



Northwest Justice Project

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César E. Torres
Executive Director

June 13, 2014

Ms. Stefanie K. Davis
Assistant General Counsel
Legal Services Corporation
3333 K Street NW
Washington, D.C. 20007

Re: Comment on Proposed Rulemaking - 45 CFR Part 1614

Dear Ms. Davis:

The Northwest Justice Project (NJP) is the LSC funded provider of legal services to the poor in Washington State. Since 2007, we have carefully followed developments regarding interpretations of the Private Attorney Involvement (PAI) rules and are gratified that many of the concerns raised by some of LSC's interpretations have been positively addressed in the proposed revisions. We fully support and appreciate LSC's desire to expand flexibility for how recipient programs meet their PAI obligations. We also appreciate LSC's effort to encourage increased PAI participation by changing the definition of "private attorney" and setting out a non-exclusive list of PAI "support and other activities." In particular, we are heartened by the fact that under the proposed revisions it appears that NJP's significant support for the statewide pro bono delivery system in Washington, through its telephonic intake and referral system (CLEAR), will now enjoy recognition of the important role this support plays to enhance private bar involvement efforts statewide.

While NJP in large part supports and endorses the proposed changes, there are a few items of concern. These are listed below:

- §1614.3 Definition of "private attorney": This provision excludes an attorney employed by an LSC recipient 1,000 hours or more per calendar year. This would exclude attorneys (1) who leave a recipient's employment after 1001 hours during any year and then seek to volunteer for the program, including recently retired attorneys, attorneys leaving the recipient upon termination of a grant-based position, or attorneys leaving for private employment; and (2) who volunteer for a recipient, but may on occasion be employed on a short-term basis to fill temporary needs arising from staff vacancies or absences such as an extended family medical leave, military leave, short-term special project grant funding, or emergency needs occurring from a sudden staff departure. Should such a temporary stint last approximately six months after which the attorney returns to volunteer status, the recipient would not be

able to allocate costs associated with the attorney's volunteer time to PAI. The 1,000 hour per calendar year limit is incongruous with the stated purpose of the changed definition of "private attorney", which "explicitly contemplates that *any* attorney licensed or otherwise authorized...to practice law... may provide legal assistance to eligible clients...through a recipient's PAI Program." (Emphasis added).

Given that a recipient cannot allocate non-PAI activity to PAI costs in any event (45 CFR §1614.5(a), (b)) there seems little reason to limit who is considered a "private attorney" for purposes of supporting their pro bono services based on duration of employment by a recipient, so long as costs are not allocated for time spent while they are employed by the recipient. The limitation also directly conflicts with §1614.5(c)(1). To avoid confusion as to what is intended, we urge LSC to eliminate (2)(i) from the definition of "private attorney" and to instead deal solely with the issue under §1614.5(c) as written.

- Omission of the current 45 CFR §1614.3(e)(4) provision protecting client records of a private attorney that contain "confidences and secrets as defined by state law" is counter-productive and unnecessary. This omission seems to extend the proposed changes in 2015 Grant Assurances Nos. 10 and 11 (to which NJP strongly objects) to private attorneys providing services under a PAI contract. For the same reasons NJP objects to the proposed changes in the Grant Assurances, NJP objects even more strenuously to the omission for clients served by private attorneys pursuant to a recipient's PAI plan. Compelling a private attorney to disclose client information in contravention of applicable Washington law and Rules of Professional Conduct¹, creates a significant disincentive to participation in a compensated PAI program through NJP. NJP would be hard pressed to entice lawyers to participate in NJP's PAI efforts if they must put their law license at risk should they be forced to disclose client information related to the representation absent a court order. While NJP is completely accountable for PAI expenditures and oversight of cases handled by private attorneys under the auspices of its PAI judicare contracts or as volunteers, it is unnecessary and ill-advised for LSC to reach into client information held by private attorneys. LSC should retain the protective language in current §1614.3(e)(4).²
- Increase sub-grant exclusion limit in 45 CFR Part 1627: At hearings before the LSC board on the Pro Bono Task Force's recommendations, NJP asked LSC to also consider amending the definition of "subrecipient" in §1627.2. The rule currently excludes private attorney (judicare) services contracts from being deemed a sub-grant, and the attorney a subrecipient, if the contract is limited to \$25,000. The \$25,000 limit was enacted in 1983 and has not been revisited since. Based on

¹ As fully discussed in NJP's comments on the proposed 2015 Grant Assurance changes, Washington Rule of Professional Conduct (RPC) 1.6 strictly prohibits disclosure of client information related to the representation, is broader than other states' and federal law in this regard and expressly does not authorize disclosure "to comply with other law."

² The Washington State Bar Association's Chief Disciplinary Counsel has also provided LSC with his interpretation of Washington's RPC 1.6 as creating an "untenable dilemma" for NJP and its staff. Few, if any, private attorneys are likely to voluntarily assume this dilemma and risk disciplinary action as a condition of providing reduced fee legal services to Washington's poor.

available cost of living calculations, \$25,000 in 1983 equals approximately \$60,000 in 2014 dollars. NJP has had situations in which one lawyer or law firm has exceeded \$25,000 in costs for one case or combined with cases handled earlier in the year, causing NJP either to have to seek sub-grant approval or to use non-LSC funds on the matter. Increasing the sub-grant exclusion limit for PAI contracts to \$60,000 or more will avoid unnecessary delays or uncertainties in providing client services and maximize the availability of attorneys willing to take on complex cases at already reduced rates. It would also promote greater flexibility in entering into PAI contracts for services with private attorneys.

Thank you for the opportunity to comment on the proposed changes to the PAI rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah Perluss", written over a light blue horizontal line.

Deborah Perluss
Director of Advocacy/General Counsel

C César E. Torres, Executive Director
Joan Kleinberg, NJP Director of Private Bar Involvement
Steve Pelletier, NJP Director of Finance