

**National  
Center for  
Access to  
Justice**  
*at Cardozo Law School*

“Thou Shalt Not Ration Justice”  
– Hon. Learned Hand

August 28, 2013

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

Re: Comments & Request  
to Appear as a Panelist

- 45 CFR 1614 (78 FR 27739)
- <https://federalregister.gov/a/2013-11071>
- <https://www.federalregister.gov/articles/2013/08/12/2013-19383/private-attorney-involvement#h-12>

Dear Mr. Freedman,

I am writing to submit these comments on behalf of the National Center for Access to Justice in support of the recommendation to modify the Legal Services Corporation (LSC) regulation on Private Attorney Involvement (PAI), 45 CFR 1614, to authorize LSC programs to exercise their discretion to count toward satisfaction of their PAI Requirement the expenditures they make on involving law students and law graduates in the provision of legal services.

**I. Introduction & Qualifications**

In its recent report, the LSC Pro Bono Task Force observed: “[A]t least 50% of people seeking help from LSC funded organizations – and eligible to receive it – are turned away because of insufficient resources. Other studies have found that 80% of the civil legal needs of low-income people go unmet.”<sup>i</sup>

It is with an understanding of the seriousness of this “Justice Gap,” which is pervasive and which has been broadly documented, that NCAJ has undertaken a project to examine opportunities for strengthening law student pro bono service as a means of increasing access to justice. NCAJ’s activities include the following:

- NCAJ is working to replicate in the 50 states a new law in New York that conditions admission to the New York Bar on completion of 50 hours of pro bono service.
- NCAJ is working to establish an accreditation standard for law schools that would require every law school to assure that its students perform 50 hours of pro bono service prior to graduation.
- NCAJ is promoting the replication of model pro bono programs across the country that succeed in engaging law students in important activities that respond to people’s otherwise unmet legal needs.
- NCAJ has promoting development of software applications that would help law schools and other stakeholders match law students to pro bono opportunities, and that would also track the amount of law student pro bono performed, the quality of the experience from the students’ perspectives, and the impact of the activities as an instrument of reform and as a service to clients.
- NCAJ is preparing a national report on the ways in which law students can more effectively provide pro bono service that responds to people’s otherwise unmet legal needs.

NCAJ is the single academically affiliated non-partisan law and policy organization exclusively committed to assuring access to our civil and criminal justice systems. In carrying out its policy reform initiatives, NCAJ partners with the bar, judiciary, law schools, legal services and indigent defense communities, and other stakeholders in the justice system. At the same time, its independence as a free-standing non-profit organization can help its allies to see the world through the eyes of those who rely upon them. NCAJ’s tools include litigation, books and reports, public education and public advocacy, conferences, and legislative drafting. NCAJ is located at Cardozo Law School, where it teaches the Access to Justice Clinic each spring. For information about NCAJ and its initiatives to increase access to the justice system, visit [www.ncforaj.org](http://www.ncforaj.org).

## **II. The PAI regulation, problem, and recommendation**

*The PAI regulation.* In its current form, the PAI regulation requires LSC grantees to commit 12 1/2% of their annualized basic field award to involving “private attorneys in the delivery of legal services.” The text of the regulation states: “[A] recipient of Legal Services Corporation funding shall devote an amount equal to at least twelve and one-half percent (12 1/2 %) of the recipient's LSC annualized basic field award to the involvement of private attorneys in such delivery of legal services; this requirement is

hereinafter sometimes referred to as the “PAI requirement.”

*The Problem.* The problem with the PAI regulation in its present form is that in its command to LSC programs to involve “private attorneys” it omits all mention of the possibility of involving “law students” and/or “law graduates.”<sup>ii</sup> In light of the structure of the regulation, if LSC grantees spend resources on administration or supervision of pro bono activities that involve law students or law graduates, those expenditures may not be counted toward satisfaction of the PAI requirement. Yet, as NCAJ has found through its research, initiatives involving the pro bono activities by law students can constitute extraordinarily valuable and dynamic responses to the justice gap. Indeed, LSC grantees are discouraged by the regulation from relying on students and graduates and are permitted by the PAI regulation to satisfy the PAI requirement only by relying on private attorneys, even in circumstances in which private attorneys are unavailable while students and recent graduates are ready, willing, and able to help.

*The Recommendation.* In its report, the Pro Bono Task Force recognizes this problem with the regulation and recommends a solution. The Task Force observes: “Engaging students and instilling a lasting commitment to pro bono work is wholly consistent with the aims of the PAI regulation.”<sup>iii</sup> The Task Force further states, “The LSC Board therefore should consider amending the regulation to allow grantee organizations to count as PAI expenses the funds they expend on training and supervising law students.” Finally, in its formal recommendation, 2(a), the Task Force states: “Resources spent supervising and training law students, law graduates, deferred associates, and others should be counted toward grantees’ PAI obligations, especially in “incubator” initiatives.”<sup>iv</sup>

### **III. NCAJ Supports the Recommendation**

For the reasons set forth below, NCAJ supports recommendation 2(a) as an important step that will increase opportunities for LSC grantees to involve law students and law graduates in the delivery and support of legal services for vulnerable people.

#### *1. LSC programs are being asked to do more with less.*

Across the country, LSC programs are reeling from budget cuts that have forced layoffs and that have created pressure to reduce service.

At the same time, LSC programs, and the courts themselves, have seen an increase in the number of vulnerable people in need of help.

These changes have taken place in an environment in which, as noted above, legal services programs are by all accounts already turning away one potential client for every client accepted.

While LSC grantees inevitably must spend money to make effective use of law students and recent law graduates, the students and recent graduates offer

LSC grantees a relatively inexpensive and potentially effective way of extending their reach to help more people with fewer resources.

With appropriate administration and supervision, LSC programs can potentially engage larger numbers of students, for substantial numbers of hours, to tackle significant problems, with enormous potential energy, enthusiasm, and ability.

In light of the challenging environment for unrepresented litigants, for the courts, and for LSC programs, it is important to increase the flexibility of LSC programs to involve law students and law graduates in the work of the programs.

2. *The New 50 Hour Pro Bono Service Bar Admission Requirement in New York is Focusing More Students and Law Graduates on the Justice Gap*

In May 2012, New York adopted a new law that requires all persons applying to the New York Bar to complete 50 hours of pro bono service as a condition of bar admission.

As a direct consequence of this new requirement, students and law graduates who seek to practice law in New York must now identify a sufficient number of opportunities through which to complete their required service.

Since so many law graduates intend to practice in New York, the law is already having an impact in New York and across the country.

Additionally, other states are considering adopting requirements similar to the New York requirement. Thus, in California and in New Jersey, a state bar committee and a court appointed task force are recommending adoption in their respective states of rules inspired by, and similar to, the new law in New York.<sup>v</sup> The ABA is also being urged to adopt an analogous requirement as a national accreditation standard that would require each law school to involve all of its students in 50 hours of pro bono service.

With more students than ever before seeking to perform pro bono service, this is an especially important moment in which to modify the PAI regulation to afford LSC grantees the flexibility to involve increased numbers of law students and law graduates in their work.

3. *Law student pro bono helps to teach students about the legal services bar, access to justice, the particular skills involved in being a lawyer, and the importance of a lifelong commitment to pro bono service.*

LSC programs have additional reasons for wanting to encourage pro bono service by law students and recent law graduates.

Law school pro bono enables students to learn about a defining feature of our justice system, often omitted from the law school curriculum – which is that millions of people annually proceed in their cases without the assistance of a lawyer, frequently against an opposing party that has counsel. The opportunity to volunteer in a legal services program often teaches future lawyers about the importance of the legal services bar, and about the opportunity to support civil legal aid after becoming a practicing attorney. It can also help to instill a commitment in law students to continue to provide pro bono assistance as professional attorneys. LSC programs have a stake in all of these outcomes.

Law student pro bono service also offers students a valuable opportunity to acquire specific skills of the profession that include: interviewing clients, analyzing and developing facts, interpreting law and drafting affirmative and responsive pleadings, presenting oral argument, carrying out legal research, interpreting and explaining legal documents, educating the public about the requirements of the law, and understanding the operation of justice system institutions. LSC programs, along with other justice system stakeholders, have a stake in ensuring that future practitioners acquire these skills.

Modifying the PAI regulation to accord LSC grantees increased flexibility to involve students and recent graduates in the work of the programs will help to advance these goals.

4. *New and Established Models for Engaging Law Students and Recent Graduates in Legal Services Work Can Make a Difference for Clients and Communities*

This current moment is one in which pro bono services are evolving into new structures and projects, many of which, including so-called “incubator” projects, hold promise for creating helpful partnerships with legal services programs. Many models are already in place, and many more are under development. Some are identified in NCAJ’s memo, *Model Projects & Structures To Strengthen Law Student Pro Bono to Increase Access to Justice*.<sup>vi</sup>

#### **IV. The Recommendation**

NCAJ endorses Recommendation 2(a). As noted above, it states: “Resources spent supervising and training law students, law graduates, deferred associates, and others should be counted toward grantees’ PAI obligations, especially in “incubator” initiatives.”<sup>vii</sup> While NCAJ supports the recommendation, we would note that in the final regulation, it will be important to include language preserving the discretion of the LSC grantees as to when to count services of law students and law graduates toward the PAI amount.

## V. Conclusion

Thank you for the opportunity to submit these comments in support of Recommendation 2(a).

Respectfully submitted,

*David Udell*

David Udell

- 
- <sup>i</sup> Legal Services Corporation, Report of the Pro Bono Task Force (October 2012), at 1-2.
  - <sup>ii</sup> In the comments herein, NCAJ does not take a position for or against other proposals to modify the PAI regulation.
  - <sup>iii</sup> LSC, Report of The Pro Bono Task Force, at 20.
  - <sup>iv</sup> LSC, Report of The Pro bono Task Force, at IV, and 20 (Recommendation 2(a)). This recommendation is included in the NPRM as Topic 1
  - <sup>v</sup> See generally, NCAJ's Blog on national and state based initiatives to establish pro bono service requirements for law students, <http://ncforaj.org/2013/08/07/chief-justices-issue-resolution-in-support-of-law-student-pro-bono-more-progress-toward-a-national-50-hour-pro-bono-service-requirement-for-future-lawyers/>.
  - <sup>vi</sup> <http://ncforaj.files.wordpress.com/2012/10/final-models-memo-lspb-2p.pdf>.
  - <sup>vii</sup> LSC, Report of The Pro bono Task Force, at IV, and 20 (Recommendation 2(a)).

NATIONAL  
CENTER FOR  
ACCESS TO  
JUSTICE  
*at Cardozo Law School*

“Thou Shalt Not Ration Justice”  
– Hon. Learned Hand

[parulemaking@lsc.gov](mailto:parulemaking@lsc.gov)

June 25, 2013

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

Re: Comments, & Expression of Interest  
in Appearing as a Panelist

Private Attorney Involvement Rulemaking  
Legal Services Corporation  
45 CFR part 1614 (78 FR 27339)  
<https://federalregister.gov/a/2013-11071>

Dear Mr. Freedman.

I am submitting these comments in support of the recommendation which states:  
“Resources spent supervising and training law students, law graduates, deferred associates, and others should be counted toward grantees' PAI obligations, especially in “incubator” initiatives.”

I. Outline of Key Points:

I support the recommendation. I request an opportunity to make the following points at the workshops hosted by the Legal Services Corporation in connection with the rulemaking:

1. Civil legal aid programs increasingly seek to involve law students in pro bono initiatives as a means of increasing access to justice for vulnerable people, but have limited resources for training and supervising the students.
2. Law students increasingly seek to volunteer in civil legal aid programs, in response to the following developments: the justice gap, the access to justice movement, the increased emphasis on skills acquisition in law school, and the new, nationally significant, 50 hour pro bono service bar admission requirement in New York.

3. To effectively train and supervise law student volunteers, it is important for civil legal aid programs to be able to use their resources in satisfaction of their PAI obligations.

## II. Summary of Qualifications:

During the past two years, I have carried out research, engaged in public writing, and participated in conference sessions with justice system stakeholders, on how the justice gap, the access to justice movement, and the new 50 hour pro bono service requirement in New York are helping to reshape legal education. I have become knowledgeable about how changes in legal education and in pro bono service by law students are creating new opportunities for civil legal aid programs, while also increasing demands on those programs. This perspective should have a place in the workshops at which LSC's PAI regulation will be reconsidered. Information about my work (along with some examples) is available here:

- *Is New York's 50 Hour Pro Bono Service Rule Changing the Future of Law Student Pro Bono*, in Bloomberg Law (January 28, 2013)<sup>1</sup>
- *Law Students for Strengthening Law School Pro Bono*, Facebook<sup>2</sup>
- *Software for Law Student Pro Bono*, NCAJ's Policy Recommendation (February 25, 2013)<sup>3</sup>
- *National Roundtable on Pro Bono and Professional Development*, NALP (moderated by LSC President, Jim Sandman) (January 31, 2013)<sup>4</sup>
- *List of Replicable Law Student Pro Bono Model Projects and Structures – NCAJ's Policy Recommendation* (Oct. 15, 2012)<sup>5</sup>
- *Report & Recommendations of the Law School Involvement Working Group of the Task Force to Expand Access to Legal Services in New York* (contributing author) (December 1, 2012)<sup>6</sup>
- *Bio*, David Udell.<sup>7</sup>

## III. Checklist of topics and items to be addressed

I have attached the checklist of topics and items to be addressed.

\*\*\*\*\*

---

<sup>1</sup> <http://ncforaj.files.wordpress.com/2013/02/tyler-udell-bloomberg-law-law-student-pro-bono.pdf>

<sup>2</sup> <https://www.facebook.com/LawStudentProBono>

<sup>3</sup> <http://ncforaj.files.wordpress.com/2013/02/lspb-software-application-2-25-13.pdf>

<sup>4</sup> <http://www.nalp.org/probonoandpdroundtable>

<sup>5</sup> <http://ncforaj.files.wordpress.com/2012/10/final-models-memo-lspb-2p.pdf>

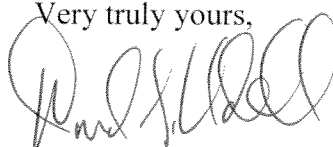
<sup>6</sup> <http://ncforaj.files.wordpress.com/2012/12/report-recommendations-on-legal-ed-2012-tf.pdf>

<sup>7</sup> <http://ncforaj.org/about-2/staff/david-udell/>



Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Udell", with a large, stylized initial "D" and "U".

David Udell

Name	David Udell, Executive Director, National Center for Access to Justice
<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>	
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?
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 how any approaches you recommend might be implemented.
x	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>	
	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?
	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).

LSC PAI Rulemaking Workshop—September 17, 2013—Topics and Items for Discussion

**A. Scope of Part 1614**

Topic 1:

X	1. Please provide specific suggestions for definitions, limits, or guidelines relating to the potential addition of law students, pre-admission law graduates, or paralegals to the scope of Part 1614 activities.
X	2. Are there any other categories of non-lawyers whose work should be considered for inclusion in Part 1614?
X	3. If you recommend changing the definition of a private attorney, then please provide specific recommendations addressing the scope of the definition and how the proposed definition relates to the purpose of the rule.
X	4. Please provide specific suggestions relating to the potential inclusion in Part 1614 of underemployed attorneys receiving reduced fees (e.g., in “incubator projects”) that may be their primary professional income.
X	5. Please provide specific suggestions relating to the potential inclusion in Part 1614 of attorneys who are not authorized to practice law in the jurisdiction of the LSC recipient but who may provide legal information or other Part 1614 services if permitted under local bar rules.

Topic 2:

	6. Should Part 1614 include the use of non-LSC funds as a subgrant to provide support to attorneys working at a staff-attorney model legal aid program that receives no LSC funds? This question specifically addresses the situation in Advisory Opinion 2009-1004. Please identify how involving attorneys at non-LSC, staff-attorney model legal aid programs relates to the purposes of Part 1614.
--	--

**B. Tracking and Accounting for Part 1614 Work**

Topics 2 and 3:

	1. What criteria and methods should LSC recipients use to identify and track Part 1614 services to provide sufficient information for reporting and accountability purposes about attempts to place eligible clients with private attorneys, or others, and the outcome of those efforts?
	2. Please identify what criteria should apply to referral placement organizations, such as bar association programs, for them to qualify for Part 1614.
	3. Please identify how LSC recipients can account for and track PAI services while not creating conflicts for the recipient regarding future representation of clients, consistent with local bar rules.

**C. Support for Unscreened Work of Private Attorney Clinics**

Topics 3:

	1. Should LSC permit LSC recipients to obtain some credit under Part 1614 for support for these clinics if they do not screen for LSC eligibility and the clinics may provide services to both eligible and ineligible clients? Please provide specifics about screening concerns and methods to address them.
	2. Should eligibility screening in these clinics for Part 1614 be the same as regular intake screening for LSC recipients or different? If different, then please identify methods or criteria for screening.
	3. Please identify methods or criteria for LSC to ensure that LSC recipients providing support to these clinics, if permitted, are not improperly subsidizing either services to ineligible individuals or impermissible activities.
	4. Please identify methods or criteria to distinguish between permissible activities supporting other entities and attorneys, such as general trainings, and impermissible subsidization.