



Sent by email to: pairulemaking@lsc.gov

June 16, 2014

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3333 K Street NW
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**RE: Comments Concerning Proposed Revisions to 45 CFR Part
1614, Private Attorney Involvement (79 Fed. Reg. 21188-
21202 (April 15, 2014))**

Dear Ms. Davis:

This letter is submitted in response to LSC's request for comments on proposed revisions to the regulation on private attorney involvement (PAI) in the delivery of legal services to eligible clients, 45 C.F.R. § 1614. The comments are submitted on behalf of NLADA by its Civil Policy Group, the elected representative body that establishes policy for the NLADA Civil Division, and its Regulations and Policy Committee.

We want to thank LSC for the thorough, thoughtful and inclusive process you employed prior to proposing these revisions, starting with the establishment of

LSC's Pro Bono Task Force (PBTF) and followed by the regulatory workshops and requests for public comment regarding the recommendations of the PBTF. NLADA strongly supports a number of the proposed revisions that implement Recommendation 2 of the PBTF Report and expand the availability of both legal assistance for people living in poverty and legal information for the client community. These revisions are highlighted in Section I of our comments.

We are also recommending reconsideration of several of the proposed revisions, including the definition of private attorney as well as the rules regarding when LSC programs can allocate resources to PAI clinics that provide legal assistance. These comments are provided to ensure that the final rules are consistent with the purposes of the PAI regulation and aligned with Recommendation 2 of the PBTF Report. These recommendations are in Section II of our comments.

I. NLADA strongly supports the following proposed revisions.

A. Resources Spent Supervising and Training Law Students, Law Graduates, Deferred Associates and Others.

NLADA concurs completely with LSC's proposed revision of 1614 expanding the 12.5% PAI requirement to include "the involvement of private attorneys, law students, law graduates, and other professionals in the delivery of legal services to eligible clients," and overturning External Opinion 2005-1001. (Current 1614.1(a); Proposed 1614.2(a) and 1614.3).

This change provides LSC programs with enhanced flexibility in using valuable existing resources, law students and graduates, deferred associates, paralegals, lay advocates and others working under the supervision of attorneys. Including the contributions of paralegals and lay advocates providing representation in administrative proceedings before tribunals such as the Social Security Administration is a very effective way of increasing the capacity of programs. And as acknowledged in the PBTF Report, "engaging students and instilling a lasting commitment to pro bono work is wholly consistent with the aims of the PAI regulation." PBTF Report, p. 20.

B. Incubator Initiatives.

In addition, LSC's revisions to 45 C.F.R. 1614.5 regarding incubator projects as proposed by the Pro Bono Task Force provides multiple benefits. This revision assists LSC programs in creating incubator programs that benefit new attorneys by giving them a start in practice. The change also benefits recipients by providing trained attorneys to handle cases for a modest payment thus expanding the supply of available lawyers. PBTF Report, p. 20.

C. Revisions to Screening and Referral Systems.

NLADA fully supports the proposed rule 1614. 4(b)(5) eliminating the requirement, described in EX-2008-1001, that when a person is screened by a recipient at a clinic and referred to a private attorney, the recipient must accept the referred client as its own in order to count the recipient's time spent on information and referral as PAI. This revision implements Recommendation 2 of the PBTF Report and substantially increases grantees' abilities to engage private attorneys and expand services to eligible clients.

The change also resolves longstanding concerns raised by the legal services community. In our June 25, 2013 Comments to LSC regarding the PAI regulation, NLADA reiterated the points from our earlier memorandum requesting withdrawal of OLA Advisory Opinion #A0 2011-001.

Requiring an LSC grantee to accept a client referred to a private attorney as its own case could often prevent programs from referring clients to private attorneys in conflict situations. Elimination of this requirement is particularly important in areas where the LSC program is the only source of free legal representation for poor people. Under this approach, both parties, if LSC eligible are able to obtain representation.

D. Range of Activities, PAI Clinics – Legal Information Provided in PAI Clinics.

NLADA fully supports this revision which allows a recipient to provide support to clinics that provide legal information regardless of whether the clinic screens for eligibility. LSC-funded programs provide invaluable support to local pro bono clinics, thereby developing close working relationships and collaborations with the organized bar and other groups.

II. NLADA Recommends Revisions to the following Proposed Rules.

A. PAI Clinics – Legal Assistance provided in PAI Clinics -1614.4(ii).

LSC’s proposed revisions only permit grantees to allocate resources spent providing support to clinics to PAI “... if the clinic screens for eligibility and only provides legal assistance to clients who may be served consistent with the LSC Act and relevant statutory restrictions.” 79 FR 21200, Proposed 45 C.F.R. 1614.4 (4)(ii). LSC indicated that it “... considered the burden that screening may place on recipients’ support for clinics...” in drafting its revisions. 79 FR 21194. This eligibility screening requirement is not only burdensome; it will make it practically impossible for many programs to support important pro bono clinics in the communities they serve. It is not necessary to ensure compliance with the LSC Act and other statutory restrictions.

Local clinics, for various reasons, do not want to be limited to serving only LSC-eligible clients. For example, courts support clinics housed in their courthouses based on the need for legal assistance by large numbers of unrepresented litigants.¹ LSC programs are or will be excluded from

¹ “Judges across the country report that the economic downturn has not only caused a spike in the number of unrepresented litigants in civil cases (especially with respect to housing foreclosure, domestic relations, and consumer disputes), but has also negatively affected the parties themselves and the courts.” LSC FY 2015 Budget Request, p. 3

participating in these courthouse clinics because the courts, like many pro bono programs, do not want to limit services solely to clients eligible for LSC funding, as illustrated by a LSC funded program in Milwaukee.

The Legal Action of Wisconsin Volunteer Lawyers Project was forced to stop participating in the first court-based, self-help advice clinic in the city, which they spent years working to develop. The success of the clinic required obtaining the support of the child support agency, the Clerk of Court and local judges. None of these partners wanted participants screened. September 2013 PAI Workshop Transcript, p. 100. This is just one instance of how requiring full LSC screening at a clinic to make sure a client qualifies for LSC funding prevents grantees from participating in numerous pro bono clinics throughout the county. Many other examples were cited during the regulatory workshops and in written comments prior to LSC's proposed revisions.

There are a number of less restrictive alternatives to ensuring that a LSC program's support for a clinic that provides legal assistance complies with the LSC Act and other statutory restrictions. These alternatives would allow a grantee to participate in clinics by developing procedures to allocate expenses for activities that are permissible under the LSC Act and statutes, thereby ensuring that LSC funds are not used to provide legal assistance to ineligible clients. The majority of these alternatives would need to include some type of limited screening.

Limited screening has been recommended by NLADA, a number of stakeholders and was raised during the September 2013 workshops by Charles Keckler, LSC Board's Chair of the Operations and Regulations Committee, who questioned whether there is a role for limited screening. September 2013 PAI Workshop Transcript, p 118.

Clinics are operated in many different ways depending on the needs and resources of the community. Since there is no "one size fits all" clinic model,²

² "...LSC believes that there likely is no "one size fits all" structure for creating the optimal PAI program. The most effective and efficient system is a function of, among other factors, the nature of the unmet legal needs and the available volunteer resources in a recipient's service area. Furthermore, LSC does not believe that it has the data or the experience to identify a single optimal structure for PAI services. As with their priorities, recipients must

the rules need to provide clinics with the flexibility to make their own determinations on how to allocate their resources, so that LSC grantees are able to support the clinic and remain in compliance with LSC requirements.

1. *Allow programs to provide support to programs that provide both legal information and assistance.*

If the legal education activities are distinct and separate from the legal assistance activities of the clinic, an LSC program should be permitted to support the legal education activities and count the resources used to support these activities towards their PAI requirement. Since LSC maintains “[c]linics that provide only legal information do not require screening,” 79 FR 21193, there is no reason to prohibit the allocation of PAI to an LSC program’s support of a clinic’s legal information activities which are severable from the legal assistance activities of the clinic.

2. *Conduct limited screening of persons seeking legal assistance at the clinics for financial and alien status eligibility.*

If legal assistance activities can be provided in a manner that ensures that the recipient’s staff only provides legal assistance to LSC eligible clients, recipients should be able to count their participation in the clinic as PAI activities. For example, a clinic participant could be determined LSC eligible if the applicant attests that he is a U.S. citizen or has a green card and either has zero income or receives assistance under programs such as SNAP, TANF, Medicaid or SSI.

While this limited screening may rule out eligible clients, the screening could serve as an acceptable and workable method for clinic participants to determine who should and should not be referred to LSC program staff participating in the clinic for legal assistance. Limited screening could also be used to calculate the percentage of LSC eligible applicants served by the clinic and appropriately apportion LSC program resources used to support services provided by the clinic to LSC eligible individuals.

determine which combination of direct delivery, intake and referral systems, clinics, or other activities will allow them to meet or exceed their PAI requirements and best serve their clients.” 79 FR 21194.

3. *Periodic limited screening of persons seeking legal assistance at the clinics for financial and immigration status eligibility to determine whether the clinic is primarily serving individuals who meet LSC eligibility criteria.*

Similar to the example in number 3 above, limited screening could also be used to calculate the percentage of LSC eligible applicants served by the clinic and appropriately apportion LSC program resources used to support the clinic that can be allocated to PAI. The appropriate proportion of time spent on screening, referring and supporting collaborative pro bono activities could be allocated to a program's PAI requirement. . The clinic would then have the option to have LSC grantees not participate in the provision of legal assistance to individual clients or have procedures in place to conduct limited or full screening with LSC grantees only providing legal assistance to LSC eligible individuals.

B. Definition of Private Attorney

The proposed regulation, 1614.3(2) (ii), regarding the definition of private attorney excludes: “an attorney employed by a non-LSC-funded legal services provider acting within the terms of his or her employment with the non-LSC-funded provider.”

As drafted, this definition could arguably include any attorney who is not employed by an LSC provider acting within the terms of his or her employment. LSC's comments in the supplementary information for this regulation indicate that its intent is to limit the term to providers of legal services to low income people. “LSC proposes these exclusions because the purpose of the PAI rule is to engage attorneys who are not currently involved in the delivery of legal services to low-income individuals as part of their regular employment.” (79 FR 21191).

The purpose of the PAI rule is not only to engage attorneys who are not currently involved in the delivery of legal services to low-income individuals, but also to continue to expand the availability of legal education and assistance for people

living in poverty and maintain existing pro bono programs. These programs include partnerships with attorneys engaged in private practice, government attorneys and faculty at law school clinics. “LSC also believes that helping to meet the unmet legal needs of eligible clients was and remains a significant purpose of the rule.” (79 FR 21194).

There are a number of non-profit “legal service provider” organizations whose primary focus is not the delivery of legal services to the poor. These should not be excluded from the definition of private attorney. These organizations, such as AARP and federally funded state protection and advocacy offices, have invaluable specialized expertise and often strong relationships/collaborations with private firms operating for profit. Partnerships with these organizations provide significant opportunities for collaborations that expand a recipient’s ability to effectively and efficiently serve clients and provide increased opportunities for private bar participation.

- *NLADA recommends that these principles be clarified in the regulation, and proposes the following language:*

“...an attorney employed by a non-profit organization whose primary purpose is the delivery of civil legal services to the poor during any time that attorney is acting within the terms of his or her employment with that organization...”.

This definition ensures that it is clear that attorneys engaged in private practice, government attorneys, law school faculty and private non-profit organizations are included in the definition of private attorney. It implements the recommendations of the PBTF and is consistent with the purposes of the PAI regulations to both engage attorneys currently not involved in the delivery of legal services to the poor and help meet the legal needs of eligible clients.

C. Failure to Comply

NLADA wants to ensure that if the Corporation withholds funds from a recipient for a perceived violation of the PAI regulation, the recipient will be afforded due

process rights in responding to LSC's proposed action, including the ability to appeal a decision to withhold funds to LSC's President.

We are concerned with the proposed language in 45 C.F.R. § 1614.10(d) that adds 45 CFR parts 1618 and 1630 to this provision and provides that, “[t]he withholding of funds under this section shall not be construed as any action under 45 CFR parts 1606, 1618, 1623 or 1630.” (79 FR 21202). These regulatory provisions delineate processes for contesting LSC revocations of funding. We want to ensure that, although actions under 1614 are not to be construed as actions under the other regulatory sections referenced above, LSC will follow normal procedures of due process, including allowing recipients the ability to appeal a decision to withhold funds to LSC's President.

Thank you again the opportunity to present comments regarding these significant changes to the PAI regulation.

Sincerely,

Dennis Groenenboom, Chair, Civil Policy Group (CPG)

Silvia Argueta, Chair, CPG Regulations and Policies Committee

Don Saunders, Vice President Civil Legal Services,

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