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MEMORANDUM

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SUBJECT: Comments concerning Proposed Revisions to the Private Attorney Involvement Rule (45 C.F.R. Part 1614)

The Legal Services Corporation (LSC or the Corporation) Office of Inspector General (OIG) would like to thank the Board of Directors and the Operations and Regulations Committee for the opportunity to submit comments on LSC's recently-published Notice of Proposed Rulemaking (NPRM) concerning Private Attorney Involvement (PAI). The OIG appreciates the deliberative approach the Board, the Committee, and LSC management have adopted in pursing this rulemaking. The OIG does not object in principle to the idea of revising the PAI rule in order to encourage more *pro bono* activity, and it recognizes many positive aspects of the proposed revisions contained in the NPRM.

The OIG would, however, caution that the approach to encouraging *pro bono* involvement adopted by the proposed rule is largely untested. The OIG remains concerned that it could have the unintended consequence of reducing involvement by private attorneys and

believes, therefore, that the new approach embodied in the NPRM should be accompanied from day one by appropriate safeguards to determine whether it is having the desired effects and facilitate appropriate changes if it is not. In the OIG's view, these measures would include additional reporting requirements.

In its comments below, the OIG also recommends several modifications to the text of the proposed rule and the supplementary information to avoid later interpretive difficulties and potential confusion within the legal service community and among LSC's congressional appropriators and overseers. The OIG would hasten to add that in making these comments it does not intend to suggest that the current version of the NPRM would make a bad rule. Rather, the OIG intends its comments to bring to the Board's attention considerations that might not otherwise be voiced in the rulemaking process in the hopes that they will help make any rule ultimately adopted by the Board better.

I. LSC should retitle the Private Attorney Involvement rule to reflect its expanding focus.

If adopted, the NRPM would broaden the focus of the PAI rule to include reduced cost and volunteer services provided by persons who are not attorneys. Regarding the current version of the PAI rule, the supplementary information included in the NPRM states that "[a] principal purpose of the PAI rule was to engage private attorneys in the delivery of legal services." Legal Services Corporation, Notice of Proposed Rulemaking, 77 Fed. Reg. 21188, 21194 (April 15, 2014) (hereinafter "NPRM"). This statement in the NPRM suggests that the current version of the PAI rule may have other principal purposes beyond the engagement of private attorneys on a *pro bono* or reduced cost basis. As the OIG reads the regulatory history, however, engagement of private attorneys is not just one among several principal purposes of the current rule; it is the principal purpose of the rule. The first sentence of the statement of purpose in the current

version of Part 1614 states as much: "This part is designed to ensure that recipients of Legal Services Corporation funds involve private attorneys in the delivery of legal assistance to eligible clients." 45 C.F.R. § 1614.1. The NPRM itself correctly quotes the regulatory history of the existing rule as memorializing the Corporation's belief that "the essence of PAI is the direct delivery of legal services to the poor by private attorneys." NPRM, 77 Fed. Reg. at 21189 (citing Legal Services Corporation, 45 C.F.R. Part 1614, Private Attorney Involvement, 50 FR 34510, 34511 (Aug. 26, 1985)).

Regardless of the policy considerations involved in the NPRM, it is beyond dispute that, unlike the existing rule, the proposed rule concerns more than private attorney involvement.[1] The NPRM appears to dilute the principal purpose of the PAI rule, making the engagement of private attorneys merely "a significant goal" of the proposed rule and placing it alongside other significant goals. NPRM, 77 Fed. Reg. at 21194. The Supplementary Information in the NPRM indicates that the proposed rule is intended to prompt grantees to "think creatively about the best means for leveraging community resources to improve the delivery of legal information and legal assistance," whether those resources comprise private attorneys, other professionals, recent law school graduates, or law students. *Id.* While direct provision of legal services still has a privileged place in the proposed rule, 45 C.F.R. § 1614.4(a)(1) (proposed in NPRM, 77 Fed. Reg. at 21199), the extent of attorney involvement under the new rule will depend on "the nature

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[1] The OIG cautions that this change in focus may not be entirely consonant with Congress's recent focus on *pro bono* involvement. While both the House of Representatives and Senate have endorsed the Pro Bono Task Force report, they have both done so in a way that makes clear their intention that the Corporation focus on "measures aimed at increasing the involvement of private attorneys." H. Rep. No. 171, 113th Cong, 1st Sess., at 75 (2013); S. Rep. No. 78, 113th Cong., 1st Sess., at 130 (2013); H. Rep. No. 463, 112th Cong. , 2d Sess., 2 at 82-83 (2012); S. Rep. No. 158,112 Cong., 2d Sess., at 116 (2012). In other words, Congress appears to understand the term "*pro bono* legal services" as referring primarily or exclusively to involvement of private attorneys in the provision of legal services.

of the unmet legal needs and the available volunteer resources in a [grantee's] area," among other factors. NPRM, 77 Fed. Reg. at 21194.

Given that the proposed rule contemplates a more prominent role for non-lawyers than the existing rule, the OIG believes the title of the rule should be changed to reflect their involvement. Such a change would reduce the risk of giving LSC's appropriators, oversight authorities, or outside observers the misimpression that all funding directed to what is now called private attorney involvement is devoted to securing the services of private attorneys. The OIG understands that at several points in the regulatory process LSC has raised the possibility of changing the title of the rule, but it has been unable to identify a suitable alternative. With the broader focus of the proposed rule, the OIG suggests that a title such as "Volunteer and Reduced Fee Services" or "Private Provider Services" would better communicate the purpose of the rule and alleviate any risk of confusion about the nature and breadth of the services being funded.

II. The revised PAI rule should contain reporting requirements that facilitate ongoing analysis of the impact had by the revisions.

In its October 17, 2013, Comments concerning Possible Revisions to the Private Attorney Involvement Rule, the OIG expressed concern that the proposed changes to the PAI rule may divert resources away from private attorneys who participate in or would participate in PAI programs designed in accordance with current requirements. The proposed revisions to the PAI rule do not increase the overall amount grantees are required to spend on PAI, and it is therefore unlikely that the rule will have the effect of directly increasing dollar value of the pool of private services provided to grantee clients. For this reason, the OIG remains concerned that if the PAI rule is revised to make PAI funds available to activities other than the involvement of private attorneys, the legal services community may end up with fewer private attorneys involved in the provision of legal assistance to eligible clients.

As the OIG pointed out in its October 17, 2013, comments there does not now appear to be any LSC regulation that prevents grantees from spending money on the sorts of non-attorney services that would be added to the PAI rule by the NPRM. The current PAI rule merely establishes what activities may be "counted towards a recipient's PAI requirement." Legal Services Corporation, 45 C.F.R. Part 1614, Private Attorney Involvement, 51 Fed. Reg. 114, 21558, 21558 (June 13, 1986). It is silent as to non-attorney services, meaning that funds spent to support non-attorney services are generally not counted toward a grantee's PAI requirement. The NPRM, on the other hand, specifically addresses non-attorney services and permits expenditures supporting non-attorney involvement to be counted toward a grantee's PAI requirement. As mentioned above, the NPRM does not at the same time increase the total amount of the PAI requirement. To the extent it has an effect on grantee behavior, the NPRM will, therefore, most likely result in a reduction of funding to support actual private attorney involvement.

The OIG is aware that the proposed expansion of PAI to cover non-attorney services is premised on a belief that any reduction in funding to private attorney involvement will be more than offset by the expanded participation of other professionals, law students, and law graduates. The NPRM appears to follow the Pro Bono Task Force in believing that early involvement of law students and recent law graduates will have the effect of introducing a new generation to *pro bono* service and lead to more private attorney involvement in the long run. There is a degree of plausibility to this view, but the Board should fully recognize that the view represented by the current draft of the NPRM has yet to be tested by experience. For this reason, the OIG believes that it is very important to have in place mechanisms for measuring the performance of the revised PAI rule from its inception. Without such measuring mechanisms in place at the

inception of the revised PAI rule, there will be gaps in data about the performance of the rule and it will be difficult to determine what effect the regulatory changes have had on private attorney involvement. These measuring mechanisms should, in the OIG's view, consist largely of reporting requirements that, at a minimum, break out the number of private attorneys (as distinguished from other service providers) involved in the program and the magnitude of their services. Reporting of this sort would allow LSC to adjust the PAI rule to suit its underlying objectives should the initial revisions to the rule produce unintended results. It would also minimize the opportunity for confusion on the part of LSC's appropriators, oversight authorities, or outside observers concerning the extent to which PAI funds are directed toward *pro bono* services of attorneys.

III. LSC should make clear that direct grantee involvement in the provision of legal information or services at clinics does not constitute PAI.

The OIG has observed some ambiguity in the discussion of PAI support for clinics that provide individualized legal assistance. The transcripts of meetings preceding publication of the NPRM appear to contain the suggestion that grantees will be able to count their direct participation in PAI clinics toward their PAI requirement. It is the OIG's understanding, however, that even under the proposed PAI rule, grantees would be unable count the cost of legal services provided by its attorneys to clients in the context of a legal clinic that also included private attorneys. Only costs incurred by the grantee in carrying out a support function would be eligible to be counted toward PAI. This understanding is consistent with both the overall regulatory scheme of the proposed PAI rule and the proposed text of 45 C.F.R. § 1614.4(b)(4), which refers to "costs associated with providing support to clinics." NPRM, 77 Fed. Reg. at 21200. The OIG urges the Corporation to clarify this point in the supplementary information published with any final rule that it might adopt.

IV. LSC should consider technical revisions to 45 C.F.R. § 1614.7 in order to account for the expanded scope of the proposed PAI rule.

Several subsections of 45 C.F.R. § 1614.7 should be revised to account for the expanded focus of the PAI rule. Specifically, 45 C.F.R. § 1614.7(a)(2) establishes record keeping requirements in connection with "payments to private attorneys for the support or direct client services rendered," and C.F.R. § 1614.7(a)(4)(c) concerns reimbursements to private attorneys for costs and expenses in the context of "private attorney models." Both subsections have been incorporated into the proposed rule from the current version of the PAI rule, and as such they appear to presume that the sort of services covered would be provided exclusively or primarily by attorneys. NPRM, 77 Fed. Reg. at 21201. This presumption would no longer hold true under the proposed rule, which contemplates the provision of direct and support services by private attorneys and non-attorneys alike. The cited sections should be revised to reflect this broader possible participation in the PAI program. It should also be noted that 45 C.F.R. § 1614.7(a)(2) and (a)(3) appear to largely overlap, especially when the distinction between private attorneys and private non-attorneys is narrowed, as it would be under the proposed rule. The OIG is uncertain as to the original motivation for keeping these two subsections separate, but it believes that it may be possible to combine them into a single subsection removing superfluity and the associated risk of confusion.

V. LSC should adopt language clarifying the intent of PAI eligibility standards set forth in the proposed rules for clinics.

The proposed text of 45 C.F.R. § 1614.4(b)(4) "establishes the rules governing recipient support for PAI clinics." NPRM, 77 Fed. Reg. at 21197, 21200. It describes in some detail eligibility constraints on three different types of PAI clinics: clinics that exclusively provide legal information not tailored to particular clients; clinics that exclusively provide individualized legal advice; and clinics that do both. In the Operations and Regulations Committee meeting

that voted to recommend publication of the NPRM to the full Board of Directors, a board member observed that without a change in meaning, one could remove the proposed eligibility constraints in Section 1614.4(b)(4) and substitute language pointing to generally applicable standards governing the use of LSC funds as the operative constraint on PAI activities, thereby reducing the complexity the proposed rule. *See*, *e.g.*, Transcript of the LSC Board of Directors Operations and Regulations Committee at 102, 106 (April 7, 2014) (hereinafter "Operations and Regulations Committee Tr."). Prompted by this insight, the OIG has considered the advisability of adopting detailed language like that proposed in 1614.4(b)(4) of the proposed rule. NPRM, 77 Fed. Reg. at 21200.

The OIG understands the proposed language of 45 C.F.R. § 1614.4(b)(4) as explicating the straightforward implications of general eligibility requirements found in LSC's regulations and governing statutes. This appears to be LSC management's position as well. *See* Operations and Regulations Committee Tr. 104 (indicating that the proposed language was intended to make clear that funds spent on LSC-eligible portions of a clinic could count toward the PAI). If the language intends to do more, the OIG would strongly recommend that the intent be clarified before it is adopted.

As a general matter, the OIG favors a systematic approach to rulemaking that avoids duplication of regulatory standards across LSC's regulatory apparatus because it believes that regulations of this sort are easier to interpret, provide clearer guidance, and minimize enforcement difficulties to a greater extent than rules with an *ad hoc* quality. On the other hand, the OIG recognizes that it may well be the case that confusion concerning the application of eligibility rules to PAI clinics makes a more detailed statement of the particular application of general rules advisable in this instance. Whether confusion concerning application of the general

eligibility rules is sufficiently widespread and entrenched to warrant such a deviation from the generally advisable policy of addressing each subject once in the body of LSC's regulations is a policy judgment concerning which the OIG does not have sufficient information to offer an opinion.

This is not to say that the OIG believes the approach represented in the current proposal is problem free. The OIG's primary concern with the approach adopted by the proposed version of 45 C.F.R. § 1614.4(b)(4) is that over time, the interpretation of that detailed language may unintentionally diverge from the interpretation of general eligibility standards, effectively establishing an unique set of eligibility criteria for PAI clinics. This outcome does not appear improbable when one considers that a future management team called upon to interpret 45 C.F.R. § 1614.4(b)(4) might not unreasonably apply some version of the rule against surplusage[2] to conclude that 45 C.F.R. § 1614.4(b)(4) must be intended to communicate something different than the generally applicable eligibility requirements. Should the Corporation chose to proceed with the proposed language in 45 C.F.R. § 1614.4(b)(4), the OIG believes that the risk of unintended divergence from the general standards can be minimized by including language in the general policy section of the rule, 45 C.F.R. § 1614.2, to the effect that notwithstanding any other provision or subsection of the rule, a grantee may only count toward its PAI requirement funds spent in support of activities that the grantee would itself be able to undertake with LSC funds.

The OIG again thanks the Board of Directors and the Operations and Regulations Committee for the opportunity to submit the foregoing comments concerning LSC's proposal to

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[2] The rule against surplusage is a well-established canon of statutory and regulatory construction according to which legal texts are interpreted to give every word meaning. Specifically, the canon holds that laws and regulations should not be interpreted in a way that renders a word, clause, or provision superfluous. *See, e.g., Corley v. U.S.,* 556 U.S. 303, 314, 129 S.Ct. 1558, 1566 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

revise its Private Attorney Involvement regulation, 45 C.F.R. Part 1614. While acknowledging the many positive aspects of the proposed revisions to the PAI rule, the OIG recommends that the Board of Directors consider in its rulemaking deliberations improvements to the NPRM that would minimize potential confusion about the scope of the PAI program and put the Corporation in a position to address quickly any unintended consequences that might result from the proposed regulatory action.