

CLASP REGULATORY – POLICY MEMORANDUM 2003-5

TO: NLADA Subscribers

FROM: Linda E. Perle and Alan W. Houseman

DATE: October 29, 2003

**RE: LSC RESTRICTIONS AND REQUIREMENTS:
IMPACT ON PAI PROGRAMS AND PRIVATE ATTORNEYS**

In the fall of 1996, the ABA Center for Pro Bono published an article prepared by the Center for Law and Social Policy (CLASP) for the first issue of the Center's publication, *Dialogue*. That article discussed the applicability of the 1996 restrictions imposed by Congress on LSC grantees to private attorneys and private attorney involvement (PAI) programs. In 1998 and again in 2000, CLASP prepared updates of the original article that addressed a number of new issues that had arisen since the restrictions were first enacted. In the last three years, several of the pending issues that were discussed in the original versions of the article have been resolved, new issues have arisen, and LSC has adopted new interpretations with respect to several of the issues addressed in the earlier articles. This memorandum addresses those new issues and will update your program's understanding¹ of those issues that were addressed in the earlier articles² as they relate to private attorneys who provide legal assistance to LSC eligible clients and to bar associations, *pro bono* programs and other organizations that participate in LSC recipients' PAI programs.

OIG/OCE Audits of PAI

Over the last several years, both the LSC Office of Inspector General (OIG) and the Office of Compliance and Enforcement (OCE) have reviewed grantees' PAI

¹ Since this memorandum was originally written for *pro bono* program directors and staff, some of the information deals with basic issues that are likely to be very well understood by LSC project directors. However, rather than editing out this discussion, we thought we would leave it in to serve as a helpful review of some of these issues.

² We have not repeated all of the detailed discussions from the original versions of the article, although we have included reviews of some of the significant issues and discussions of material changes with regard to the issues that were addressed previously. If you have questions about issues that relate to PAI that are not discussed here, please feel free to contact us.

programs as part of OCE's audits of Case Service Reviews (CSR) and the OIG's audits of the program integrity provisions of Part 1610 of the LSC regulations. Among other things, questions have been raised about whether programs have adequately accounted for their PAI expenditures, whether specific activities and expenditures are appropriately counted as PAI, and whether grantees have met their 12.5% requirement or sought a waiver. Both OIG and OCE have found that numerous LSC grantees have failed to comply with the provision of Part 1614 that requires PAI programs to include "case oversight and follow-up procedures to ensure the timely disposition of cases to achieve, if possible, the result desired by the client and the efficient and economical utilization of resources."³ Although LSC has never given specific guidance to recipients as to what kinds of procedures would be adequate to fulfill this requirement, it appears that LSC expects programs or their subgrantees to periodically follow-up on referrals to see if clients actually contacted the private attorney and to check on the status of cases.

The OIG has recently announced that it is beginning an audit of PAI to evaluate the effectiveness of PAI programs and to determine whether LSC grantees are complying with the requirements of Part 1614. The first phase of the audit will include a survey of the history of PAI and a review of PAI data that has been submitted to LSC, as well as visits to two LSC programs to get an overview of how PAI programs are working and what kinds of activities grantees are undertaking to meet their PAI requirement. Following this general review and the initial visits, the OIG will develop an audit plan. Starting at the beginning of 2004, the OIG will begin a series of audits of an indeterminate number of LSC grantees. After these audits are completed, the OIG will prepare a report on the overall PAI program. It is not clear at this time how many grantees will be audited or exactly what grantees can expect during the course of the visits. The OIG has indicated that the overall purpose of the audit is to evaluate the PAI program as a whole, rather than individual programs, and it appears from the first visit that, among other things, the OIG is planning to focus on cost effectiveness of various PAI activities. However, the OIG also looked at compliance with the requirements of Part 1614 and they do plan to look at whether the other individual programs that are visited meet the requirements of the regulation.

We will keep you informed about the OIG's PAI Audits as more information becomes available.

Case Service Reporting System

One of the most confounding issues that has arisen during the period since the imposition of the 1996 restrictions has been the intense focus on LSC's Case Service Reporting (CSR) system. After being virtually ignored for almost 20 years, the CSR system and the data reported by LSC recipients came under intense scrutiny by the OIG, the Congress, the General Accounting Office (GAO), the media and OCE.⁴ In the

³ 45 CFR §1614.3(d)(3).

⁴ The primary focus of this article is on how the CSR issues affect the operation of PAI programs and its impact on private attorneys who participate in those programs. We have not gone into detail regarding the overall genesis and evolution of the CSR issue in this article. Nor have we addressed all of the nuances of the issue that have arisen over the last several years. Numerous other documents have done so, and, if you are interested in receiving more detailed information, please contact us at CLASP

last several years OCE has expended much of its resources in reviewing the CSR and case management systems of LSC grantees, including additional resources provided to OCE in the LSC appropriation specifically for this purpose. Several aspects of the CSR issue relate to PAI programs and to private attorneys and affect the ways in which case information is recorded and PAI cases are reported for CSR purposes.⁵

One of the first issues that surfaced around CSR was the use of the case closure category “referred after legal assessment.” Among other alleged misuses of that case closure category, LSC found that many recipients were “counting” PAI cases that were referred by the recipient to private attorneys or to *pro bono* programs as having been closed as “referred after legal assessment” at the time they were referred out as PAI cases. PAI cases were categorized as referrals, rather than waiting to report until the cases were completed by the PAI subgrantee or by the private attorney and reporting them under the case closure categories that reflected the legal assistance actually provided on the case by those programs or attorneys. In addition, recipients were counting the referrals as cases, even when the client never actually received any legal assistance from the recipient or from the private attorney or *pro bono* program, generally when the client did not pursue the referral or did not appear for a scheduled appointment with the private attorney. Unless the *pro bono* program or private attorney actually provided advice, brief service or more extended legal assistance to the client as a result of the referral, LSC has determined that there is no “case” for CSR purposes⁶ and the recipient should not include the referral in its CSR numbers that are reported to LSC.⁷ However, beginning in 2002, LSC implemented a new system to collect information about non-case activities called the Matters Service Reporting system (MSR). Referrals that do not result in “cases” for CSR purposes can be counted as “matters” and reported under the MRS system.

LSC has determined that recipients need to have information regarding the assistance actually provided by the PAI attorney either in the recipient’s case files or

and we would be happy to provide it to you.

⁵ Beginning with the Year 1999 CSR reports, recipients have been required to report PAI cases separately from Basic Field cases. They are also permitted to report all cases, PAI or otherwise, that fit within the CSR definition of a case and that meet all of the documentation requirements, even if the case was fully supported with non-LSC funds. Recipients may refer ineligible clients or restricted cases or activities to private attorneys who participate in the PAI program, but they may not count such cases for PAI or CSR purposes, and LSC funds may not be used to support the representation.

⁶ On occasion, LSC recipients provide some advice or brief service to a client prior to the PAI referral. If the referral does not result in additional services being provided to the client by the *pro bono* program or private attorney, the case may be closed and counted for CSR purposes on the basis of the advice or brief service that was provided by the recipient, but it should be counted as a regular program case, rather than as a PAI case.

⁷ LSC also found that many recipients were “counting” those same cases again when they were completed by the PAI programs or private attorneys, effectively reporting their PAI cases twice. We believe that most, if not all, recipients have abandoned the practice of reporting PAI cases under the “referred after legal assessment” case closure category and counting PAI cases twice. Recipients should now be generally counting PAI cases as closed only when they are completed by the PAI program or private attorney, and reporting those cases under the case closure category that reflects the level of legal assistance actually provided to the client by the PAI program or private attorney.

accessible to them in order to report a PAI case for CSR purposes. Depending on the structure of their PAI programs, recipients should seek the information directly from the private attorneys, through case closure memos or other mechanisms, or from the *pro bono* program, bar association, lawyer referral service or other entity that actually makes the referrals to the private attorneys who undertake the representation.

A second facet of the original CSR dispute was the alleged failure of recipients to close cases in a timely manner. Audits had shown that many cases remained open in recipients' records, although there is no indication that any work has been done for many months and, in some instances, years.⁸ LSC found that untimely case closures was a particular problem for PAI cases, where private attorneys had completed work on *pro bono* cases,⁹ but had not informed the recipients that the cases should be closed in the recipients' systems and had not provided any information about the services that had been provided to the clients. Most recipients and PAI programs have now made substantial improvements to their systems for following up with private attorneys to ensure that completed PAI cases are reflected as closed in the recipient's case management systems as soon after case completion as possible. Those programs that still have a problem with timely closure should continue to work to resolve the issue.

A related aspect of CSR that has had a significant impact on the operation of PAI programs over the last several years is the increased focus by LSC on documentation of reported cases. In order to report a case to LSC for CSR purposes, with certain limited exceptions, the recipient's file must contain: documentation of LSC financial eligibility (including both income and assets); a written citizenship attestation or documentation of LSC eligible alien status; identification of the case handler; information about the nature of the assistance provided and support for the case closure code; information indicating the opening and closing dates; and the client's name.¹⁰ All

⁸ Both the OIG and the GAO auditors originally used an arbitrary "twelve month rule" to determine when an open case was not closed in a timely manner. Thus, if a case remained open for a period of twelve months beyond the last indication that work had been done, with no indication in the file of any additional work having been done on the case during that period, it was determined that it should have been closed and could not be counted as an open case for CSR purposes. The CSR Handbook now provides that, in general, cases should be closed in the year in which program staff determines that the assistance to the client has ceased and is not likely to resume. Recent revisions to the CSR Manual have further clarified the timely case closure issue, and numerous exceptions have been included to account for situations where it is unreasonable to require that cases be closed within a specified period of time.

⁹ The problem of untimely cases closure was not as significant for *judicare* or contract attorneys who are paid for specific cases because they had an incentive to close cases for which they were expecting to be paid. However, in some areas where *judicare* payments are relatively low, billing and case closure often lag far behind case completion.

¹⁰ Retainer agreements are also required except for advice and brief service cases. However, LSC has determined that, while the retainer agreement requirement is a compliance issue, it is not a CSR issue. Thus, if a PAI case file does not contain a required retainer agreement, the case can still be counted for CSR purposes, as long as all of the other documentation is included in the file. However, LSC has said that retainer agreements are required in all PAI cases where they would be required were the case being handled by program staff, even though Part 1611.8 of the LSC regulations does not mention PAI cases, since Part 1611 was last revised in 1983, before the PAI regulation was adopted. LSC has never made it clear whether the retainer should be an agreement between the client and the LSC grantee or subrecipient, or between the client and the private attorney. At one point several years ago, an Office of Legal Affairs opinion suggested that it would be prudent for there to be two retainers in a PAI case, but

of this documentation is required for PAI cases as well as for cases handled by recipient staff.

As a result of the heightened scrutiny in the late 1990s, LSC found that documentation for PAI cases was particularly problematic. When intake is done by the recipient prior to referral to a PAI program or private attorney, financial eligibility information is generally collected and kept in the recipient's files. However, the other documentation that is required may not be collected, either by the recipient, the PAI program or the private attorney, or is collected but not passed back to the recipient, and is not available to support the recipient's CSR case reporting. Citizenship attestations have proven to be particularly troublesome problems when cases are handled by private attorneys. Recipients may not have had in-person contact with the client prior to the referral and may not have had the client sign a citizenship attestation. The private attorney may not have been aware that a signed citizenship attestation was required.¹¹ In addition, recipients frequently have no information on the actual services provided to clients once the referral has been made, information that is necessary for recipients to count the cases in their CSR statistics.

As a result of the lack of documentation, some recipients have had to remove from their CSR statistics many, and in certain situations most of their PAI case referrals to subrecipients and private attorneys. The majority of recipients, *pro bono* programs and private attorneys participating in PAI programs have worked to develop systems to insure that all the necessary information and written documentation is collected and available to recipients to support CSR reporting of PAI cases, but a few grantees have simply ceased reporting PAI cases as part of their CSR reports, because of the administrative burden that collecting the documentation would impose on the program's staff, its subrecipient *pro bono* programs and/or the private attorneys who are providing services.

CLASP has urged LSC to look at the administrative burdens that the expanded emphasis on documentation requirements imposes on recipients' PAI programs and on the private attorneys who participate. PAI programs have succeeded in attracting significant numbers of private attorneys to provide legal services to eligible clients under the relative *laissez faire* attitude toward documentation that existed in prior years. However, some programs have indicated that it may be more difficult to recruit private attorneys who are willing to shoulder the additional burdens of recordkeeping that is now required. Field representatives who participated on the recent Negotiated-Rulemaking Working Groups that were established to develop proposed revisions to Parts 1611 (Financial Eligibility) and 1626 (Aliens) suggested that PAI cases should be exempt from requirement of a signed citizenship attestation (and the retainer

LSC has not followed up on that suggestion. Nevertheless, if LSC finds that retainer agreements are missing from the files in PAI cases, the LSC grantee will be found to be out of compliance with the requirements of §1611.8.

¹¹ Written citizenship attestations are required for all cases except for advice or brief service cases where service is provided by telephone and there is no in-person contact between the recipient/case handler (including a private attorney) and the client. However, a citizenship attestation is required for all cases when there is in-person contact between the client and the private attorney or *pro bono* program, even though intake and referral may have been handled by the recipient's staff over the telephone.

agreement), but LSC staff rejected the suggestions.

Finally, a few words about reporting of PAI cases supported with non-LSC funds. Recipients have always been permitted to use non-LSC funds to meet their PAI expenditure requirements. Beginning with the 1999 CSR reports, recipients were required to include within their CSR reports all cases, including PAI cases, that are done on behalf of LSC-eligible clients, regardless of the source of the support for the cases, as long as the cases were fully documented, including citizenship attestations and information to show that legal assistance was provided and to support the case closure code. Note that recipients may not include within their CSR data any cases that are supported by non-LSC funds for clients who are not eligible for LSC funded services, either because they are financially ineligible or because they are prisoners or ineligible aliens, including victims of domestic abuse.¹² In addition, although recipients may use non-LSC funds to pay private attorneys to handle cases that the program itself could not handle because they are covered by the 1996 restrictions, these cases may not be considered to be part of the recipient's PAI program and may not be counted as cases for CSR purposes.

Program Integrity Standards

Part 1610 of the LSC regulations imposes a set of "program integrity" standards¹³ on the relationships between LSC recipients and non-LSC funded organizations¹⁴ that are engaged in restricted activities. If an LSC grantee and another organization do not meet these program integrity standards, discussed in more detail below, then the restricted activities of the other organization will be attributed by LSC to the grantee, and the grantee will be deemed to be out of compliance with the LSC regulations and restrictions. Restricted activities are those that a recipient would not be permitted to engage in directly, regardless of the source of funds, because of the LSC Act or appropriations act provisions, such as class actions, legislative or administrative advocacy, alien representation, or claims for attorneys' fees.

The program integrity standards consist of three basic requirements. First, the recipient and the other organization must be legally separate entities, although they may have the same or overlapping boards. Generally, this means that they must be separately incorporated. Second, the other entity must receive no transfers of LSC funds¹⁵ and LSC funds must not be used to subsidize restricted activities, and third, the

¹² The Kennedy Amendment to the LSC appropriations act permits recipients to use non-LSC funds to serve certain otherwise ineligible aliens who are victims of domestic abuse, although the services may not be counted as cases for CSR purposes, since these clients are ineligible for LSC-funded services.

¹³ 45 CFR §1610.8.

¹⁴ The rule does not define "organization" for purposes of applying the program integrity standards. Although it would be reasonable to assume that a private attorney in solo practice would not be considered to be "an organization," LSC has recently taken the position that a solo practitioner is a law firm, and a law firm of any size is an "organization" for purposes of program integrity. A bar association or *pro bono* program is also considered to be an organization.

¹⁵ The rule defines "transfer" as "...a payment of LSC funds by a recipient to a person or entity for the purpose of conducting programmatic activities that are normally conducted by the recipient such as

LSC recipient must be "...physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient." If the recipient and the other organization meet the program integrity standards, then the other organization's restricted activities would not be attributed to the recipient. However, if the program integrity standards are not met, then the LSC recipient would be deemed to be in violation of the prohibitions because of the other organization's restricted work.

The explicit language of these standards applies to the relationship between recipients and any other entity, including a bar association, *pro bono* program, private attorney or law firm that is part of the recipient's PAI program, as well as other entities that receive transfers of LSC funds from a recipient or are otherwise related to the recipient. Nevertheless, *pro bono* programs, bar associations, law firms, private attorneys or other entities that receive LSC funds *for the sole purpose of funding PAI activities* are treated differently from other entities for purposes of Part 1610, including the program integrity standards. In general, when a recipient transfers LSC funds to another person or entity, the LSC restrictions apply to both the LSC funds transferred and to the non-LSC funds of the person or entity to whom the LSC funds are transferred, and organizations will not be viewed to have the "objective integrity and independence" that is required to meet the program integrity standards. However, when LSC funds are transferred to a bar association, *pro bono* program, private attorney or law firm or other entity for the sole purpose of funding PAI activities, the restrictions apply only to the funds transferred, and not to the other non-LSC funds of the transferee.¹⁶ The effect of this exception is to eliminate the application of the program integrity standards provision on transfers of LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities when the funds are used for PAI. Thus, the fact that LSC funds are transferred to a PAI entity or private attorney does not, by itself, constitute a violation of the program integrity standards.

The rule looks to several other factors to determine whether the recipient and the organization that engages in restricted activity have sufficient physical and financial separation to meet the program integrity standards. Those factors do apply to private attorneys and PAI entities that engage in restricted activities outside of their PAI activities. The factors include, but are not limited to: (1) the existence of separate personnel, (2) the existence of separate accounting and timekeeping records, (3) the degree of separation from facilities in which restricted activities occur and the extent of such restricted activities, and (4) the extent to which signs and other forms of identification which distinguish the recipient from the organization are present.¹⁷ The commentary that accompanied the publication of the final version of Part 1610 states that LSC will determine whether the physical and financial separation standard is met

representation of eligible clients or that provide direct support to the recipient's legal assistance activities. *Transfer* does not include any payment of LSC funds to vendors, accountants, or other providers of goods and services made by the recipient in the normal course of business."

¹⁶ 45 CFR §1610.7(c).

¹⁷ These four factors are derived from the HHS regulations that were found to be constitutional under *Rust v. Sullivan*, 500 U.S. 173 (1991).

using a case-by-case approach, based on the totality of the circumstances, with no one factor being determinative. Each year, the governing bodies of all LSC recipients are required to certify to LSC that the recipients meet the program integrity standards of Part 1610.

The OIG has been conducting a series of special audits of program integrity. These audits are scheduled to continue during the next year. Although there is no special focus by the OIG on the relationship between recipients and bar associations or *pro bono* programs, nevertheless, LSC funded legal services programs and their PAI partners need to be aware of the program integrity standards and mindful of the concerns that they raise. The OIG has informed programs that, although these audits are intended to focus on program integrity, the OIG may look at other aspects of program operation as well. In fact, the OIG has reviewed compliance with PAI requirements in connection with several of the program integrity audits and has raised numerous questions about PAI, unrelated to program integrity.

Subgrant Rule

In addition to the rules regarding program integrity and the applicability of LSC restrictions, LSC has rules regarding subgrant agreements and subrecipients that may apply to *pro bono* programs and PAI attorneys. Under Part 1627 of the LSC regulations, subgrants of LSC funds are subject to prior written approval by LSC. Not all transfers of LSC funds for PAI purposes are subgrants, but many are.¹⁸ A subgrant is a transfer of LSC funds to a subrecipient. A subrecipient is—

...any entity that accepts Corporation funds from a recipient under a grant[,] contract, or agreement to conduct certain activities specified by or supported by the recipient related to the recipient's programmatic activities. Such activities would normally include those that might otherwise be expected to be conducted directly by the recipient itself, such as representation of eligible clients...Such activities would not normally include those that are covered by a fee-for-service arrangement, such as those provided by a private law firm or attorney representing a recipient's clients on a contract or judicare basis, except that any such arrangement involving more than \$25,000 shall be included....[Contracts for goods and services in the normal course of business are not subgrants.] 45 CFR 1627.2(b).

Thus, a transfer of LSC funds to a bar association or a *pro bono* program to run a PAI program would be a subgrant. A payment of LSC funds at an hourly rate or set fee to an individual judicare attorney for a case undertaken on behalf of a client referred to the attorney would generally not be a subgrant, as long as the annual amount of the payment is less than \$25,000.¹⁹ LSC funds paid to a private attorney under a contract to

¹⁸ Agreements between a recipient and another entity for work that is paid for entirely out of non-LSC funds are not subgrants, are not subject to LSC approval and are not subject to the rules regarding subgrants.

¹⁹ Any judicare attorney who receives more than \$25,000 in LSC funds in a single year, is subject to the subgrant rule. Before making such a payment, the recipient should have received approval from LSC, and the payment would be subject to the audit and other requirements of Part 1627.

handle numerous cases or a large case might or might not be a subgrant, depending on the amount of the payments made under the contract during one year.

Aside from the requirement for LSC approval of the subgrant agreement, Part 1627 limits subgrant to one year and requires that funds remaining at the end of the year be included in the recipient's fund balance. Recipients are responsible for ensuring that subrecipients comply with the financial and compliance audit requirements applicable to LSC funded programs, and subgrants are subject to the same oversight by LSC and the OIG as grants to recipients. OCE has looked closely at subgrant agreements as part of its recent monitoring visits. If expenditures by subrecipients are disallowed under the LSC regulations on cost standards,²⁰ the recipients are theoretically responsible for repaying the disallowed costs to the Corporation, regardless of whether or not they are able to recover the expenditures from the subrecipients, although LSC has not required such repayments in recent years. Subgrant agreements are required to follow a prescribed LSC form. As discussed above, LSC restrictions apply only to the LSC funds that are transferred under PAI subgrants, and not to the other funds of the subgrantee, unless the entity is also a subgrantee for purposes other than PAI, in which case, all of the entity's funds are restricted.

Attorneys' Fees Restriction

As part of the 1996 appropriations process, Congress prohibited LSC recipients from claiming or collecting and retaining attorneys' fees. Under Part 1642 of the LSC regulations, LSC has prohibited programs from seeking fees awarded under fee-shifting statutes and common law practices as well as those in Social Security cases. The regulation explicitly applies the prohibition to "any case undertaken by a private attorney on behalf of an eligible client when the attorney receives compensation from a recipient to provide legal assistance to such client under the recipient's private attorney involvement (PAI) program, judicare program, contract or other financial arrangement." The text of the rule does not address the applicability of the restriction to private attorneys who provide *pro bono* services to eligible clients, but the preamble to the rule states:

The prohibition does not include *pro bono* attorneys who receive no compensation from a recipient to handle cases, because they are not receiving financial assistance from the recipient to provide the services. Thus, attorneys who are handling cases on behalf of eligible clients on a *pro bono* bases (sic) may seek and collect attorneys' fees. It is the Corporation's judgment that the restrictions of this part would be a substantial impediment to the recruitment of *pro bono* lawyers.

Until recently, LSC had taken the position that all private attorneys, whether they are part of a PAI program or not, who handle cases for eligible clients on a *pro bono* basis and are not paid any compensation²¹ by a recipient or subrecipient may seek

²⁰ 45 CFR 1630.

²¹ "Compensation" does not include payments to cover out-of-pocket expenses. Thus, if a recipient or PAI program refers cases to private attorneys who agree to provide their time on a *pro bono* basis, but

attorneys' fees in those cases. In May of 2002, LSC's Office of Legal Affairs wrote an opinion that included a footnote on this issue, unrelated to the text of the opinion or the issues that were being addressed. This footnote reversed the longstanding policy on attorneys' fees in *pro bono* PAI cases, stating that *pro bono* attorneys who are part of a PAI program could no longer seek attorneys' fees in their PAI cases, and only those attorneys who were taking *pro bono* cases that were not part of PAI could seek attorneys' fees. If a *pro bono* attorney sought fees in a PAI case, the program could not count the case as a PAI case for CSR purposes. CLASP has urged LSC to reconsider and withdraw this footnote, arguing that OLA's new interpretation is at odds with the clear intent of the LSC Board in adopting the rule and saying that the interpretation makes no sense, since private attorneys who accept *pro bono* referrals that are not part of PAI would not be covered by the rule in any event. LSC is considering our request, but to date has not made a final decision.

Similarly, it has always been understood that attorneys who co-counsel cases with recipients on a *pro bono* basis may seek attorneys' fees for the time that the private attorneys spend on the cases, although they may not ask for attorneys' fees for the time spent by the recipient. In a recent visit by the Office of Inspector General (OIG), the OIG has taken the position that Part 1642 prohibits LSC recipients from counting as PAI cases those cases where private co-counsel seeks attorneys' fees for their time. Again, CLASP has urged OLA to change its interpretation and withdraw the footnote in the opinion noted above, which has provided support for the OIG's position. We expect a resolution from OLA on this issue shortly.

A common question is whether private attorneys who receive attorneys' fees for cases where they co-counsel with a recipient may donate those fees to the recipient. There is no prohibition on the donation of attorneys' fees to an LSC recipient. However, there should never be any formal written agreement between the attorney and the recipient that the donation will come from the private attorney's fees in a case co-counseled by the recipient, since LSC could view such an agreement as an indirect effort by the recipient to collect attorneys' fees in a case in which they are participating.

Questions have been raised regarding the general applicability of the attorneys' fee restriction to attorneys who receive funds directly from a recipient as compensation to handle cases under a contract or other financial arrangement. There is no one simple answer. If the funds are LSC funds and the payment is part of the recipient's PAI program, the attorneys may not seek attorneys' fees for any case supported by those funds,²² but the restriction does not apply to the attorney's non-LSC funded cases. If the funds are LSC funds, but the transfer²³ is not part of the PAI program, all of

the program reimburses the attorney for travel expenses, expert witness fees, postage, copying, etc., those attorneys are not considered to be "compensated" for purposes of Part 1642.

²² In a recent OLA opinion, a recipient stated that a judicare attorney had received an attorneys' fee in a PAI case that had been referred by the recipient. LSC informed the recipient that it should not compensate the private attorney for his work and should not include the case in its CSR report. In addition, LSC told the grantee that it needed to make it clear to its judicare attorneys that they were not permitted to seek attorneys' fees in any case for which they were receiving compensation from the recipient under its PAI program. See OLA opinion 2002-1004, May 7, 2002.

²³ Section 1610.2 of the LSC regulations define "transfer" as "...a payment of LSC funds by a recipient to

the attorney's cases are subject to the appropriations act restrictions and no attorneys' fees may be sought by the private attorney anywhere in his or her practice, whether the cases are LSC-funded or not.²⁴ If the private attorney works for an "organization that engages in restricted activities," including a private law firm, then any restricted activities that the organization does engage in, including seeking attorneys' fees, will be attributed to the recipient under the program integrity standards of Part 1610 of the LSC regulations. Thus, we do not recommend any transfer of LSC funds to private attorneys, law firms or other organizations that do restricted activities outside of a PAI program context. However, a recipient may refer a case where attorneys' fees are likely to be available to a private attorney who is paid by the recipient to do other cases as part of a PAI program. As long as the recipient does not pay LSC funds to the private attorney for that case and does not count the case for PAI purposes, the private attorney may seek attorneys' fees for that specific case.

The situation is totally different if a recipient uses non-LSC funds to pay a private attorney to do work on a case or cases. Part 1610 of the LSC regulations permits recipients to transfer non-LSC funds to outside persons or entities for any purpose without subjecting those funds or any other funds of the transferee to the LSC restrictions, including the attorneys' fee prohibition.²⁵ Thus, recipients may use non-LSC funds to compensate a private attorney for work on a case and the private attorney may seek attorneys' fees in that case. However, in order for the recipient to count the expenditure of non-LSC funds as a PAI expenditure, the compensated private attorney may not seek attorneys' fees in those cases supported by the non-LSC funds.

Timekeeping

The timekeeping requirements of Part 1635 of the LSC regulations apply to "all of the efforts of the attorneys and paralegals for which compensation is paid." Although the requirements are written in the context of action by the recipient, they apply to any

a person or entity for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients, or that provide direct support to the recipient's legal assistance activities. *Transfer* does not include any payment of LSC funds to vendors, accountants or other providers of goods and services made by the recipient in the normal course of business." Purchases of goods and services such as manuals or training do not constitute "transfers" and would not trigger the restrictions.

²⁴ In practice, LSC has no control over the private attorneys who receive LSC funds from a recipient. However, LSC could theoretically take the position that if a private attorney receives a transfer of LSC funds from an LSC grantee that is not part of PAI, then any restricted activity that the attorney does in his/her practice, including seeking attorneys' fees, as well as lobbying, work for prisoners or ineligible aliens, class actions, etc., would be attributable to the grantee. Thus, the grantee that provided the compensation would be viewed as out of compliance with the LSC restrictions because of the non-LSC work of the private attorney.

²⁵ The text of the rule itself only addresses the applicability of restrictions to transfers of LSC funds. However, the preamble to the final rule makes the point, in a rather indirect manner, that since the final rule deleted the provision applying LSC restrictions to non-LSC funds that are transferred by a recipient and there is no statutory provision requiring that a transfer of non-LSC funds be subject to LSC restrictions, then non-LSC funds transferred to another attorney or entity by a recipient are not subject to the LSC restrictions, as long as the program integrity standards, discussed below, are met.

use of funds for any “case” which is “a form of program service in which an attorney or paralegal of a recipient provides legal services to one or more specific clients....” Section 1610.7(b)(2) of the LSC regulations specifically states that “...persons or entities receiving a transfer of LSC funds are required to maintain records of time spent on each case or matter undertaken with the funds transferred.” Thus, private attorneys and subrecipients who receive LSC funds as compensation from an LSC recipient to handle cases or matters for eligible clients as part of a PAI program are required to keep time records for those cases or matters, but *pro bono* attorneys, who receive no compensation from the recipient for their work on cases for eligible clients, are not.²⁶ The preamble accompanying Part 1635 makes it clear that, although compensated PAI attorneys or subgrantees are required to keep some form of time records, they are not required to keep time in strict accordance with the provisions of Part 1635, but may use whatever timekeeping system is appropriate for their specific operations.²⁷

Solicitation

Under Part 1638 of the LSC regulations (Restrictions on Solicitation), recipients and their employees are prohibited from representing a client as a result of unsolicited advice and are prohibited from referring to other recipients those individuals to whom they have given unsolicited advice. However, nothing in the rule prohibits a recipient from referring such a client to a private attorney, or from taking a case for such a client referred by a private attorney to the recipient. Neither the regulation nor the CSR Handbook address whether such cases referred to PAI attorneys may be counted as PAI cases for CSR purposes. Arguably, since CSR cases must be cases that the recipient could otherwise undertake directly, it would not be appropriate to count those cases for CSR, although the recipient’s PAI referral mechanism may be used to make the referral and expenses incurred in making the referral may be included the recipient’s PAI allocation.

Fee-Generating Case Referrals

Part 1609 of the LSC regulations (Fee-Generating Cases) sets out the circumstances under which LSC recipients are permitted to undertake representation in fee-generating cases. The general assumption of the rule is that, subject to numerous exceptions, recipients should refer to private attorneys those cases where an attorneys’ fee is reasonably expected to be awarded to the client from public funds or from the

²⁶ "Compensation" does not include payments to cover out-of-pocket-expenses. Thus, if a recipient or a PAI program refers cases to private attorneys who agree to provide their time on a *pro bono basis*, but the program reimburses the attorneys for their out-of-pocket expense, e.g., travel expenses, expert witness fees, postage or copying, those attorneys are not considered to be "compensated" for purposes of these regulations.

²⁷ In 2002, OLA issued an opinion stating that PAI subrecipients and compensated PAI attorneys were required to use a timekeeping system that met the requirements of Part 1635. CLASP urged LSC to withdraw the opinion, citing the clear language of the Part 1635 preamble. After considering our arguments, LSC withdrew the opinion and reissued it, indicating that the Part 1635 requirements were not applicable to PAI subrecipients and compensated PAI attorneys. See OLA opinion 2002-1009 (July 19, 2002) which superceded the earlier OLA opinion 2002-1007.

opposing party. Recipients may refer such cases to private attorneys, whether or not they participate in PAI programs.

Neither the rule nor the CSR Handbook address whether fee-generating cases referred to PAI attorneys may be counted as PAI cases for CSR purposes. Arguably, since CSR cases must be cases that the recipient could otherwise undertake directly, it would not be appropriate to count those cases for CSR. However, since recipients may count as PAI expenses work that they do on cases in which they co-counsel with private attorneys, and recipients are permitted to co-counsel in fee-generating cases although they cannot claim attorneys' fees for their work, co-counseled cases may be counted for CSR purposes. Clearly, the recipient's PAI referral mechanism may be used to make the referral, and expenses incurred in making the referral may be included the recipient's PAI allocation

Applicability of the Burton Amendment Case Disclosure Requirements

The FY 1998 appropriation for LSC included a new requirement, known as the Burton Amendment, providing for the public disclosure of information on cases filed by recipients' attorneys and for reporting that information to the Corporation in semiannual reports.²⁸ The Burton Amendment, which has been carried over into each subsequent LSC appropriation, required LSC to implement a system of case information disclosure by January 1, 1998. The final version of Part 1644 of the LSC regulations contained procedures that recipients are required to follow to meet the requirements of the Burton Amendment.²⁹

Under Part 1644 all recipients and subrecipients³⁰ that "...receive LSC funds for direct representation of eligible clients..." must follow the disclosure requirements "except for subgrants for private attorney involvement activities pursuant to part 1614...." In addition, the regulation explicitly exempts PAI cases filed by private attorneys from the disclosure requirement, stating that "this part does not apply to any cases filed by private attorneys as part of a recipient's private attorney involvement activities pursuant to part 1614...." Thus, the rule makes it clear that the Burton Amendment disclosure requirements do not apply to cases that are filed by PAI subrecipients or by private attorneys under a recipient's PAI program.

²⁸ The Burton Amendment requires the following information to be disclosed to the public upon request and to LSC in semi-annual reports: the name and full address of each party (subject to certain exceptions), the cause of action, the name and address of the court where the case was filed, and the case number assigned to the action. By its terms, the Burton Amendment applies only to LSC-funded basic field programs.

²⁹ The OIG, in its recent Program Integrity audits of LSC grantees, has been checking grantees' Burton Amendment reports against court records to ensure that grantees are appropriately reporting all of their cases where Burton Amendment reports are required.

³⁰ An entity that receives a transfer of non-LSC funds is not a subrecipient for purposes of Part 1627, even if the transferred funds are to be used for the direct representation of eligible clients, and the entity is not required to disclose case information under the Burton Amendment.

Client Identity and Statement of Facts

Part 1636 (Client Identity and Statement of Facts) of the LSC regulations generally requires recipients to identify their clients by name when they are plaintiffs in litigation filed in court or when they engage in pre-litigation negotiations, and to prepare a statement of facts for each plaintiff. The regulation contains a provision that also applies the requirements of the rules to cases filed by private attorneys who receive compensation from the recipient to provide legal assistance to eligible clients under a *judicare* or other financial arrangement. However, the commentary to the regulation makes it clear that when private attorneys provide legal services to eligible clients on a *pro bono* basis under a grantee's PAI program, the attorneys are not subject to the client identification or statement of facts requirements of Part 1636. The cases they undertake may still be "counted" as cases for CSR purposes, and recipients may still provide substantive support, training and oversight³¹ to the *pro bono* attorneys, even if they do not identify their clients or prepare statements of fact.

Other Regulations and Restrictions

Finally, we wish to make several general points regarding the applicability of the LSC restrictions to individual private attorneys who participate in recipient PAI activities, either as a member of a compensated *judicare* panel, under a contract or on a *pro bono* basis. Nothing in the LSC Act, the appropriations act or the LSC regulations prohibits recipients from referring, or private attorneys from agreeing to undertake, cases or matters for over-income clients, ineligible aliens³² or prisoners, or other cases (e.g., class actions, welfare reform, legislative or administrative advocacy) that the recipient would not be permitted to undertake directly, as long as the recipient does not "count" the cases for CSR purposes, does not provide compensation or reimbursement for expenses for those cases, and does not provide support, training or follow-up services with respect to restricted cases or matters. In addition, the fact that a private attorney participates in a *judicare* or *pro bono* panel run by a recipient or subrecipient has absolutely no effect on any case or matter that the attorney may wish to handle for any client who is referred by the recipient or PAI subgrantee, but is not considered to be a PAI case.

A bar association or *pro bono* program that receives LSC funds from a recipient as part of that recipient's PAI program may use its LSC-funded referral mechanism to refer restricted cases to its private attorney panel. However, it may not use LSC funds received from a recipient to provide private attorneys with compensation, reimbursement, support, training or follow-up on restricted cases. The PAI program may use non-LSC funds it receives from any source, including a recipient, to provide such compensation, support, etc., although the recipient may not "count" the restricted

³¹ However, recipients should not provide training or support to *pro bono* attorneys on issues relating to their attorneys' fee claims.

³² Section 1626.3 of the Corporation's regulation explicitly states that "normal intake and referral services" do not come within the prohibition on providing legal services for or on behalf of an ineligible alien.

cases for CSR purposes or apply those non-LSC funds against its PAI expenditure requirement.

If you have any other questions about PAI and the restrictions that are not addressed by this memorandum, please feel free to contact Linda Perle at 202-906-8002 or lperle@clasp.org. You can also reach Linda by mail at CLASP, 1015 15th St., NW, Suite 400, Washington, DC 20005, and the fax number is 202-842-2410.