



er for

OFFICE OF LEGAL

To: Operations and Regulations Committee

From: Ronald S. Flagg, General Counsel and Vice President for Legal Affairs
Mark Freedman, Senior Assistant General Counsel
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Date: February 24, 2014

Re: July 2013 PAI Rulemaking Workshop—Summary of the Panel Discussion

LSC selected six panelists for the July 2013 PAI rulemaking workshop. This memo summarizes their testimony during the workshop. The transcript of the workshop, audio recordings of the workshop, background information about the panelists, panelist written comments, and the Federal Register notice are posted on the PAI rulemaking webpage at <http://bit.ly/PAIrulemakingdetails>. The three topics of discussion are:

Topic 1: LSC Pro Bono Task Force Recommendation 2(a)—Resources spent supervising and training law students, law graduates, deferred associates, and others should be counted toward grantees' PAI obligations, especially in “incubator” initiatives.

Topic 2: LSC Pro Bono Task Force Recommendation 2(b)—Grantees should be allowed to spend PAI resources to enhance their screening, advice, and referral programs that often attract pro bono volunteers while serving the needs of low-income clients.

Topic 3: LSC Pro Bono Task Force Recommendation 2(c)—LSC should reexamine the rule, as currently interpreted, that mandates adherence to LSC grantee case handling requirements, including that matters be accepted as grantee cases in order for programs to count toward PAI requirements.

| Panelist | Organization | Topic 1 | Topic 2 | Topic 3 |
|------------------------------|---|---------|---------|---------|
| Silvia Argueta | Legal Aid Foundation of Los Angeles, on behalf of the National Legal Aid & Defender Association (NLADA) | X | X | X |
| Steve Gottlieb | Atlanta Legal Aid Society | X | X | X |
| Judge Mary Katherine Huffman | Greater Dayton Volunteer Lawyers Project (GDVLP) | X | X | |
| Joan Kleinberg | Northwest Justice Project (NJP) | | X | X |
| Kenneth Penokie | Legal Services of Northern Michigan (LSNM) | X | | X |
| Lisa Wood | ABA Standing Committee on Legal Aid & Indigent Defendants (SCLAID) | X | X | X |

attorneys who are retired or licensed in other jurisdictions (including staff in many corporate legal departments).

In response to a question regarding the importance of what qualifies for the PAI 12.5%, Mr. Gottlieb said that there are practical effects of not counting certain expenses or cases toward the PAI requirement. While grantees can still conduct uncounted programs, people will follow the lead of what LSC urges and provides credit for doing.

Judge Mary Katherine Huffman, Greater Dayton Volunteer Lawyers Project

Judge Huffman echoed Mr. Gottlieb's comments and added that she would focus on the structure of PAI programs. She said that legal aid organizations need very structured programs—often with full-time professional coordinators—to provide adequate assistance to low-income clients. She provided examples from GDVLP and the University of Dayton School of Law. Her concern was that the proposed changes could lead to a dilution of the services provided. Thus, while she agreed that the work of paralegals, law students, and others should be counted, she also recommended making sure that grantees have viable pro bono programs. In response to a question about this concern, Judge Huffman explained that a viable program needed to have resources for involving services provided by attorneys.

In response to a question about paraprofessionals, Judge Huffman noted that paralegals are vital to providing services to clients and counting their work could make a difference for small programs.

In response to a question about law school clinics and student admissions, Judge Huffman explained that the Dayton program does not count law school clinic hours but it does pair law students with private attorneys and with projects at large law firms.

Kenneth Penokie, Legal Services of Northern Michigan

Mr. Penokie described the delivery of legal aid for LSNM, which has a very rural service area with many small firms and solo practitioners. If pro bono programs are to exist at all in this area, they have to be designed around these attorneys and their interests. For instance, pro bono work in a small town poses a large risk of conflicts of interest, which can make attorneys disinclined to take pro bono cases. Moreover, rural lawyers often do not want the public to know them as the “free attorney” in town because that carries a risk of too many people asking for free work.

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effective work involving private attorneys. Mr. Gottlieb recommended going further and counting these cases as PAI cases when LSC grantees had some involvement in them.

In response to a question about tracking these referrals, Mr. Gottlieb noted that often they can only obtain follow-up information from the volunteer attorneys in about 50 percent of the cases.

Judge Mary Katherine Huffman, Greater Dayton Volunteer Lawyers Project

Judge Huffman said that she fully supported the recommendation of Topic 2 because grantees and subgrantees need the extra support that the PAI rule provides. They need it for their intake because they do not have enough money to provide their private attorney contacts with sufficient referrals. Moreover, she added, sometimes conversations at intake are the only service provided, either because the client realizes he does not have a legal problem or because the client does not follow up. As a result, intake should count as a service rendered under the PAI rule. Judge Huffman added the caveat that the rule's restrictions should not be relaxed to the point where an activity is counted although services are not actually provided.

In response to a question about tracking these referrals, Judge Huffman noted that often the screening itself is the service, especially when the screener can explain that the legal issue belongs to someone other than the caller, such as a family member.

Joan Kleinberg, Northwest Justice Project

Ms. Kleinberg supported the recommendation. She stated that LSC needs to remain flexible, letting programs change with time, so that organizations can design PAI projects that fit into their area's delivery system. She noted that an integrated intake and delivery system—as Washington State has created—

In response to a question regarding support for clinics and concerns about eligibility, Mr. Gottlieb suggested finding a way to test for eligibility so that the grantee could obtain PAI credit in proportion to the LSC-eligible clients served by the clinic.

Kenneth Penokie, Legal Services of Northern Michigan

In response to a question about the impact of changing the PAI rule, Mr. Penokie replied that four out of five PAI-style initiatives cannot be reported to LSC. While grantees could still participate in those initiatives, the lack of reporting has a detrimental effect. Every grantee is evaluated by LSC, Congress, and the public, but neither the grantees nor LSC are fully equipped to tell the whole story of what they do to involve private attorneys

Another problem arises with full LSC intake and screening because screening cases for handling by a pro bono attorney creates the risk of creating conflicts for the grantee. Those conflicts can exclude clients from core cases involving domestic violence or landlord-tenant lockouts when opposing parties may be assisted through a volunteer lawyer. Alternative screening mechanisms can prevent conflicts.

Mr. Penokie concluded that projects that cannot be reported as PAI might not occur when programs have limited funds. He explained that technology can foster innovative approaches, which flexibility in the rule could permit. Grantees could report that work to LSC and to Congress, regardless of whether the work is identified as cases, matters, or something else.

Joan Kleinberg, Northwest Justice Project

The difficulty of the current PAI rule, Ms. Kleinberg said, arises from the conflation of CSR case requirements with the PAI rule's reportable time requirements. This conflation keeps LSC from taking credit for leveraging massive amounts of pro bono activity through investment in local programs. She discussed examples of situations where NJP is the subject matter expert and can provide training for volunteer lawyers, but without any CSR-reportable cases. Similarly NJP is involved in a debt clinic at a courthouse, a domestic violence clinic for refugees and immigrants, and other support for local programs. They do not report these activities as PAI because there are no CSR-eligible cases.

Ms. Kleinberg also discussed an issue not raised in the PBTF report. NJP has compensated PAI cases in which NJP pays a fee of less than 50 percent of the normal attorney rate. She noted that the \$25,000 threshold for subgrants for those activities has not changed since 1980 and creates difficulties.

Lisa Wood, SCLAID

Ms. Wood explained that SCLAID was waiting to hear more about eligibility screening before commenting on it. For brief service clinics with screening for LSC eligibility, SCLAID supports allocating supervision time to the PAI requirement. Brief service work is an important

part of the delivery of legal services and highly attractive to volunteer attorneys. She explained that ethics rules are increasingly permitting brief services work without creating conflicts.

OTHER PUBLIC COMMENTS

Jonathan Asher, Colorado Legal Services (CLS)

Mr. Asher reported that CLS requested that the OLA opinion on referrals be reversed. CLS runs an internal PAI program and provides screening and referral for a large Denver area pro bono program and a number of rural, smaller bar association programs, which had been counted as PAI expenses. CLS provides support, training, and referrals for the Colorado Lawyers for Colorado Veterans program. CLS does not track the outcome of the referrals. Nonetheless, CLS spends resources screening and referring these cases to the pro bono programs and supports counting that toward the PAI allocation.

Mr. Asher supported including attorneys licensed in another state. Colorado allows single-client lawyers licensed in another state, such as in-house counsel, to handle pro bono cases.

Mr. Asher also supported changing the definition of a private attorney away from one that is measured by the income of the attorney. Stay-at-home parents who take PAI fee cases are excluded by the rule when their only professional income is PAI fees, even when the total fees are only a small amount of income.

Chuck Greenfield, NLADA

Mr. Greenfield commented that the purpose of the PAI rule is to leverage additional resources for clients, with other benefits for partnerships and fundraising. Increasing services justifies flexibility and innovation, which are frustrated by adherence to technical CSR reporting requirements. He speculated that many of the Technology Initiative Grant (TIG) accomplishments would not have occurred if the CSR requirements applied to TIG activities. He suggested thinking about PAI as having a research and development capacity. Nonetheless, he stated that NLADA understands that LSC and Congress want services to go to eligible clients. He suggested that the CSR requirements should not inhibit opportunities for LSC grantees to provide the architecture for new and creative approaches to technology, court-based services, and PAI, when those approaches produce substantial benefits primarily to the LSC-eligible community.

Helenka Marculewicz, Greater Dayton Volunteer Lawyers Project

Ms. Marculewicz commented that half of the cases that her program refers out are not reported as CSR cases because they never get back a signed citizenship attestation. She also commented that successful leveraging of resources requires private bar ownership of pro bono. Lastly, Ms.

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Silvia Argueta, NLADA

Ms. Argueta noted that fraud, waste, and abuse were not addressed, and she cautioned against creating more burdens on programs. She stated that existing auditing and compliance reviews are sufficient without more regulation.

Steve Gottlieb, Legal Aid Society of Atlanta

Mr. Gottlieb recommended discussing liberalization of what constitutes a PAI case. While there is no required number of PAI cases, the exclusion of some types of cases as a result of changes in the rules caused concern about the resulting decrease in numbers.

Judge Mary Katherine Huffman, Greater Dayton Volunteer Lawyers Project

Judge Huffman recommended discussing expanding services in an era of shrinking budgets and increased need and not just discussing how to count services towards the 12.5% PAI requirement.

Kenneth Penokie, Legal Services of Northern Michigan

Mr. Penokie supported Mr. Gottlieb and Judge Huffman's comments. He also noted that fraud concerns should be taken in the context of the risk that a private attorney, not an LSC grantee, might provide legal advice to an ineligible client.

Joan Kleinberg, Northwest Justice Project

Ms. Kleinberg suggested inviting comments on any other regulations that affect Part 1614.

Lisa Wood, SCLAID

Ms. Wood suggested devoting time to discuss methods, such as sampling, for pro bono programs that do not screen for eligibility. The ABA welcomes a conversation about that to better inform their comments. She also suggested discussing questions that had been asked during this workshop and had not been addressed.

Father Pius Pietrzyk, LSC Board of Directors

Father Pius suggested talking about the goals of the PAI rule and the value LSC intends to get out of it. He also suggested discussing how delivery of legal services has changed over the last 30 years and how that affects the PAI rule.