CALIFORNIA RURAL LEGAL ASSISTANCE, INC.
FIGHTING FOR JUSTICE, CHANGING LIVES

June 13, 2014

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Legal Services Corporation
3333 K Street NW
Washington, DC 20007

RE: Comments Concerning Proposed Revisions to 45 CFR Part 1614, Private Attorney Involvement (79 Fed Reg. 21188-21202, April 15, 2014)

Dear Ms. Davis:

This letter is submitted in response to LSC's request for comments on proposed revisions to the regulation on private attorney involvement (PAI) in the delivery of legal services to eligible clients, 45 C.F.R. § 1614. These comments are submitted on behalf of California Rural Legal Assistance, Inc. (CRLA) and the Legal Services Association of Michigan (LSAM). We wish to express our opposition to LSC's proposed definition of "private attorney" as expressed in 79 FR 21188.

Established in 1966, CRLA has 21 offices serving over 37,000 low-income individuals and families a year in 22 California rural counties. Half of CRLA's resources are committed to multi-client cases that address the root causes of poverty. LSAM is a non-profit corporation created in 1982 whose members are the largest 14 civil legal services providers in that state. LSAM member organizations collectively provide legal services to low income individuals and families in over 50,000 cases a year.

LSC's proposed definition makes radical changes to the definition of "private attorney" which will harm rural communities by forcing rural LSC recipients to exclude co-counseling and other work relationships with non-LSC-funded legal services providers (or non-profits) engaged in helping the poor from their PAI plans. Consistent with the recommendations of LSC's Pro Bono Task force, LSC should instead define "private attorney" to include any person authorized to provide legal services who is not an employee of LSC grantee. In order to enhance the creativity and flexibility of PAI Plans, the definition of private attorney should be as broad as possible. To that end, the definition of "private attorney" should, as LSC recommends, be expanded to include LSC recipient legal services that involve law students, law graduates and other professionals.

LSC's proposed "private attorney" definition will restrict the ability of rural LSC recipients to fully utilize co-counseling as part of its PAI program. Our PAI plans will be adversely impacted by this proposed definitional change because we utilize co-counseling in remote rural areas with urban-based, private, non-profits who primarily serve low income communities. We oppose LSC's proposed "private attorney" definition not simply because it will adversely impact our programs and the services we provide, but also because the proposed definition is vague and ambiguous, and LSC's proposal inaccurately portrays the legislative history and purpose of PAI.

In 79 FR 21188, at § 1614.3(h)(2)(ii), LSC proposes to exclude an undefined, but potentially large, number of skilled attorneys from the a new definition of "private attorney" as follows:

> (2) Private attorney does not include:
>
> > (i) An attorney employed 1,000 hours or more per calendar year by an LSC recipient or subrecipient; or
> >
> > (ii) **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.** (Emphasis added)

The term "legal services provider" as used in § 1614.3(h)2(ii) is not defined anywhere within the LSC Act, nor is it defined in the LSC regulations. Nowhere in the proposed regulation does LSC define what it means by "legal services provider". Does this term include private law firms who exclusively represent low-income clients? Does it include a legal advocacy entity that employs attorneys who provide advocacy to clients based upon direct cost to the client charged through a contingency agreement? Does the definition include non-profit advocacy organizations which represent many low-income clients free of charge, but also charge market rate to other clients? In short neither LSC nor we really know what the term "legal services provider" means.

LSC's proposed definition of "private attorney" is a dramatic extension of an Office of Legal Affair's("OLA") opinion expressed in OLA 2009-1004, which concluded that:

> "For the purposes of the PAI rule, where a staff-model legal services provider receives funds from an LSC recipient (regardless of the original source of the funds) to perform programmatic activities, an attorney who receives more than one half of his/her professional income from that staff-model legal services provider is not a "private attorney."

LSC misinterprets the language in 50 FR 48586 regarding the adoption of § 1614.1(d) to argue that the purpose of PAI is simply to "engage private attorneys who have not been involved before in the delivery of legal services to the poor." This is an exaggeration of the true intent of the regulation. This interpretation error has led LSC to propose to exclude from PAI all work

done with attorneys "employed by a non-LSC-funded legal services provider acting within the terms of his or her employment with the non-LSC-funded provider." The legislative history of 45 CFR 1614 makes it clear that this exclusion of a vital sector of the private attorney community was never intended.

In FR 46 61017 LSC established "(t)here are many private attorneys willing and able to provide high quality legal assistance to the poor, and there are a variety of mechanisms for involving private attorneys..." If private attorneys "employed by a non-LSC-funded legal services provider acting within the terms of his or her employment with the non-LSC-funded provider" had been excluded from PAI at the outset, as LSC now incorrectly claims was always the intent of PAI, the "many private attorneys willing and able to provide high quality legal assistance to the poor" would have been reduced to a "few attorneys", or in the case of rural communities, to zero. In order to attract the largest pool of private attorneys possible LSC did not distinguish between types of private attorneys by excluding attorneys who commonly worked with low income communities.

LSC mistakenly concludes that FR 50 48586 establishes that *the* purpose of PAI is to "engage attorneys who are not currently involved in the delivery of legal services to low income individuals as part of their regular employment." In truth, 50 FR 48586 actually only refers to engaging private attorneys who have not previously been involved before in the delivery of legal services to the poor as "one of the purposes of PAI". The purpose of LSC's PAI requirement is actually broader and was clearly articulated in 50 FR 48586 at § 1641.1(c) as "based upon an effort to generate the most possible legal services for eligible clients from available, but limited, resources...." The term "private attorney" as used in § 1614 was first defined in § 1614.1(d).

The definition of "private attorney" in § 1614.1(d) was added to § 1614 for two equally important reasons. 50 FR 48586 makes it clear that one of the major purposes of the Corporation's PAI requirement was "to bring people who have not been involved before in the delivery of legal services to the poor." However, § 1614.1(d) was also intended to address "situations in which programs had laid off staff attorneys and then contracted to pay these attorneys for doing the same work they had done before as staff." The concern was that "these sorts of arrangements create an appearance of impropriety." Section 1614.1(d) addressed the second concern by employing the Ethics in Government Act's two year cooling off period being employed "for the limited purpose of determining whether funds given to a particular lawyer shall be counted toward a recipient's PAI requirement."

The intent of the two year cooling off period mandated in § 1614.1(e) was to guarantee improprieties did not occur. After the two year cooling off period a recipient could then award contracts to an attorney who had left a recipient's staff and count the expense as PAI. There was no intent to limit or exclude these attorneys' participation being counted towards a recipient's PAI requirement. The sole limitation was on the transfer of funds to former staff and that limitation was only for a **two year period**. After two years passed, funds given to former staff through contracts to do work with low income communities they had worked with

previously could be counted as PAI. Just as important, for our purposes here, a recipient could co-counsel with these former staff members within 24 hours of their leaving the employ of a recipient and the staff time spent co-counseling with the former staff member could be counted as PAI. (September 12, 2013 email from LSC Office of Compliance and Enforcement to California Rural Legal Assistance, available upon request). There was no intent to exclude co-counseling with private attorneys or non-profits devoted to serving low income communities from being counted towards the PAI requirement.

LSC's Proposed "private attorney" definition as defined in FR 79 211188 ignores and misstates the true purpose of PAI. By excluding attorneys employed by a non-LSC-funded legal services provider acting within the terms of his or her employment with the non-LSC-funded provider from the definition of "private attorney", LSC undermines rural LSC recipients PAI Plans that utilize co-counseling as a means to meeting their PAI requirements. Often times, due to lack of profitability, logistics and conflicts the only law firms willing to join rural LSC recipients as attorneys willing to co-counsel education, housing and environmental justice cases in the remote rural communities we work in are attorneys employed by a non-LSC-funded, non-profit legal services provider who is acting within the terms of his/her employment. Similarly, it is these same attorneys employed by non-LSC funded, non-profit legal services providers acting within the terms of their employment who provide our offices with their expertise and experience that help build confidence and capacity in many of our remote regional offices.

LSC believes its proposed revision and expansion of the § 1614 PAI regulation will substantially ease recipients' burden to meet their PAI requirement by including "the involvement of private attorneys, law students, law graduates, and other professionals in the delivery of legal services to eligible clients" as part of PAI plans. (Proposed §§ 1614.2(a) and 1614.3). While these additions to PAI are all positive and should increase services that some programs can allocate to their PAI requirements, they are all geared towards PAI Plans that focus their efforts on advice and counsel or individual service cases. The proposed change in the "private attorney" definition will restrict PAI plans in rural communities where pro bono options are limited due to fewer practicing attorneys serving those communities, lack of a pro bono culture and legal conflicts that prevent the private bar from engaging in pro bono.

For rural LSC grantees to engage in co-counseling cases they largely rely on non-LSC funded non-profits with an expertise in specific legal areas, but no geographic ties to the communities to these rural communities. The use of urban-based non-LSC funded non-profits dedicated to helping low income communities as co-counsel in sparsely populated rural communities is consistent with the PAI purpose of making "available to eligible clients a greater diversity in services and a higher degree of specialization than would be available through a necessarily limited number of staff attorneys." 50 FR 48586.

The definition of "private attorney" proposed by LSC in 79 FR 21188 extends well beyond the rule established in OLA 2009-1004. OLA 2009-1004 pertained exclusively to recipients' subgrants to a staff-model legal services provider in order to provide programmatic

activities. OLA 2009-1004 does not exclude from PAI counting staff time facilitating, supervising or co-counseling with these same non-profit, non-LSC staff model legal providers who donate their time to a recipient. Even assuming that LSC should restrict **payments from** LSC recipients to other non-profits (the situation in OLA 2009-1004) there is no justification for refusing to acknowledge the time that an attorney employed by a non-profit **donates to** support the work of a LSC recipient. To an LSC recipient and its client the only differences between the time and expertise donated by a non-profit, non-LSC staff model legal provider that regularly works with low income communities and that of a corporate law firm with little or no experience working with low income communities is that the non-profit is not subject to the numerous conflict concerns or as restrained by the same logistical barriers that constantly inhibit their corporate counterparts from engaging with rural LSC recipients as co-counsel. The donation of any lawyer's time and resources is at the heart of pro bono legal services and should be at the heart of all LSC PAI plans.

The unwarranted expansion of OLA 2009-1004 in LSC's new definition of "private attorney" should be rejected. If a change in the definition has to be made, we believe there is a less radical "private attorney" definition, that is more inclusive, truer to the spirit of PAI as expressed in 46 FR 61017 and 50 FR 48586, and yet still consistent with OLA 2009-1004. The more reasonable proposal would be to narrow the exclusion to:

§ 1614.3(h)(2) Private attorney does not include:

> (i) An attorney employed 1,000 hours or more per calendar year by an LSC recipient or subrecipient; or
>
> (ii) *An attorney who receives more than half of his or her professional income from a non-LSC-funded legal services provider which receives a subgrant from any recipient, acting within the terms of his or her employment with the non-LSC-funded provider.*
>
> > *(a) Subgrant, as used herein, does not include a recipient's advancement of litigation costs in cases wherein a recipient and the non-LSC-funded legal services provider are engaged in co-counseling;*
> >
> > *(b) Subgrant, as used herein does not include a transfer of less than $1,000 per calendar year from any recipient to the non-LSC-funded legal services provider.*

This definition would, as was done in OLA 2009-1004, limit the "private attorney" exclusion to LSC recipients' subgrantees. This would address LSC's ongoing concerns about the transfer of money and still protect recipients' flexibility and innovation in the execution of their PAI plans. PAI should be about expanding the quantity, quality and expertise of the legal services provided to low income communities.

Despite the viability of the above compromise definition, we continue to believe that when evaluating PAI plans LSC should focus on the services delivered to clients and not on the corporate status or history working with low income communities of the non-LSC provider who is bringing added services to a recipient's service area. Focusing on client needs and the delivery of services leads to an inclusive definition of "private attorney" that promotes flexibility and innovation. PAI Plans should be evaluated from the client perspective, and not in the narrow and bureaucratic way proposed by LSC here. Rural LSC recipients deserve the opportunity to build PAI Plans that engage private attorneys (both for profit and non-profit as well as those engaged with low income communities and those that represent corporate behemoths...) and expand and improve the quality of legal resources available to clients.

Sincerely,

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