. Examples are screening, advice, and referrals.
- Topic 3: Atlanta Legal Aid notes that private attorney interest may not align with grantee priorities, and some private attorneys may be willing to only accept limited and non-urgent cases. Furthermore, he notes that clinics and hotlines are methods of involving private attorneys in which eligibility screening may interfere with providing immediate services.

Panelist: Judge Mary Katherine Huffman, Greater Dayton Volunteer Lawyers Project

Judge Huffman is a General Division Judge in the Court of Common Pleas in Dayton, Ohio. Judge Huffman is the immediate past president of the Greater Dayton Volunteer Lawyers Project and continues to serve on its Board of Trustees. Judge Huffman intends to address Topics 1 and 2, but not Topic 3.

Judge Huffman emphasizes concerns about limitations in the current private attorney referral system. Judge Huffman cautions that LSC should consider a number of issues before considering expansion of the scope of permissible PAI activities. In particular, Judge Huffman focuses on ensuring that LSC grantees have viable pro bono programs that make full use of interested and available private attorney resources.

Panelist: Joan Kleinberg, Northwest Justice Project (NJP)

Joan Kleinberg is the Director of Strategic Initiative and Private Bar Involvement at the Northwest Justice Project, an LSC grantee serving the state of Washington. Ms. Kleinberg intends to address Topics 2 and 3, but not Topic 1.

- Topic 1: Although NJP will not address Topic 1, NJP supports the recommendation.
- Topic 2: NJP supports the recommendation and will address NJP's intake and referral system, the limitations on counting this work as PAI under Part 1614, and alternate methods of accountability for pro bono referrals.
- Topic 3: NJP supports this recommendation and will address NJP's use of volunteers in brief service clinics, screening for LSC eligibility, non-direct support, limitations counting this work as PAI under Part 1614, and methods of accountability.

Panelist: Kenneth Penokie, Legal Services of Northern Michigan

Mr. Penokie is the Executive Director of Legal Services of Northern Michigan (LSNM), an LSC grantee. Mr. Penokie will address Topics 1 and 3, but not Topic 2.

- Topic 1: LNSM identifies obstacles to the recruitment of pro bono legal services that are not addressed in the Pro Bono Task Force Report, especially those faced by programs in sparsely populated rural areas with few attorneys.
- Topic 3: LNSM discusses how the current rules, especially regarding data collection, impair the success of novel pro bono programs by emphasizing traditional full screening and follow-up that might not be appropriate to limited pro bono services. Tailoring accountability to the level of service provided may increase the ability to leverage PAI funds.

Panelist: Lisa Wood, ABA SCLAID

Lisa Wood is the Chair of the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and a partner and chair of the litigation department at Foley Hoag LLP in Boston. Ms. Wood will address all three topics. Generally, the ABA recommends increasing flexibility in the regulations to foster creative and collaborative approaches. The ABA cautions against over-specificity that could inhibit novel initiatives. The ABA also submitted its July 14, 2011, memorandum to LSC requesting withdrawal of OLA opinion AO-2011-001.

- Topic 1: The ABA supports this recommendation and notes that law students, law graduates, deferred associates, and others present valuable opportunities to leverage volunteers while fostering commitments to pro bono services. "Incubator" initiatives involving contract work for newly admitted attorneys are valuable pro bono opportunities.
- Topic 2: The ABA supports eliminating requirements that, in order for intake, screening and referral activities to be allocable to an LSC grantee's spending requirements, a grantee must conduct follow-up of private attorney referrals and consider those referrals

as grantee cases. The ABA states that the policy set forth in AO-2011-001 is overbroad, discourages pro bono involvement, and was not adopted through a public process.

- Topic 3: The ABA supports examining this issue to consider how to balance the need for screening for statutory eligibility with effective operation of brief service clinics. The ABA expects to develop a position on this topic based on further review and the views of others at the PAI workshop in July.

#### COMMENTS FROM OTHERS

Commenter: Janice Chiaretto, Statewide Legal Services of Connecticut

Janice Chiaretto is the Executive Director at Statewide Legal Services of Connecticut (SLSC), an LSC grantee. Ms. Chiaretto submitted comments that addressed the PAI requirements but did not specifically relate her comments to the three topics. SLSC recommended:

- no increase in the 12.5% requirement,
- elimination of the 12.5% requirement to dedicate scarce funds for operating expenses,
- development of competitive grants, similar to TIGs, to foster PAI ventures, and
- seeking additional funding for PAI grants, similar to TIGs.

Commenter: Lynda Krupp, Legal Aid and Defender Association (Mich.)

Lynda Krupp is the Managing Attorney of the Private Attorney Involvement Unit at the Legal Aid and Defender Association (LADA) in Detroit, Michigan. LADA's comments:

- support and encourage asking Congress to separately fund a Pro Bono Innovation/Incubation fund,
- emphasize the need for adequate staff and resources for pro bono programs,
- welcome the recognition of a need for substantial funding for infrastructure for pro bono programs,
- support including law students and law graduates as pro bono work (Topic 1),
- support counting matters towards PAI requirements, and
- support the following, if new PAI funding is available:
  - using PAI resources to increase screening, advice, and referral programs (Topic 2), and
  - using PAI resources for supervision of pro bono volunteers in new incubator/innovation projects.

Commenter: Linda Warren Seely, Memphis Area Legal Services

Linda Warren Seely is the Director of Pro Bono Projects at Memphis Area Legal Services, an LSC grantee, and the President of the Memphis Bar Association. She submitted comments on behalf of the Memphis Bar Association Access to Justice Committee. These comments were limited to Topic 1 and discuss the following:

- the success of the Memphis Saturday Legal Clinic,
- the interest of volunteers and externs from law schools, paralegal schools, and undergraduate schools to volunteer with Memphis Area Legal Services,
- the availability of paralegals to handle social security disability hearings pro bono,
- permitting counting for PAI purposes training, supervision, and other work related to non-attorney volunteers in pro bono activities,
- using pilot programs to look for unintended consequences, fraud, or waste, and
- concerns about LSC requirements discouraging private attorneys from volunteering.

Commenter: William Tanner, Legal Aid Society of Orange County (Calif.)

William Tanner is a Directing Attorney at the Legal Aid Society of Orange County (LASOC) in California. LASOC's comments involve Topic 1, especially incubator programs. LASOC discusses the importance of involving law students, recent graduates, and newly admitted attorneys in public interest work, including paid work in pro bono and "low bono" incubator programs providing service to low- and moderate-income communities. LASOC also discusses how the current definition of private attorney in Part 1614 does not account for these types of volunteer activities.

LASOC also noted the following three concerns regarding fraud, waste, or abuse:

- avoiding excessive emphasis on law students instead of admitted attorneys by setting proportional limits on the use of law students or the amount of PAI funds used for student or deferred associate efforts,
- setting clear limits on counting the work of former legal aid program staff attorneys in PAI activities (within two years of departure from the LSC-funded legal aid program), and
- setting clear rules for involving attorneys in paid PAI programs when they have little or no other professional income and might otherwise not qualify as "private attorneys" under the PAI rule if they are paid by the LSC grantee.

Commenter: David Udell, National Center for Access to Justice

David Udell is the Executive Director of the National Center for Access to Justice and Visiting Professor from Practice at Cardozo Law School. Mr. Udell submitted comments on Topic 1 supporting the recommendation. Mr. Udell's comments emphasize the importance of including law students in pro bono programs that qualify for PAI credit.