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AMERICAN BAR ASSOCIATION

**Standing Committee on Legal Aid
and Indigent Defendants**

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Via e-mail to: PAIRULEMAKING@lsc.gov

Re: Comments on Notice of Proposed Rulemaking Regarding 45 CFR Part 1614

Dear Ms. Davis,

The American Bar Association, through its Standing Committee on Legal 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 proposed revisions to the Legal Services Corporation's (LSC) Private Attorney Involvement (PAI) requirement.

The ABA appreciates the process that LSC engaged in to obtain input on a variety of issues regarding PAI before drafting and publishing the proposed revisions, as well as the fact that many of the ABA's suggestions were acted upon. Some of the proposed changes that reflect the ABA's views include: expanding the scope of Part 1614 to include law students, law graduates and paralegals; permitting LSC recipients to spend PAI resources towards intake, screening and referral of individuals to pro bono programs without the need to open cases for the individuals screened and referred; and easing the administrative burden on recipients to enable certain lawyers to obtain low-fee PAI contracts including those who participate in incubator programs, as well as those who are stay-at-home parents or re-entering the workforce.

There are, however, several proposed revisions that the ABA recommends be further revised. They are discussed in detail below.

I. Definition of the Term "Legal Services Provider"

The proposed revisions at 45 CFR 1614.3 include a definition of the term "private attorney," as well as a subsection explaining who is not included in that term. One of the types of lawyers not included is: "An attorney employed by a non-LSC-funded legal services provider acting within the terms of his or her employment with the non-LSC-funded provider." It is not clear from this language what is meant by the term "legal services provider" in this context. The term is so broad that it

could include a private law firm, which is clearly not the intent. LSC indicates in the Preamble to the revisions at 79 Fed. Reg. 21191 (April 15, 2014) that it is excluding this group because the purpose of the PAI regulations is to engage lawyers “who are not currently involved in the delivery of legal services to low-income individuals as part of their regular employment.” The ABA agrees in principle with this view, but would refine it further because there are lawyers working for private law firms who represent low-income individuals on a contingency fee basis in a variety of matters including personal injury suits and social security disability claims. As a result, the ABA urges LSC to clarify the definition of “legal services provider” within the regulation as being “an entity whose primary purpose is the delivery of free legal services to low-income individuals.”

II. Range of Activities – PAI Clinics

The ABA is keenly aware of the requirements under which LSC operates regarding screening for eligibility for services, as well as the prohibition on representing aliens. LSC has addressed these issues as they apply to PAI Clinics by providing in proposed 45 CFR 1614.4(b)(4) that LSC-eligibility screening is required for those clinics that provide legal advice, but is not required when only legal information to the public is provided. Furthermore, the proposed regulations indicate at 45 CFR 1614.4 (b)(4)(ii)(C) that a program can allocate to PAI the support provided to a clinic that provides both legal information to the public and legal advice to those screened for LSC eligibility.

There are several clinic settings that are not specifically addressed in the regulations that the ABA believes should be. The first is the situation in which a clinic does not screen for LSC eligibility and has two components to its operation: a legal information to the public component and a legal assistance component. While not addressed in the proposed regulations, this issue is discussed in the Preamble at 79 Fed. Reg. 21197 (April 15, 2014) where such clinics are referred to as hybrid clinics: “Recipients may support hybrid clinics and allocate costs associated with their support to the PAI requirements, but only if the clinic screens for LSC eligibility prior to providing legal assistance and only provides assistance to individuals who may be served by an LSC recipient.”

The approach articulated in the Preamble is problematic because the proposed regulations permit legal information to be provided to the public without requiring screening for LSC-eligibility. As a result, it follows logically that such screening should continue to be unnecessary even if the clinic has a separate component that provides legal advice to those who are not screened for LSC eligibility. For example, a clinic may provide community legal education seminars at which pro bono lawyers lead the seminars and have a separate component of the clinic that provides legal advice. LSC staff could play an important role in the legal information portion of the clinic by developing materials distributed to attendees, as well as by assisting the pro bono attorney with preparation for the presentation. Even if the legal assistance portion of the clinic does not screen for eligibility, the ABA believes that a LSC recipient should be able to assist the pro bono lawyer participating in the legal information portion of the clinic and allocate to PAI costs associated with any support

provided. In addition, any time spent by the recipient in helping to plan and organize the legal information portion of the clinic should also count towards PAI.

Another situation that the proposed regulation fails to consider adequately is one in which the clinic has two components: one in which LSC-eligible clients are provided pro bono advice by one group of lawyers, and another component in which non-eligible individuals are provided service by either staff of the clinic (who are not employees of a LSC recipient) or a separate group of pro bono lawyers. In this situation, screening would take place in advance by clinic staff who are not employees of a LSC recipient, but may be staff of a bar association that has organized the clinic. Those screened individuals who are eligible for LSC services would be seen in the portion of the clinic to which a LSC recipient provides support. Staff of the LSC recipient would not provide support to any of the activities taking place in the other portion of the clinic that provides assistance to non-eligible individuals. In that scenario, LSC recipients should be able to provide support to the portion of the clinic assisting LSC-eligible clients and allocate that support provided to PAI. The ABA is taking this position because in many communities, the bar association wants to serve through its pro bono programs many people who cannot afford an attorney, not just those who fall within the LSC eligibility guidelines. Given that LSC encourages its recipients to cooperate and collaborate with local bars, the solution that the ABA suggests here enables the LSC recipient to respect the bar's wishes while still assuring that it is in compliance with LSC regulations.

A related scenario that the proposed regulations do not address is one in which a court or bar contacts the local LSC recipient and requests assistance in planning a pro bono clinic. The bar or court may not decide initially if LSC-eligibility screening will take place at its clinic or if the clinic will provide legal information or legal assistance. Is the LSC recipient permitted to provide technical assistance to the court or bar before such decisions are made? And if such activity is permitted, can the LSC recipient allocate to PAI the costs associated with any support or technical assistance that is provided to the bar or court during the discussion period if the decision is ultimately made that the clinic will provide legal assistance and not screen for LSC eligibility? The ABA regards these support activities as permissible and as ones that should count toward the PAI requirement because the LSC recipient is not assisting lawyers who will be helping ineligible clients, but is simply engaging in discussions initiated by the court or bar to explore options. This type of collaboration and cooperation is precisely the type of activity that LSC encourages its recipients to engage in with the bar and the courts. Regardless of the final view taken by LSC on these issues, it would be best if it provides clarity to LSC recipients so that they understand from the start when that collaboration is permissible and when it is not.

III. Failure to Comply

Currently, 45 CFR 1614.7(c) provides that if any funds are withheld from an LSC recipient for failure to comply with expenditure of PAI funds as required by the regulations, LSC is to make those funds available for providing legal services in the recipient's service area through PAI programs pursuant to a competitive grant process. However, under proposed 45 CFR

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1614.10 (c), such withheld funds are to “be made available for basic field purposes, which may include making those funds available for use in providing legal services in the recipient’s service area through PAI programs.” In the Preamble at 79 Fed. Reg. 21198 (April 15, 2014), LSC explains this change is being proposed due to its concern that if the current recipient is the only applicant for those funds in the competitive grant process, the deterrent effect of withholding the funds would be reduced and would defeat the purpose of holding the competitive grant process.

The ABA urges LSC to reconsider this change because it is contrary to the purposes of the regulation to encourage PAI. If the consequence of failing to use funds for PAI is that the funds become available for basic field services, this provides a disincentive to comply with the PAI requirement. Instead, these withheld funds should be required to be used for PAI, if not in the service area of the program being penalized, then somewhere else in the state or the country. The ABA therefore recommends that LSC maintain the current language, but add a caveat that if the program from which funds are being withheld is the only LSC recipient applying for the funds in the competitive grant process, then LSC shall redirect the funds to another service area for a competitive grant process for PAI services.

The ABA appreciates the opportunity to present these comments and would be happy to provide additional clarification or analysis if such is required.

Sincerely,



Lisa C. Wood

cc: James R. Silkenat, ABA President