



OFFICE OF LEGAL AFFAIRS  
EXTERNAL OPINION

External Opinion # EX-2005-1001

**To:** Anne Milne  
Director  
Utah Legal Services, Inc.  
205 North 400 West  
Salt Lake City, UT 84103

**Date:** March 7, 2005

**Subject:** **Whether Work with Law Students May Count Towards PAI Requirement**

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You asked this Office for an Opinion regarding whether the costs relating to Utah Legal Services (ULS) staff attorney time spent working with and supervising law students volunteering with ULS may be counted toward ULS' Private Attorney Involvement (PAI) requirement under 45 CFR Part 1614.

***Brief Answer***

No, ULS may not count costs related to staff attorney time spent supervising and working with law student volunteers towards ULS' PAI requirement.

***Background***

For more than 20 years, LSC has had a formal requirement that recipients take affirmative steps to involve private attorneys in the delivery of legal assistance to eligible clients.<sup>1</sup> Specifically, 45 CFR §1614.1 requires that recipients of LSC funds "devote an amount equal to at least twelve and one half percent (12½%) of the recipient's LSC annualized basic field award to the involvement of private attorneys in [the] delivery of legal services to eligible clients." The PAI program is intended to take advantage of the fact that there are "many private attorneys willing and able to provide high quality legal assistance to the poor" and that recipients should make a "substantial" investment in promoting and supporting the involvement of the private bar in legal assistance activities

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<sup>1</sup> The PAI requirement has been part of LSC's regulations (at Part 1614) since 1984. *See*, 49 Fed. Reg. 21328 (May 21, 1984). Prior to the adoption of Part 1614, LSC instituted a PAI requirement with the issuance of an Instruction published in the Federal Register on December 14, 1981 (46 Fed. Reg. 61017). In 1983, LSC revised the PAI requirement with the publication of Instruction 83-6. 48 Fed. Reg. 53763 (November 29, 1983). Since incorporating the PAI requirement into Title 45 of the Code of Federal Regulation in 1984, LSC has amended Part 1614 twice, in 1985 (50 Fed. Reg. 48586 (November 23, 1985) and 1986 (51 Fed. Reg. 21558 (June 13, 1986)). Part 1614 has remained unchanged since 1986.

by devoting funds to that effort. 46 Fed. Reg. 61017 (December 14, 1981). As the preamble to the 1985 revision to Part 1614 states:

PAI, when used effectively, expands the base of attorneys representing the poor . . . . Widespread use of PAI promises to make available to eligible clients a greater diversity in services and a higher degree in specialization than would necessarily be available through a necessarily limited number of staff attorneys.

50 Fed. Reg. 48586, 48587 (November 26, 1985).

ULS would like to be able to count costs related to time spent by ULS staff attorneys supervising its volunteer law students toward ULS' PAI requirement. To that end, ULS have provided us with the following information on its volunteer student program.

ULS has law students from the J. Reuben Clark Law School at Brigham Young University and the S.J. Quigley College of Law at the University of Utah working at ULS on a volunteer basis. Some of these students receive class credit for work done at ULS, while most do not. Approximately 75% of the student volunteers at ULS are first or second year law students; approximately 25% of the students are third year students. All of the students work on cases involving LSC eligible clients.

The students perform a variety of tasks under the supervision of ULS staff attorneys, including doing research, drafting memoranda of law, drafting simple documents, interviewing clients, and accompanying ULS staff attorneys to court. In addition, third year students may appear in court (under the supervision of a ULS staff attorney) on behalf of ULS clients under Utah Code of Judicial Administration ("Utah Code Jud. Admin.") R 11-301. Rule 11-301 provides:

**Rule 11-301. Law student assistance.**

*Intent:*

To ensure the provision of competent legal services.

To increase the opportunity of law students to have first-hand contact with the legal system and participate directly in the court process.

*Applicability:*

This rule shall apply to the bar, the judiciary and to law students.

*Statement of the Rule:*

Subject to the inherent power of each judge to have direct control of the proceedings in court and the conduct of attorneys and others who appear

before the judge, the courts of this state are authorized to allow law students to participate in matters pending before them, provided:

(A) The student's participation is limited to civil and misdemeanor cases;

(B) The student has completed legal studies amounting to at least four (4) semesters or the equivalent if the school is not on a semester basis;

(C) The student's participation is under the direct and immediate personal supervision and in the presence of a resident attorney admitted to practice law before the court, except the presence of a resident attorney shall not be required at default divorce proceedings which are not contested and where the appearing party is represented by a non-profit public service legal agency;

(D) The student's participation is agreed to by written stipulation of counsel for all parties to the action and filed in the case file;

(E) The student does not receive any compensation or remuneration of any kind from the client on whose behalf the services are rendered.

Most of the cases on which law students work are cases in which the students are not doing the majority of the work on the case and those cases are closed by ULS as staff cases under LSC's Case Reporting System. ULS estimates that fewer than 50 cases per year are cases in which a student does the majority of the work on the case; those cases are closed as pro bono cases under LSC's Case Reporting System.

### *Analysis*

The plain language of Part 1614 speaks to the "involvement of private attorneys in the delivery of legal services to eligible clients." 45 CFR §1614.2(a). The questions presented by ULS are whether the work contributed by law students can be characterized as "the involvement of private attorneys in the delivery of legal services to eligible clients" and whether the supervisory activities of the ULS staff attorneys may be considered as providing support in the involvement of private attorneys in the delivery of legal assistance to eligible clients. We do not believe that they can consistent with the plain language of the regulation, the intent of the regulation and the definition of attorney in 45 CFR Part 1600.

The first issue for consideration is whether any or all of the law students volunteering with ULS can be considered private attorneys for the purpose of the regulation. When originally adopted, the regulation (like the previously published Instructions) did not contain any definition of the term "private attorney." A definition was added in 1985, in response to instances in which recipients had laid off staff attorneys, then contracted with them to have them handle the same matters which they had been handling while on staff. 50 Fed. Reg. 48586 (November 23, 1985). LSC

determined that allowing the costs related to such contracts to be counted toward the PAI requirement frustrated the purpose of expanding the number of attorneys providing legal services to eligible clients and created an appearance of impropriety. *Id. See also*, 51 Fed. Reg. 21558 (June 13, 1986). Accordingly, 45 CFR §1614.1(d) defines “private attorney” as “an *attorney* who is not a staff attorney as defined in §1600.1 of these regulations” (emphasis added).<sup>2</sup>

The term “attorney” is not defined in Part 1614, but is defined in Part 1600, the general definitions portion of the regulations. Under 45 CFR §1600.1, “[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.” Under Utah Code Annotated §78-9-101, except as otherwise provided by law, a person who is not admitted and licensed to practice law within the state of Utah is not authorized to practice law.<sup>3</sup> Law students who have not yet graduated from an accredited law school, passed the bar and Multistate Professional Responsibility exams, and met other specified requirements are not qualified to be admitted to the Utah State Bar and licensed by the Board of Commissioners of the Utah State Bar to practice law. Utah Code Jud. Admin. R 2-1 and R 3-1 (2004). Thus, under the terms of §1600.1, law student volunteers at ULS are not “attorneys” and cannot, under the terms of §1614.1(d), be considered “private attorneys” for the purpose of the PAI requirement.

A question could be raised as to whether third year law students appearing in court under Utah Code Jud. Admin. R 11-301 may be considered as otherwise “authorized to practice law” in Utah and, consequently, within the ambit of “private attorney” for the purposes of Part 1614. Rule 11-301, however, does not speak in terms of “admission” of the student, or of permitting the student to “practice” or the “practice of law.” Rather, it permits the student to “participate” in matters pending before a court and in the court process under the “direct and immediate supervision” of a “resident attorney admitted to practice law before the court.”<sup>4</sup> Accordingly, it does not appear that Rule 11-301 confers any authority upon law students to engage in the practice of law.

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<sup>2</sup> The term “staff attorney” is defined as “an attorney more than one half of whose annual professional income is derived from the Legal services Corporation or is received from a recipient, subrecipient, grantee, or contractor that limits its activities to providing legal assistance to clients eligible for assistance under the Act.” 45 CFR §1614.1(d). This Office has interpreted the definition of the term “staff attorney” to refer to any attorney employed by an LSC basic field program who receives more than one-half of his income from the program’s funds, regardless of the source (LSC or non-LSC) of that attorney’s income from the program. OLA External Opinion EX-2003-1004

<sup>3</sup> Utah Code Ann §78-9-101, Practicing law without a license prohibited, provides (in pertinent part):

(1) Unless otherwise provided by law, a person may not practice law or assume to act or hold himself out to the public as a person qualified to practice law within this state if he:

(a) is not admitted and licensed to practice law within this state. . . .

<sup>4</sup> Moreover, this stands in contrast to the Utah Code Jud. Admin. R 11-302 and R 11-303, which provide for limited “admission” for attorneys not otherwise admitted in Utah on either a *pro hac vice* basis or

Even if the law students may not, themselves, be considered “attorneys,” there is an issue as to whether supervision of law students by ULS staff attorneys may, nonetheless, be considered within the range of “support” activities set forth in §1614.3(b)(2) (such as the provision of training, technical assistance, research, advice and counsel by the recipient or making available the use of recipient resources) which recipients may undertake to meet the PAI requirement. ULS argues that because law student volunteers are more likely to become volunteer lawyers after graduation, time spent working with law student volunteers should be interpreted as an investment in future increased private attorney involvement. As such, ULS suggests that the spent by ULS staff attorneys supervising law students should be counted toward the PAI requirement.

It is true that Part 1614 anticipates and permits “support” services as part of a PAI program.<sup>5</sup> However, implicit in this paragraph is the notion of *to whom* the support activities may be provided. ULS would read the regulation to include the provision of such support activities to law students who may, *at some future point*, become private attorney volunteers. We do not believe that such a broad reading of the regulation is sustainable. Rather, we believe that §1614.3(b)(2) refers to support provided by the recipient to persons who are *current* private attorneys.

The policy underlying the PAI requirement is to provide an incentive and methods for recipients to engage with the private bar to increase the number of currently practicing attorneys providing legal assistance to the eligible client population on a current basis. None of the support or indirect delivery activities listed in §1614.3(b)(2) expressly include the supervision of law students or discuss activities done solely as an “investment” in potential future private attorney involvement, nor is there anything in the regulatory history of Part 1614 to suggest otherwise. Although §1614.3(b) is expressly non-exhaustive in its list of support or indirect activities which may properly be considered within the ambit of a PAI program, there is nothing in the regulation or regulatory history to suggest that such other permissible activities would not have to involve current private attorneys.

Since the adoption of the PAI requirement, there has been only one Opinion from this Office addressing support for law student work as a PAI activity. Letter of September 26, 1985 from Terry Duga, Assistant General Counsel to Roberta Stick, Legal

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because the attorney is a military lawyer stationed in Utah, respectively. In both of the latter rules, the term “practice” or “practice of law” is used.

<sup>5</sup> See, 45 CFR §1614.3(b)(2). See also, 50 Fed. Reg. 48586, 48588 (November 23, 1985). Subsection 1614.3(b)(1) also contemplates “support” services, such as community outreach, training and research, but only as performed by private attorneys. Thus, under the plain language of that subsection the supervision by ULS staff attorneys of law students working on ULS cases does not qualify as a §1614.3(b)(1) PAI activity.

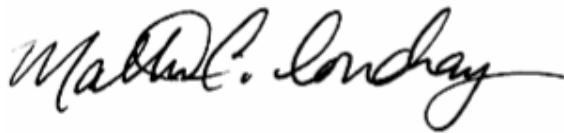
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Services of Southeast Nebraska. That Opinion found that financial support provided to a law school clinical program could be counted toward the PAI requirement because the Clinic provided direct delivery of legal assistance to eligible client. The letter specifically notes that the arrangement between the recipient and the Clinic requires the Clinic to accept cases on referral from the recipient and that the Clinic, via its students acting *under the supervision of a practicing attorney* on the law school faculty, was providing representation to some 300 eligible clients annually. *Id.* In that case, the supervising attorney working at the Clinic was a “private attorney” under Part 1614. Although that opinion does note, approvingly, that support for the clinic encourages the involvement of future lawyers, the opinion does not suggest that encouraging the involvement of future lawyers is, itself, a sufficient PAI activity.

In summary, where, as here, the proposed activity does not involve current private attorneys in any way, the activity cannot be considered a PAI activity.

Very truly yours,



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