

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

TELEPHONIC MEETING OF THE
OPERATIONS AND REGULATIONS COMMITTEE

OPEN SESSION

Monday, March 3, 2014

2:50 p.m.

Legal Services Corporation
3333 K Street, N.W.
Washington, D.C. 20007

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairman
Laurie I. Mikva
John G. Levi, ex officio

OTHER BOARD MEMBERS PRESENT:

Martha L. Minow
Father Pius Pietrzyk, O.P.
Julie A. Reiskin

STAFF AND PUBLIC PRESENT:

Lynn Jennings, Vice President for Grants Management

Rebecca Fertig, Special Assistant to the President

Ron Flagg, Vice President for Legal Affairs, General Counsel, and Corporate Secretary

Mark Freedman, Senior Assistant General Counsel, Office of Legal Affairs

Stefanie Davis, Assistant General Counsel, Office of Legal Affairs

Laurie Tarantowicz, Assistant Inspector General and Legal Counsel, Office of the Inspector General

Matthew Glover, Associate Counsel, Office of the Inspector General

Janet LaBella, Director, Office of Program Performance

Lora M. Rath, Deputy Director, Office of Compliance and Enforcement

Joanna Allison, Volunteer Lawyers Project, Boston

Sharon Bashan, Neighborhood Legal Services of Los Angeles County

Sam H. Buchanan, Executive Director, Mississippi Center for Legal Services Corporation

Peggi Cornelius, Program Director, Arizona Volunteer Lawyers Program

STAFF AND PUBLIC PRESENT (Continued):

Jim Guest, Legal Services of Eastern Missouri

Shelby Bean, Director of Pro Bono Evaluations, Legal
Aid of Northwest Texas

AnnaMarie Johnson, Executive Director, Nevada Legal
Services

Anne Milne, Executive Director, Utah Legal Services

Patricia Z. Risser, Legal Action of Wisconsin
Volunteer Lawyers Program

Lillian Krusz Welby, Pro Bono Director, Legal
Services of the Hudson Valley

Andrea Zigman, Deputy Director, Legal Services NYC

Don Saunders, National Legal Aid and Defenders
Association (NLADA)

Chuck Greenfield, NLADA

Robin Murphy, NLADA

Terry Brooks, Director, Division for Legal Services,
American Bar Association

Mary Ryan, Chair, Standing Committee on Pro Bono and
Public Service, American Bar Association

Steve Scudder, Standing Committee on Pro Bono and
Public Service, American Bar Association

Bev Groudine, Standing Committee on Legal Aid and
Indigent Defendants (SCLAID), American Bar
Association

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1 P R O C E E D I N G S

2 (2:50 p.m.)

3 CHAIRMAN KECKLER: Let me note the presence of
4 a quorum for this announced magnitude of the Operations
5 and Regulations Committee, and call it to order, with
6 the first item of business being the approval of our
7 agenda for the afternoon.

8 M O T I O N

9 MS. MIKVA: So moved.

10 CHAIRMAN KECKLER: Is there a second?

11 MR. LEVI: Second.

12 CHAIRMAN KECKLER: All in favor?

13 (A chorus of ayes.)

14 CHAIRMAN KECKLER: The agenda is approved.

15 Our next item is to approve the minutes from
16 our quarterly meeting just concluded in January.

17 M O T I O N

18 MR. LEVI: So moved.

19 MS. MIKVA: Second.

20 CHAIRMAN KECKLER: All in favor?

21 (A chorus of ayes.)

22 CHAIRMAN KECKLER: With that taken care of,

1 the minutes are approved.

2 I want to thank everybody for joining us, and
3 I especially want to thank the people here in
4 Washington, the LSC staff. For those that are outside
5 Washington, you may not realize that the federal
6 government is closed today, and the LSC offices, or
7 almost the entire federal establishment is closed
8 because we are continuing on with our meeting thanks to
9 the extra efforts of staff and Management. So I want
10 to offer my thanks for that.

11 MS. MIKVA: Why is it closed? For Pulaski
12 Day?

13 CHAIRMAN KECKLER: The federal government is
14 closed because of what perhaps people in Chicago would
15 consider a minor sprinkling of snow, but which has --

16 MR. LEVI: We had a rush hour storm today of
17 about 2 inches that came down furiously, but now it's
18 sunny.

19 CHAIRMAN KECKLER: Yes. In any event, it's
20 paralyzed the city into gridlock, once again unusually.
21 But we're carrying on here nevertheless.

22 Before I turn it over to the Office of Legal

1 Affairs to introduce the topic for today, I want to
2 just note where we are in the process. We're
3 developing this Rule for a Notice of Proposed
4 Rulemaking to come out and be discussed. The draft of
5 that should be discussed at the next quarterly meeting.

6 This has been an extended process that
7 originates in the work of the Pro Bono Task Force, and
8 throughout, we've focused on getting public comment.
9 It's not necessarily usual for public comment to occur
10 before we even present the draft of the Rule, but in
11 this case it's sort of been an ongoing thing. We've
12 had the Pro Bono Task Force. We've had the rulemaking
13 workshops. And we also have today.

14 Of course, the main focus of public comment
15 will be in its traditional role. Once we get a draft
16 and we agree on some language to go out for public
17 comment, probably for 60 days, coming up after the next
18 quarterly meeting, then that's when we'll really look
19 for another important round.

20 So go ahead, and we'll be interested in
21 comments today. But make sure that you offer those
22 comments, to the extent that they're still relevant,

1 when the draft is released.

2 With that, I will turn it over to the Office
3 of Legal Affairs to discuss where they're at in the
4 development of the Rule.

5 MR. FLAGG: Thanks, Charles. This is Ron
6 Flagg, the General Counsel. And I just want to thank
7 my colleagues in the Office of Legal Affairs who will
8 also be joining us this afternoon, and that includes
9 Stefanie Davis and Mark Freedman and Diana Camosi, who
10 all have devoted a lot of time to developing the draft
11 as far as we've gotten so far.

12 And I would add that work on this draft has
13 not been limited to the Office of Legal Affairs, but
14 we've gotten the input of many people within our
15 organization, as well as the guidance from the Pro Bono
16 Task Force and from 12 oral sets of comments and 10
17 written sets of comments during the workshops that
18 Charles mentioned.

19 Stefanie Davis will provide a more detailed
20 overview of the draft. But I wanted to put those
21 comments into some context with some general points
22 about the process that LSC has gone through in

1 developing this draft.

2 We have carefully considered the Pro Bono Task
3 Force's recommendations and all of the comments that I
4 just mentioned. And I wanted to share several
5 observations about the process we've undertaken in
6 light of those comments.

7 First, the draft regulation addresses a wide
8 range of vehicles through which our recipients may
9 leverage their resources via the involvement of private
10 attorneys and others.

11 For example, that involvement could take the
12 form of direct representation by a private attorney
13 providing extended services. Alternatively, and this
14 is just one alternative, the involvement could be a
15 screening and referral by a recipient in the context of
16 an advice and referral clinic. And again, those are
17 just two examples of vehicles that would be covered by
18 the regulation.

19 Likewise, we are proposing to expand who would
20 qualify as a person to provide service for which our
21 recipients could allocate costs for PAI purposes.
22 Currently under our regulation, only private attorneys

1 are covered, and under the proposed regulation, we
2 would have law students and recent law graduates and
3 other professionals, among others.

4 And in considering all of these alternative
5 vehicles and these various alternative professionals
6 who might qualify for coverage under the Rule, we were
7 really guided at the end of the day by a couple of
8 points.

9 First, it seems to us that the most effective
10 and efficient vehicle for a recipient to use for PAI
11 purposes may well differ depending on the specific
12 legal needs and available resources in a recipient's
13 service area. This is not necessarily a
14 one-size-fits-all rule in which every recipient is
15 facing either the same set of legal needs in their
16 service area or the same available resources to use for
17 PAI purposes, and we recognize that.

18 And secondly, in thinking about whether LSC
19 should prescribe numerically on a percentage or other
20 basis the particular vehicles that a recipient should
21 use for PAI purposes, we were guided by the thought
22 that such a requirement or a limitation on the use of

1 certain vehicles or the use of certain people such as
2 law students, that those kinds of requirements or
3 limitations ought not to be put into place unless we
4 had evidence or data to support those kinds of
5 requirements or limitations.

6 So you will see in the current draft that we
7 have not generally either prescribed numerical
8 requirements or limits other than the 12-1/2 percent
9 provision, which has been in place for many years. But
10 beyond that, we've not prescribed a particular vehicle
11 or limited a particular vehicle or the use of
12 particular vehicles.

13 Second, I want to address some issues
14 generally that arise in connection with regard to
15 clinics or other PAI vehicles in which our recipients
16 screen and refer people, that is, clients to PAI
17 volunteers.

18 Under the current PAI rules we have in place,
19 LSC generally requires reporting regarding such
20 referrals, and indeed, generally they must be treated
21 for reporting purposes as if they were the recipient's
22 case. And we received quite a number of comments from

1 the Pro Bono Task Force and from members of the public
2 and our recipients in the context of our workshops
3 about that issue.

4 And we have certainly taken those comments
5 seriously, and in light of those comments, we are
6 proposing in the draft to make the reporting
7 requirements in the clinic or referral context much
8 less onerous than they have been in an effort to make
9 it easier to get pro bono assistance.

10 With respect to clinics, we also gave
11 extensive consideration to whether statutory and
12 regulatory requirements limiting legal assistance to
13 eligible clients, whether those requirements could
14 somehow be avoided in whole or in part or sidestepped
15 in some way.

16 And after considering at great length whether
17 those requirements could be avoided, we were not able
18 to identify either exceptions or shortcuts that could
19 be taken consistent with the language of the statutes
20 and regulations under which we operate.

21 So those are a quick overview of some of the
22 general policy issues and legal issues, in the case of

1 the restrictions, which we encountered. And I'll turn
2 the microphone, or in this case the telephone, over
3 Stefanie to walk through the regulation in a little
4 more detail.

5 MS. DAVIS: Great. Thank you, Ron. Again,
6 I'm Stefanie Davis in the Office of Legal Affairs.
7 Thank you to everyone for joining us this afternoon.
8 We really appreciate your being on this call.

9 I would like to ask those of you who joined
10 after the meeting started, if you could please send me
11 an email to confirm your attendance on this call. My
12 email address is sdavis@lsc.gov. Thank you.

13 So as were mentioned, we're going to just take
14 a quick walk through the draft provisions of the Rule
15 at this point. And I think the overall philosophy that
16 we took when we were drafting the provisions that you
17 see in front of you was to improve and expand the
18 quality and availability of legal services,
19 particularly pro bono services.

20 And in doing that, we looked at all of the
21 recommendations that the Task Force made, we looked at
22 the comments that we received in response to the

1 request for information, and we considered the comments
2 that were provided by panelists at the workshop, and
3 tried to cast as light a net as we could, with the end
4 goal being to improve the delivery of legal services.

5 So our approach to the drafting took Pro Bono
6 Task Force recommendation 2 as its framework, with its
7 three subparts recommending various changes to the Rule
8 to improve flexibility and to make it easier for
9 recipients to meet their PAI requirement.

10 The recommendations and the comments lent
11 themselves more easily to being considered in light of
12 three -- or, I'm sorry, five -- different categories
13 that then filtered out into what you see in the
14 proposed Rule.

15 Those five categories were: the definition of
16 private attorney, which would (sound blip) the
17 involvement of law students; the involvement of
18 paralegals and other professionals; clinics, including
19 screening; and intake and referral activities,
20 including tracking, since screening and clinics seem to
21 hang together, and intake a referral and tracking seem
22 to hang together.

1 We have made the changes to the Rule primarily
2 through the introduction of new text rather than making
3 modifications to the existing provisions. And you'll
4 see most of that new language in proposed Section
5 1614.4(b), Support and Other Academies.

6 We have generally not touched a lot of the
7 existing text, and the version that you have has in
8 yellow highlight all of the new text. The rest of the
9 text is original to the Rule.

10 In some instances we've moved provisions
11 around to try to streamline the Rule and improve the
12 logic in the Rule. And in some places we have simply
13 inserted "students, law graduates, and other
14 professionals" as individuals who may be engaged to
15 deliver legal services in the PAI requirement.

16 So with that kind of framework in there, I
17 will just start with Section 1614.1, where you see that
18 the new text is to ensure that recipients of LSC funds
19 involve private attorneys and encourage recipients to
20 involve law students, law graduates, and other
21 professionals.

22 This language was really targeted to make

1 clear that the primacy in this Rule is still with
2 involving private attorneys in the delivery of legal
3 services, but also to make clear that other parties can
4 be involved as well, and to the extent that they can be
5 involved, we encourage recipients to involve them.

6 Section 1614.3 is the first big, major,
7 substantive section where we have pulled out the
8 definition of private attorney and set it here in
9 "Definitions," along with definitions of a number of
10 other new terms.

11 We have drafted "Law Student" and "Law
12 Graduate" to be rather broad terms. We wanted to be
13 inclusive here. We wanted to capture people who were
14 participating in nontraditional programs such as
15 internships -- I'm sorry, not internships,
16 apprenticeships -- in the Law Student definition.

17 And within the Law Graduate definition, we
18 wanted to make sure that we were reaching people who
19 had graduated from law school and were awaiting their
20 bar results, or clerking, or otherwise had not sat for
21 the bar or become admitted to the bar within two years
22 of graduating from law school.

1 These two definitions help respond to one of
2 the recommendations of the Task Force, which was to
3 expand the scope of the Rule to include the efforts of
4 law graduates and law students, particularly law
5 graduates participating in incubator activities, which
6 we'll touch on a little bit later as well.

7 There are two definitions that we have taken
8 from the LSC Case Service Reporting Handbook. Those
9 are the definitions of "Legal Assistance" and "Legal
10 Information." We've broken out these two definitions
11 in the context of the Rule to explain basically when
12 screening is necessary, and you'll see this in the
13 discussion of clinics below in Section 1614.4, which
14 we'll reach in just a few minutes.

15 These definitions have been used for years
16 within the context of both legal services provided by
17 clients and through the course of their PAI programs.
18 So they seemed like a natural fit here. So that's the
19 framework we've used, and we're happy to hear whether
20 there are concerns with using those constructs here.

21 "Other Professionals," as you'll see, is a
22 very broad definition. But the key point is, with

1 Other Professionals, an other professional must be
2 using their professional experience in furtherance of a
3 recipient's provision of legal information and legal
4 assistance to eligible clients.

5 So through this Rule we are trying to capture
6 those circumstances where, for example, a tax attorney
7 might be providing an educational seminar on the earned
8 income tax credit; but we're not looking at not
9 accountants who are doing recipients' books. We're
10 looking really at other professionals who are helping
11 recipients deliver legal services to their clients.

12 "PAI Clinic" we've defined specifically here
13 to mean an activity that is under this part as opposed
14 to a clinic that may be run solely by a recipient
15 without the involvement of a private attorney.

16 And then we get to "Private Attorney," which
17 is new and improved. It is much broader. Private
18 Attorney is no longer tied to the definition of "Staff
19 Attorney," which had the requirement that if someone
20 earned more than half of their professional income from
21 a recipient, they were considered a staff attorney.

22 And the Task Force and commenters pointed that

1 out as a problematic issue with the definition of
2 Private Attorney because it caused complications for
3 compensated service, PAI compensated service, that was
4 provided by someone who had worked for a recipient
5 within the preceding two years. We've completely done
6 away with the tie between the Staff Attorney definition
7 and Private Attorney.

8 We have described private attorneys in terms
9 of who they are. They are attorneys who are licensed
10 or otherwise authorized to practice law in the
11 jurisdiction in which they're located; or they're
12 retired attorneys who are authorized to practice in the
13 law pursuant to the rules of the jurisdiction in which
14 they're located; or they're attorneys who are employed
15 less than 1,000 hours per calendar year by an LSC
16 recipient or sub-recipient, but only as to activities
17 carried out the scope of his or her employment.

18 We drafted that particular part of the Rule to
19 try to capture people who may be employed less than
20 part-time by a recipient but continue to provide
21 voluntary services to the recipient. We thought it was
22 reasonable, based on the comments that we have

1 received, to allow those voluntary services or those
2 PAI services to count.

3 We have excluded from the definition any
4 attorney who is employed more than 1,000 hours per
5 calendar year by a recipient or sub-recipient or an
6 attorney who is employed by another legal services
7 provider. The reason for this exclusion was that these
8 attorneys are already providing these services, and
9 they are not who the Rule is intended to reach.

10 The Rule is still intended to reach those
11 attorneys who are not engaged in or are no longer
12 engaged directly in providing legal services to the
13 population of clients that LSC recipients are. So
14 these pairs of individuals are already doing the work.
15 They're not who we're trying to reach.

16 CHAIRMAN KECKLER: Stefanie, can I stop you
17 just for a second there?

18 MS. DAVIS: Sure. I would appreciate it,
19 actually.

20 CHAIRMAN KECKLER: Great. So under 1614.5 --
21 I'm looking there -- there's this issue, right, where
22 if you can't allocate it to PAI, if an attorney, law

1 graduate, or other professional provides more than 800
2 hours of service under this part --

3 MS. DAVIS: Right.

4 CHAIRMAN KECKLER: But that's distinct in the
5 Rule from being employed by the LSC recipient. Is that
6 right?

7 MS. DAVIS: I'm sorry. Could you say that
8 again? You're echoing, actually.

9 CHAIRMAN KECKLER: So there's the 800 hours
10 rule, that you can't be compensated, anyway, for
11 compensated low bono/pro bono type of services for more
12 than 800 hours. Once you cross the 800 hours
13 threshold, then any further costs can't be allocated.

14 MS. DAVIS: Right.

15 CHAIRMAN KECKLER: And so that activity, that
16 compensated activity on behalf of the recipient by a
17 private attorney, is distinct -- that 800 hours is
18 distinct from the 1,000 hours that you could be
19 employed or could have been employed.

20 MS. DAVIS: That's correct. That seems to be
21 correct, yes.

22 CHAIRMAN KECKLER: So why don't you pick up

1 again there. But that just creates an oddity in my
2 mind. I don't think it would be very common that
3 somebody would be employed for 1,000 hours by a
4 recipient and then paid low bono for 800 more hours.

5 MS. DAVIS: Right.

6 CHAIRMAN KECKLER: And it's not like the
7 person's going to be making a mint.

8 MS. DAVIS: Right. No, I understand.

9 CHAIRMAN KECKLER: But I think it still seems
10 odd to me. It's not something that I would want to
11 happen very often, that that person would be getting
12 1800 hours from the recipient and still be involved in
13 meeting the PAI requirement.

14 MS. DAVIS: No. The point is well taken. The
15 point is well taken. I don't recall whether we had
16 discussed that particular combination of factors or
17 that particular combination of regulatory elements and
18 how it would play out, so I very much appreciate your
19 mentioning it.

20 CHAIRMAN KECKLER: Okay. Carry on.

21 MS. MIKVA: I'm sorry. This is Laurie Mikva.

22 MS. DAVIS: Yes?

1 MS. MIKVA: What was the reasoning behind
2 limiting it to an attorney licensed to practice in the
3 state? I thought one of those things that people were
4 perhaps seeking was if the state allows someone from
5 out of state or not licensed to do some of this stuff,
6 why would we not allow that to be PAI?

7 MS. DAVIS: Well, I think there are two
8 things. One is that the definition says "licensed or
9 otherwise authorized to practice law." So if someone
10 is licensed from out of state and the state court rules
11 allow them to provide some limited representation, they
12 could certainly do that and that would count towards
13 the PAI requirement. That's exactly the kind of
14 situation that we had in mind when we drafted the "or
15 otherwise authorized to practice law" language.

16 I think if they were not able to practice in
17 the jurisdiction but wanted to provide services,
18 obviously they couldn't practice law, but their
19 services could be considered under "Other Professional
20 Services." Does that make sense?

21 MS. MIKVA: Okay. Thank you.

22 MR. FLAGG: This is Ron Flagg. Stefanie has

1 given what's clearly the right answer, given this
2 draft. I got a comment from Martha Minow in writing
3 that the Rule needs to make clear that all of the
4 services provided under this Rule, whether it's by
5 attorneys, law students, or others, have to be
6 consistent with the unauthorized practice of law rules
7 in each particular jurisdiction. And certainly that's
8 our intention, and we'll make that clear.

9 But the answer to Laurie's question is
10 clearly, to the extent somebody from out of state can
11 practice on a whatever basis, limited or otherwise, in
12 a jurisdiction, the Rule is drafted to allow expenses
13 associated with that work to be counted toward PAI.

14 MS. MIKVA: Thank you.

15 MS. DAVIS: All right. Any other questions,
16 or back to the Rule?

17 MR. LEVI: I think your 1614.3(e), if I
18 understand it, that Other Professional --

19 MS. DAVIS: Yes.

20 MR. LEVI: Are you following what's happening
21 with proposals in California about individuals being
22 able to become somehow -- who are non-lawyers --

1 there's a proposal out there that will allow
2 non-lawyers to get certified, in a sense, to handle
3 some fairly routine matters? I'm assuming that would
4 fall under the (e).

5 MS. DAVIS: I believe it would if it's not --
6 yes. I think that would probably fit within (e). We
7 can take a look at that.

8 MR. FLAGG: John, this is Ron. We can
9 certainly make clear -- the way this is written now is
10 there's a dichotomy, basically. You're either a
11 private attorney who is authorized to practice law in
12 the jurisdiction, either because you're a member of
13 that bar or you're otherwise admitted for pro bono or
14 other purposes, or you're an other professional who's
15 not engaged in the practice of law.

16 You're in a sense describing something that
17 falls in between, that is, somebody who is on a limited
18 basis authorized to practice law but is not a lawyer.
19 And clearly, it was our intent to include those in the
20 other professional category, and we can make that
21 clear.

22 MR. LEVI: Yes. But I thought you do --

1 because you gave that Supplemental Security case as an
2 example of a paralegal. So it was similar but not
3 quite the same.

4 MR. FLAGG: Okay, Stefanie. Go ahead.

5 MS. DAVIS: All right. So then I think those
6 are the high points in the Definitions section.

7 So we get on to 1614.4, and this is really the
8 heart of the NPRM. This is really where the
9 recommendations come to life, where we really bring
10 them into substance.

11 Subsection (a), which is "Direct Delivery of
12 Legal Assistance to Clients," takes original 1614.3(a)
13 and combines it with what was 1614.3(d), which was the
14 requirements that a direct delivery system has to have,
15 which would include the intake and case acceptance
16 procedures, case assignments, case oversight, and
17 access to recipient resources.

18 It made sense to us that those two things
19 should be together in this new iteration of the Rule.
20 This rule has one change to it, and that's in Section
21 (a)(2), which allows for the direct delivery of legal
22 assistance to eligible clients to include

1 representation by a non-attorney in an administrative
2 tribunal. So a Supplemental Security Income case
3 handled by a non-attorney could constitute direct
4 delivery under the new iteration of the Rule.

5 And then we move on to subsection (b), which
6 is "Support and Other Activities." Subsections (b)(1)
7 and (b)(3) are taken directly from the original Rule;
8 these are taken from existing 1614.3(b)(1) and (2).
9 And the only change to 1614.4(b)(1) is that it makes
10 clear that support provided by private attorneys to the
11 recipient is as part of its delivery of legal
12 assistance to eligible clients.

13 The original language says, "Support provided
14 by private attorneys to the recipient in its delivery
15 of legal assistance to eligible clients." We revised
16 that language to say "as part of" in (b)(1) and in
17 (b)(2).

18 (b)(2) covers support provided by other
19 professionals because again, we wanted to make it very
20 clear that because we are expanding the scope of who
21 can participate in PAI activities, to include other
22 professionals who will be providing services outside of

1 legal advice, we wanted to make sure that the
2 assistance that's being provided in support of the PAI
3 Rule is truly in support of the recipient's delivery of
4 legal information and legal assistance.

5 So we are truly looking at assistance,
6 services, support that go to benefitting the delivery
7 of assistance to clients, whether it's providing
8 support in a client's case or whether it is providing
9 training that will help recipients to better address
10 the issues faced by their clients. Those are the kinds
11 of things that we are trying to capture in this Rule.

12 We then move on to Subsection (b)(4), which is
13 "PAI Clinics."

14 MS. REISKIN: Can I just ask a question?

15 MS. DAVIS: Yes. Sure.

16 MS. REISKIN: When you say "support the case,"
17 so would that mean like in an SSI hearing, if they got
18 a volunteer to go with the client to their doctor's
19 appointments to make sure they got there, could
20 something like that count even though it's not legal
21 but it's supporting the case?

22 MS. DAVIS: I think that would pose a

1 difficult question. What is the volunteer doing? Are
2 they helping to develop the case, or are they simply
3 providing support for the person going to their
4 appointment?

5 MS. REISKIN: They're probably not helping
6 develop -- they're making sure the client gets there so
7 the case doesn't get tanked, and maybe reporting back
8 to the attorney on what happened and what the concerns
9 are. That was just an example. So are you not looking
10 that far out from legal?

11 MS. DAVIS: I don't want to say definitively
12 at this point. But that does seem a bit more removed
13 than what we were thinking in this case.

14 MS. REISKIN: All right. That's just -- I'm
15 sorry? I was just curious how -- I'm very happy to see
16 non-attorney stuff in here. But I was just curious
17 about how much -- when you said "supporting," I didn't
18 know what that meant.

19 MS. DAVIS: No. I understand that. And
20 that's the kind of feedback that we are hoping to get
21 both now and as we are developing -- once the NPRM hits
22 the streets, figuring out if there is a way to state

1 more clearly what those parameters are. Because we
2 have a concept of what "support" means, but as you
3 point out, what the outside limits of that are I don't
4 think we know.

5 MS. REISKIN: Thank you.

6 MS. DAVIS: Sure. All right. Moving on to
7 "PAI Clinics," we've divided this into two subsections.
8 One is purely for clinics that are providing legal
9 information.

10 "Recipients may allocate costs to their PAI
11 requirement that are associated with providing support
12 or technical assistance to other organizations whose
13 clinics only provide legal information" -- so general
14 legal information that is not specifically targeted to
15 an individual's legal problem and that doesn't require
16 the provision of individualized, specialized legal
17 advice.

18 Subsection (2) describes what needs to happen
19 when the clinic provides legal assistance to
20 individuals. Legal assistance, direct legal
21 assistance, to an individual, whether it's brief
22 services or extended services, as Ron mentioned

1 earlier, we believe under the statute requires
2 screening before that legal assistance can be provided.

3 And the Rule states that a recipient can
4 allocate to its requirement costs associated with the
5 support of clinics for legal assistance provided to
6 individuals who are eligible to receive LSC-funded
7 legal services.

8 And recipients can support but not allocate
9 costs to their PAI requirement for clinics that serve,
10 for example, over-income individuals because those
11 individuals can be served by recipients, but not using
12 LSC funds.

13 Then we address in Section 4(2)(c) clinics
14 that provide a combination of legal information and
15 legal assistance to clients. Recipients can allocate
16 to its PAI requirement costs associated with the
17 support of both parts of the clinic, but of course,
18 screening must occur for the legal assistance portion
19 of the clinic.

20 We then move on to "Screening and Referral
21 Systems." Screening and referral systems were
22 mentioned in recommendation 2(b) of the Pro Bono Task

1 Force report, and this is our provision responding to
2 both that recommendation and the comments received in
3 response to the RFI and at the workshop.

4 So in this section, recipients can participate
5 in screening and referral systems. In order to
6 allocate costs associated with those screening and
7 referral systems, recipients must be able to report the
8 number of eligible persons that were referred to each
9 program and the number of eligible persons who were
10 placed by the program with a private attorney.

11 So there is screening required. There is some
12 reporting required. But under the new conception of
13 the Rule, in both clinics and in screening and referral
14 systems, recipients are not required to take the
15 referred clients on as their own in order to allocate
16 their costs to the PAI program. That's not to say that
17 recipients can't do that if they want to and they find
18 that that's effective. It's just saying that that's no
19 longer required.

20 CHAIRMAN KECKLER: Could you stop? It's
21 Charles. Could you stop and talk a little bit about --
22 because I think this is always one of the key questions

1 about that -- about how your planning in the Rule, what
2 your current thinking is in the Rule, about keeping
3 track.

4 In the screening and referral systems, and
5 then also to some extent in the clinics, there's this
6 idea that we're going to be able to -- rather, the
7 recipients are going to be able to and then we'll be
8 able to -- keep track of people referred, the people
9 who get lawyers, the people who are eligible.

10 Is there any sense in the Rule of how that
11 kind of reporting or that kind of recordkeeping is
12 going to be facilitated or to occur?

13 MS. DAVIS: We have not in the text of the
14 Rule prescribes a reporting procedure or documentation
15 requirements beyond the ones that are currently in
16 existence.

17 So I don't think that we have a specific idea
18 for how that would happen. Yes. I don't think we have
19 a specific idea for how that would happen. We have
20 listed the information that we think needs to be
21 provided in order for credit to be assigned for
22 participating in a screening and referral system.

1 And we have given thought to whether the
2 reporting should go into the Rule, whether the
3 reporting can be described through either our ongoing
4 data project or through policy guidance from the Office
5 of Compliance and Enforcement. But we haven't created
6 a new system, and we haven't -- yes. We have not
7 created a new system for reporting.

8 CHAIRMAN KECKLER: Right. And that --

9 MR. FLAGG: Charles, can I just --

10 CHAIRMAN KECKLER: Yes.

11 MR. FLAGG: We've actually given this a good
12 deal of thought, and our view is that reporting
13 requirements, that is, what details concerning PAI
14 activities, for example, since that's what we're
15 addressing here -- that's obviously very important to
16 us. I know it's important to the Board. And we've
17 been doing a good deal of work in terms of data
18 collection.

19 I think it's Management's view, or I know it's
20 our Management's view, that we ought not to put the
21 details of reporting requirements generally into the
22 regs because as we're working with our recipients

1 regarding reporting requirements, and we've been doing
2 this frequently over the last several years, we're
3 trying to develop more helpful data, data that are
4 helpful to our recipients and data that are helpful to
5 LSC.

6 And we want to be able to adjust those
7 reporting requirements as circumstances dictate. And
8 if we put the details of the reporting requirements
9 into a reg, then all of a sudden, as we do have
10 insights, it becomes much harder to either adjust the
11 requirements one way or another -- that is, add to what
12 people think ought to be reported or eliminate some
13 requirements.

14 So I think Management's recommendation is that
15 reporting requirements beyond what is in here -- and
16 there are two requirements, which is that the recipient
17 must be able to track the number of eligible persons
18 referred by the recipient to each program and the
19 number of eligible persons who were placed with a
20 private attorney. That's in the draft.

21 But beyond that sort of thing, our
22 recommendation is not to include the details of

1 reporting requirements in the regulation.

2 CHAIRMAN KECKLER: Right. And I totally
3 understand that, and we are thinking about these things
4 sufficiently such that we do want flexibility. I
5 wanted just to highlight that issue for the Committee
6 and Board members because it is of importance that this
7 rule isn't the end of the story. There's going to be
8 accompanying guidance that's going to have to be
9 attached to it one way or the other.

10 And it's something that I just am personally
11 trying to think about, trying to think ahead to that
12 guidance, and making sure that the Rule has the right
13 architecture so that we are able to issue the kinds of
14 guidance that Management and the Board are going to
15 want in the future.

16 So I just wanted to highlight that point for
17 thinking about and making sure we have that, that kind
18 of architecture.

19 MR. FLAGG: Yes. Our rules generally -- we
20 have, through our grant assurances and otherwise, the
21 levers that are required to develop data requirements
22 in cooperation with our recipients. And I think, by

1 and large, we've not put in each substantive regulatory
2 provision a statement that oh, by the way, you'll have
3 reporting obligations. Those reporting obligations are
4 without regard to what's in the particular regulation.

5 CHAIRMAN KECKLER: Right. Okay. Thanks.

6 MS. DAVIS: Great. So then we have just a
7 couple more substantive points to discuss in the text
8 of the Rule.

9 Provision 1614.4(b)(6) covers law student
10 activities, and it's pretty simple. In this provision,
11 recipients can allocate to their PAI requirements costs
12 associated with law student work supporting the
13 recipient's provision of legal information, so again,
14 legal information or delivery of legal assistance to
15 eligible clients. Again, has to be assistance that
16 benefits clients.

17 We envision that this provision would cover
18 costs associated with supervising the law student and
19 costs associated with the overhead for the student.
20 But if the recipient is compensated, if they're
21 receiving a stipend, that would not be covered. That
22 amount would not be able to be credited to the PAI

1 requirement.

2 And the reason for that is that we believe
3 that all costs should be treated the same across
4 students, and that since no one else gets compensated
5 for the PAI work, by which I mean the -- that actually
6 was a terrible example. But we simply chose not to
7 allow the compensation for the students themselves to
8 count toward the PAI requirement.

9 MR. FLAGG: And that gives students the same
10 treatment in that regard as other volunteers. If
11 people -- well, I guess it's not -- we're not
12 permitting students who are compensated. The
13 compensation for students is not counted toward PAI.

14 MS. DAVIS: Right. And just to also be clear
15 that we are allowing -- through this provision,
16 recipients may allocate costs associated to their
17 existing student internship and externship programs.
18 This won't apply only to new programs.

19 CHAIRMAN KECKLER: Let me pose another query.
20 You don't have to answer that one; it's not designed
21 for an instant ruling, instant OLA ruling. But suppose
22 that, as often happens in law school clinics and we

1 hope will happen for us, too, there's a supervising
2 attorney who, may be a practitioner or may be a
3 clinical faculty member, that may be involved in the
4 students' representation.

5 That rule doesn't necessarily bar some form of
6 compensation flowing to the law school clinic or to
7 their professor, in theory.

8 MS. DAVIS: No, it doesn't. And the law
9 school professor example, I think that type of clinic
10 is already covered within the existing Rule. This law
11 student rule specifically applies to student
12 internships at a recipient. It doesn't cover the law
13 school clinic context.

14 CHAIRMAN KECKLER: Okay.

15 MS. DAVIS: So then we get on to our last big,
16 new, substantive provision, and it's 1614.5. This has
17 to do with compensation of recipient staff and private
18 attorneys, and other professionals -- this title needs
19 to be changed -- and the blackout period.

20 So this rule basically sets forth the
21 requirement, or the principle, that a recipient may
22 allocate to its PAI requirement costs associated with

1 compensation paid to staff. And this would include
2 attorneys or paralegals, any staff at the recipient who
3 is facilitating the involvement of private attorneys,
4 law students, law graduates, and other professionals
5 under this part.

6 So that's another way that we're drawing the
7 distinction between the individuals who are working to
8 engage private individuals in the delivery of legal
9 services and the students who are working at the
10 recipient.

11 1614.5(b) -- again, this is a provision that
12 Charles had mentioned earlier that essentially sets a
13 cap on the amount of PAI resources that can be devoted
14 to one attorney or other individual who is providing
15 assistance as a private attorney or other professional
16 under this part.

17 The reason for that is to really make sure
18 that private attorneys are private attorneys and are
19 not being compensated or essentially coming into a
20 rather staff attorney role through providing a high
21 level of services, whether compensated or not, to a
22 recipient.

1 CHAIRMAN KECKLER: Excuse me. Let me pause
2 you right there. In that language, I can see why you
3 wrote the list there about the salary. I'm looking at
4 (b)(1). The one-half average salary to the recipient
5 staff attorney, law graduate, or other professional --
6 now, the recipient staff attorney, I think we can
7 understand pretty well what that is.

8 But I'm not sure -- it's a little odd, just
9 looking at the language, and you might want to think
10 about it -- the recipient staff attorney, law graduate,
11 or other professional, it's a little ambiguous -- I'm
12 not sure exactly how to describe it -- of what standard
13 the individual's going to be judged against.

14 MR. FLAGG: Charles, regardless of who the
15 service provider is, the standard is the average salary
16 paid during the recipient's fiscal year to recipient
17 staff attorneys. So for enforcement purposes and
18 otherwise, that's a number that is known to our
19 recipients, whatever the -- I take your point.

20 The comparable professional experience for
21 somebody who's not a member of the bar might create an
22 issue. You raise a good point. We'll have to look at

1 that.

2 CHAIRMAN KECKLER: Okay.

3 MS. DAVIS: Okay. Last one. So our last
4 substantive provision is (c). This is really adopting
5 the blackout provision from the existing Rule. This is
6 in 1614.1(e), I think.

7 But this is the provision that says that, "No
8 PAI funds shall be committed for direct payment to
9 anyone who for any portion of the previous two years
10 has been employed more than 1,000 hours per calendar
11 year by an LSC recipient or sub-recipient."

12 There are a few exceptions here. We've put
13 the 1,000-hour standard in here because the language in
14 the existing Rule says, "as a staff attorney." Since
15 we've removed the staff attorney definition from the
16 definition of private attorney and we've tried to, as
17 much as possible, not tie any part of this rule to the
18 staff attorney definition, we've put 1,000 hours to
19 have some benchmark for when the blackout period should
20 apply. So that's why you see the 1,000 hours there.

21 The blackout rule has been expanded beyond
22 private attorneys to encompass other professionals.

1 Since we are extending the scope of the Rule to account
2 for them as individuals who can provide services as
3 volunteers and for activities that are part of the PAI
4 requirement, it seemed reasonable to us that if that
5 other professional was employed by a recipient, that
6 they should also be subject to the blackout rule.

7 This has the same provision stating that the
8 blackout rule shall not be construed to restrict the
9 use of PAI funds in a pro bono or judicare project on
10 the same terms that are available to other attorneys.
11 And it has the same provisions saying that -- huh?

12 MR. FLAGG: Somebody is talking, probably
13 thinking that their phone is mute. But we're hearing
14 it. So if you're talking offline, just make sure your
15 phone is mute. Thank you.

16 MS. DAVIS: Thank you, Ron.

17 And paragraph (c)(3) is also from the existing
18 Rule and restates the principle that the blackout rule
19 shall not be construed to restrict the payment of PAI
20 funds as a result of work performed by an attorney or
21 other individual who practices in the same business as
22 the former employee. So it's not extending the

1 blackout rule to anyone else who works with a former
2 recipient employee.

3 Paragraph (c)(2) addresses the Pro Bono Task
4 Force recommendation to not apply the blackout period
5 or to make it possible for attorneys who are law
6 graduates or who were attorneys who were participating
7 in an incubator program operated by a recipient to
8 accept payment for PAI cases after leverage the
9 incubator program.

10 So this provision allows for attorneys who
11 were receiving training from a recipient, whether they
12 were compensated as an employee of the recipient or
13 not, to get the training from the recipient, and
14 subsequent to completing their training through the
15 incubator program, to take on PAI cases and to receive
16 a reduced fee.

17 If they were employed by the recipient,
18 Subsection (c)(2) says that they are exempt from the
19 blackout provision so that they can continue to receive
20 or so they can receive PAI fees rather than being
21 restricted from doing so if they were employed by the
22 recipient as part of the incubator program.

1 MR. LEVI: Now, so that would mean, though,
2 that a paraprofessional who was employed by the grantee
3 who was going to night school and then became a lawyer
4 would be barred for two years.

5 MS. DAVIS: That is the way that the rule -- I
6 think that's correct, that that is how the rule would
7 apply in this case.

8 MR. LEVI: That worries me just a little bit.
9 I can't say that that's ever happened, but it is not
10 unusual for our law firm to have -- and I certainly
11 know of firms where paralegals are going to night law
12 schools and then end up -- not that many end up working
13 at our firm, but sometimes it does happen.

14 MS. DAVIS: Right.

15 MR. LEVI: So I know we can't write for every
16 circumstance. But that one seems like, boy, those
17 folks could be really enthusiastic, know the business,
18 know the need, and might want to be committed. That
19 seems like one where I was a little bit -- I don't know
20 if it's ever happened or we've ever been asked the
21 question for a waiver. Do you know?

22 MS. DAVIS: Right.

1 MR. FLAGG: John, I think the way this works
2 -- okay. First of all, in the hypothetical you posed,
3 if that former law clerk went somewhere, say, went to a
4 law firm, you could allocate expenses for PAI services
5 provided pro bono by that person after graduation. I
6 think the limitation this puts in is paying that person
7 directly and taking PAI credit for it.

8 MS. DAVIS: Right.

9 MR. FLAGG: So in the hypothetical you posed,
10 this rule doesn't say anything about whether or not you
11 could hire that person to provide legal services on a
12 part-time or full-time basis. All it says is that
13 compensation for two years can't be counted for PAI
14 purposes.

15 MR. FREEDMAN: This is Mark Freedman. I also
16 want to add that this blackout does not apply to
17 situations where the individual is taking PAI payments
18 as part of a regular system that other folks are
19 getting PAI payments through as well.

20 It's merely prohibiting preferential treatment
21 for people who recently worked at the grantee, and it's
22 aimed at avoiding even any appearance of impropriety by

1 having a former employee of the grantee getting PAI
2 fees, and the grantee getting credit for the PAI fees,
3 where other attorneys are not getting that same
4 opportunity.

5 And it doesn't even prohibit paying them those
6 fees with preferential treatment. It just says you
7 can't get PAI credit for it.

8 MR. LEVI: So that person that I'm talking
9 about goes to a law firm -- that's what I'm assuming
10 they did -- and now wants to work on a pro bono matter
11 for that grantee at the new firm. Any funds expended
12 with respect to that by the grantee do not count?

13 MR. FLAGG:

14 MR. FLAGG: Yes, they do count. If the
15 services are being provided pro bono, the support of
16 those services by the grantee would be support that
17 could be allocated to PAI, absolutely.

18 And Mark has made the further point -- let's
19 say the former law clerk went to a law firm that
20 provides judicare services, and the recipient has a
21 judicare program or hires judicare attorneys and gets
22 PAI credit for that.

1 If the former law clerk goes to a law firm
2 that provides judicare services as do other firms, then
3 even that could be counted toward PAI if it's the same
4 sort of program that the program is otherwise
5 providing.

6 What the blackout rule is intended to preclude
7 is specialized treatment, permitting PAI credit for a
8 payment to somebody where the recipient does not
9 otherwise do that for other attorneys.

10 MR. LEVI: Thank you.

11 MS. DAVIS: All right. Well, that brings to
12 an end our tour of the PAI rule and the new substantive
13 provisions. So I think we can turn it over to Charles
14 for any questions, any additional questions.

15 MR. LEVI: Charles, can we say that this has
16 really responded, I think, to the comments and also to
17 the task force. I hope our colleagues agree.

18 MR. FLAGG: And just to be clear, this will
19 not be your only opportunity. We'll be presenting the
20 entirety of or a revised version of the Rule you see
21 today along with a preamble at the April Board meeting
22 and Committee meeting.

1 MR. LEVI: But are we asking for a vote today?

2 MR. FLAGG: No, no, no, no, no. No, no. The
3 purpose of this was --

4 MR. LEVI: Okay. Because it says "consider
5 and act."

6 MR. FLAGG: No. While you have, in theory,
7 the authority to act, the intention was to just give
8 you opportunities to comment and to ask questions, as
9 you've done.

10 MR. LEVI: Good.

11 MR. FLAGG: Charles, are you there?

12 CHAIRMAN KECKLER: Yes. Yes. And this allows
13 us to debate among ourselves. I've interlaced my
14 questions throughout the discussion, and so I'm going
15 to go ahead and move us to the public comment portion
16 of the meeting, if there's any public comment, or
17 comment from other Board and Committee members that can
18 help us enhance the draft of the rule that will be
19 presented presented at the quarterly meeting.

20 (No response.)

21 CHAIRMAN KECKLER: If there's no public
22 comment at this time or further questions, we can move

1 to congratulate the OLA on its work thus far. Yes,
2 what was that?

3 MS. MIKVA: I said, I second that.

4 CHAIRMAN KECKLER: You second that, yes. And
5 we can ask if there is any other business to bring
6 before the Committee today.

7 MS. DAVIS: Charles, this is Stefanie. I'd
8 just like to make one more pitch for people who came
9 onto the meeting after we had already started. If you
10 could please send me an email at sdavis@lsc.gov to let
11 me know you were on, I would appreciate that.

12 CHAIRMAN KECKLER: Thank you, Stefanie.
13 That's very well taken.

14 I also want to inquire. I understand this
15 meeting is being recorded. But how is that being
16 handled?

17 MS. DAVIS: Our court reporter is on the line
18 and listening.

19 CHAIRMAN KECKLER: Thank you. Thanks, Pete.

20 And is there any other business to bring
21 before the Committee today?

22 (No response.)

1 CHAIRMAN KECKLER: Hearing none, I can now
2 consider a motion to adjourn the meeting.

3 M O T I O N

4 MR. LEVI: So move.

5 MS. MIKVA: Second.

6 CHAIRMAN KECKLER: All in favor?

7 (A chorus of ayes.)

8 CHAIRMAN KECKLER: The meeting is adjourned.
9 Thank you, everyone, and I look forward to talking
10 further in April.

11 (Whereupon, at 3:57 p.m., the Committee was
12 adjourned.)

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