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

Re: 45 CFR 1614
Proposed Revision to the Private Attorney Involvement (PAI) Regulation

Dear Mr. Freedman,

I am writing in response to the Legal Services Corporation (LSC) request for public comment on proposed revisions to the Private Attorney Involvement (PAI) regulation, 45 CFR 1614. This comment is submitted on behalf of the State Bar of Michigan.¹

The State Bar of Michigan has a long and proud tradition of supporting and encouraging pro bono among its members.² We enjoy a strong and positive relationship with all of Michigan's LSC-funded programs, with the Michigan State Bar Foundation, and with many more community-based programs that deliver legal services to the poor and engage State Bar members in pro bono work. We also are proud to participate in the annual American Bar Association "ABA Day" lobbying efforts on the Hill and have lobbied for LSC funding since that activity began many years ago. The comments provided here are based on the State Bar's long-standing tradition of support for pro bono work and for Michigan's LSC-funded programs. They are also based on the findings and strategies to expand pro bono in Michigan as identified in the 2013 "An Assessment of Pro Bono in Michigan"³ report commissioned by the State Bar and the Michigan State Bar Foundation.

The State Bar of Michigan appreciates LSC's leadership in convening its Pro Bono Task Force and issuing the October 2012 Pro Bono Task Force Report.⁴ We support each of the three changes in the regulation recommended by the Task Force, and suggest an approach to pro bono that we believe LSC should take in revising the regulation, as well as additional comments on LSC's specific recommendations.

¹ The comment was drafted by the Bar's Pro Bono Initiative. The PBI draft was reviewed and approved by the Bar's Committee on Justice Initiatives and the Board of Commissioners.

² A listing of the extensive Bar efforts to support and expand pro bono can be found on the Bar's website: <http://www.michbar.org/programs/ATJ/home.cfm>

³ <http://www.michbar.org/programs/pdfs/probonoreport2013.pdf>

⁴ http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf

An Approach to Pro Bono. While we support each of the three recommended changes to the regulation, we believe that the most important guidance that the LSC Board can provide is to change the Corporation's approach in reviewing its grantees' PAI activities.

We urge LSC to specifically recognize that:

1. Pro Bono is bigger than LSC. There are many examples of pro bono activities that go beyond the missions of civil legal aid programs: death penalty work, corporate and transactional work for non-profit corporations, and immigration work. Many leadership law firms embrace this work. Both the firms and LSC programs must work with bar associations and with the many other legal service providers to create a full range of pro bono opportunities for lawyers and law students, and to create a culture where pro bono is the expectation for every lawyer and law student.

LSC programs must be active partners in this dynamic network. While the cases and matters referred by these programs must be LSC-permissible work, LSC must encourage its programs to be part of a larger coordinated pro bono system.

This new perspective would change how LSC and its grantees think about pro bono and relate to bar associations and law firms. LSC should be an active partner with the ABA and the IOLTA community on pro bono with LSC talking the lead on civil legal aid to low income persons and the other entities taking the lead on non-LSC pro bono work. LSC grantees should be part of their states' pro bono network and, while directly engaging bar associations and law firms on their pro bono work, should recognize and support the broader pro bono system.

2. Successful pro bono programs are built on flexibility and innovation. The current pro bono regulation was promulgated in 1984. Since that time, the practice of law has changed dramatically and evolving technologies have altered how lawyers interact with their clients. Better programs have incorporated these changes into their pro bono programs as the technology has developed, such as volunteers staffing hotlines, answering questions over the internet, and interacting with self-represented litigants via live chat services.

We are pleased that the proposed rule changes correct three difficult LSC opinions promulgated over the past several years. While we agree that it is important to fix these past errors, it is more important to direct LSC staff to review future PAI programs in the spirit of innovation and flexibility critical to successful pro bono efforts.

Many pro bono lawyers are very busy people, whose time is extremely valuable; all are volunteers. In order to inspire a busy volunteer to give of his or her time, programs must make the volunteer experience rewarding and efficient. While time consuming regulatory compliance activities may be appropriate for government-funded programs, these barriers must be minimized in volunteer lawyer programs. It is critical that LSC: (1)

permit its recipients to develop programs that respond to the work that volunteer lawyers want to do and the ways in which they can best do it; and (2) recognize the constraints on rural practitioners and permit recipients to develop programs that are effective in rural areas.

We recommend that LSC add a statement to 1614.2(c) to the following effect:

“In reviewing the activities of recipients under this rule, LSC recognizes the need for flexibility—to meet the changing nature of client needs and the changing demands of the practice of law—and innovation—including recipients’ efforts to incorporate new technologies into their programs.”

We recommend that LSC add the following new subpart 1614.6(f) and renumber the current 1614.6(f) as 1614.6(g):

“In order to support and encourage innovation in pro bono delivery, LSC has the authority in appropriate circumstances to approve a waiver of existing regulatory provisions as applied to a private attorney involvement program. Such waivers shall be granted in the sound discretion of the Corporation if the Corporation finds that the intent of the program is to expand pro bono opportunities by reaching out to a new audience of volunteers or to expand or improve services to clients by providing services in a new or better way. A waiver under this part may be temporary or permanent. The Corporation may set a time to review a temporary waiver and may require a recipient to provide an evaluation report on a temporary program.”

Finally, we recommend that LSC adopt the following test for PAI-permissible activity:

If the activity is a good faith effort by the recipient to engage members of the private bar in pro bono and to expand services to client eligible persons, it should be a permissible PAI activity under 45 CFR 1614. The test cannot be: “100% of all persons benefitted must document eligibility under 45 CFR 1611.” LSC currently recognizes outreach and education activities as LSC-permissible without individualized eligibility determinations; it should apply this same approach to private attorney involvement activities.

Comments on LSC’s specific recommendations.

1. Law Student Pro Bono. We fully support the recommendation of the Task Force that “resources spent supervising law students, law graduates, deferred associates, and others should be counted toward grantees’ PAI obligations.”

A major positive development in Michigan is the active involvement of the state’s law schools in educating their students regarding their professional responsibility to provide

free services to those of limited means. These programs include active partnerships with legal services programs⁵, pro bono pledge programs, clinical law programs, externship programs, and law school sponsored pro bono programs. The hours LSC programs spend working with students is a community investment in the future of legal services. These activities should be recognized and encouraged by LSC.

2. Screening and Referral. Both Advisory Opinions 2009-1004 and 2011-001 create unfortunate barriers to pro bono engagement and should be explicitly overruled. LSC programs should be encouraged to create efficient intake systems that involve private attorneys in the intake process and that are integrated with pro bono referral programs.

Since AO 2009-1004 arose in Michigan, we can note first-hand two negative consequences flowing from that decision. First, it created a negative incentive for private lawyer involvement in a coordinated intake system. Programs can still use the coordinated multi-program hotline, but they were directed not to count the cases as LSC cases. Second, as a result of 2009-1004, there are approximately 10,000 cases each year that are handled by a non-LSC funded law firm for LSC-eligible clients and paid for by LSC-funded programs, but not counted in LSC's CSR reporting system. We understand that LSC has a goal of communicating the work of its grantees to Congress in a way that gives the full picture of its services offering more reason for Congress to financially support LSC. We support that goal; however, we think a rule that directs LSC grantees not to count 10,000 cases for eligible clients undermines that goal.

3. Revised case documentation in PAI cases. The Task Force notes that strict compliance with LSC case documentation rules often undermines innovative pro bono programs. Cited was Advisory Opinion 2008-1001⁶ which disallowed an Ohio pro bono program based on church and community sponsored walk-in clinics staffed by pro bono lawyers. We agree with the Task Force recommendation that the regulation be reexamined and revised to support program efforts “to develop innovative programs to promote efficiency and effectiveness in their partnerships with others”⁷ and to encourage pro bono participation.

If LSC were to adopt a test asking if a program is “a good faith effort by the recipient to engage members of the private bar and to expand services to client eligible persons,” the Ohio clinics would not have been rejected.

4. Internet Representation Project. Although the Task Force did not discuss the Internet Representation Project (IRP) developed by Legal Services of Northern

⁵ LSC has recognized the longstanding partnership between the University of Michigan Law School and Legal Services of South Central Michigan, see LSC Program Letter 2007-2.

⁶<http://www.lsc.gov/sites/default/files/LSC/lscgov4/EX20081001RequirementforPersonsAssistedbyPAIAAttorneys.pdf>

⁷ LSC Task Force Report at p. 22.

Michigan (LSNM) with special grant funding from the Michigan State Bar Foundation and LSC's Technology Initiative Grant (TIG) program, this is another innovative rural pro bono program rejected by LSC. LSNM serves a vast geographic region (36 counties) with few lawyers. The IRP permits clients to complete an online eligibility screening tool. LSC-eligible clients are sent to a panel of pro bono attorneys who provide online advice to the clients. Through the IRP, a lawyer can provide advice in 2 to 3 cases in half a day; a lawyer who accepts a case in court is often facing a half day drive to attend each hearing in this rural area.

Like the Ohio clinic program, the IRP was rejected under the analysis of Advisory Opinion 2008-1001. Because there wasn't a live-person determination of LSC eligibility, LSNM was directed not to count the IRP cases. Like the Ohio clinic program, the IRP would be permissible under the analysis suggested in this letter.

Conclusion

The State Bar strongly supports pro bono. Our efforts to engage Michigan lawyers in pro bono work would be greatly enhanced if our partnership with LSC allowed a broader view of pro bono. It is worth noting that even when a locally-developed, innovative, cost-effective, efficient program has been rejected by LSC, most Michigan LSC grantees opted to continue their programs using non-LSC funding. This means that pro bono, as reported to the Michigan State Bar Foundation, and discussed within the State Bar, is much broader and richer than the limited version recognized by LSC. We encourage LSC to recognize and support this broader vision.

We also note that 45 CFR 1614 is a creation of a 1984 LSC Board, not of Congress. The LSC Board has the authority to wholly revise the regulation. We believe that Congress supports the direction suggested by the LSC Pro Bono Task Force. We think that this LSC Board should be informed by the current concept of pro bono and motivated to support real private sector engagement, innovation and efficiency.

We applaud the efforts of the LSC Pro Bono Task Force and encourage the LSC Board to adopt the Task Force recommendations through the approach suggested in this letter.

Respectfully submitted,



Bruce A. Courtade
President