

LEGAL AFFAIRS

PAI Workshops—Final Written Comments Summary

February 24, 2014

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Author	Organization	Date Received
Lewis G. Creekmore and Edwina France Martin	New York State Bar Association Committee on Legal Aid	October 9, 2013
Lisa Wood	American Bar Association through its Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and with substantial input from its Standing Committee on Pro Bono and Public Service (Pro Bono Committee)	October 11, 2013
Ann Routt & Michael Chielens	Legal Services Association of Michigan (LSAM)	October 15, 2013



Deborah Perluss Northwest Justice Project

Regarding Topic 1, NJP proposed a change in the regulatory language to make PAI credit available to support the work of “any person licensed to practice law in the jurisdiction of the LSC recipient’s service area, who is not then otherwise employed by the recipient.” This would, in Washington’s case, allow service providers to capture a significant new resource in the state: limited license legal technicians (LLTs), who are not lawyers authorized to practice some very limited kinds of law. These LLTs, Ms. Perluss said, mostly work in an area of family law, where there is the highest demand for low-cost or no-cost services, so they would be a significant help to grantees. This definition would also address concerns about excluding from the rule lawyers who worked at an LSC grantee within the past two years or who want to accept PAI fees but do not have other full-time legal income and thus are excluded by the income test in the current private attorney definition.

NJP also supports including anyone licensed in the jurisdiction under the applicable rules such as student attorneys, emeritus attorneys, or attorneys licensed elsewhere but permitted to provide indigent representation. NJP does not support expanding the scope of the rule to include people who are not authorized to practice. Nor does NJP offer an opinion as to whether the PAI rule should include attorneys who work full-time as staff attorneys at nonprofit organizations that do not receive LSC funds.

Regarding Topic 2, Ms. Perluss stated that PAI services should not be tied to CSR requirements. She wrote that it was extremely difficult for NJP to get private attorneys who accept cases to comply with all case handling requirements. Conversely, local volunteer lawyer projects (VLPs) were very successful in recruiting attorneys to their programs which accept well screened referrals from NJP through a hotline system and an integrated tracking system that captures the referral and confirmation of some private attorney service, but does not maintain ongoing oversight of the case. NJP does not support requiring that level of tracking for all grantees though. Under the current rule, NJP is unable to get any credit for the referral.

Regarding screening and conflicts, Ms. Perluss agreed there was a legitimate concern about creating conflicts if PAI referrals are tracked in a case management system. She recommended that LSC defer to local conflicts rules to address those concerns and discussed ABA and Washington State rules regarding screening for referrals and conflicts.

Regarding Topic 3, NJP expressed no opinion on whether LSC should allow recipients to include, under the PAI framework, the time spent supporting clinics without eligibility screening. In its screening system, NJP has the capacity to screen for LSC eligibility, but does not allocate time and costs accordingly. If there are other grantees in NJP’s situation that can screen and allocate costs any concern about supporting clinics that do not screen should not be a basis to deny PAI supported referral services to those clinics.

Ms. Perluss also addressed the question about distinguishing between LSC-permissible and LSC-impermissible activities. She discussed NJP working with VLPs and bar associations on trainings and presentations for lawyers regarding legal topics relevant to low-income persons.





referrals or training and support of clinic volunteers. The ABA noted that vital services are provided in these clinics, many of which might not exist without the support of LSC grantees.

Ann Routt and Michael Chlens, Legal Services Association of Michigan

Ms. Routt and Mr. Chlens wrote to encourage LSC to redesign 1614 in order to emphasize the values of flexibility and innovation. LSC and its grantees, they wrote, should be permitted to report and receive credit for all the work grantees do, particularly in order to educate funders and the public about those activities. LSC grantees in Michigan have reported that their pro bono programs are much larger than the limited PAI activities LSC permits them to report. LSAM recommends a flexible approach to pro bono that would enable LSC and its grantees to more effectively discuss the full array of innovative and inspiring pro bono programs.

LSAM criticized treating PAI as a Case Service Reporting (CSR) compliance issue, which has created tremendous barriers to the breadth and quality of services provided by grantees. A comprehensive compliance system is appropriate for grants but is neither workable nor appropriate for volunteer projects. LSAM noted that LSC encourages activities without individual CSR compliance in the TIG programs and legal education projects. LSAM endorsed the State Bar of Michigan's earlier written recommendation that LSC use a test of good faith efforts to engage members of the private bar to expand services to clients using a "PAI matters" approach that would be inclusive, not limiting. LSAM recommends defining a private attorney as any person authorized to provide legal services who is not an employee of a

provides coordination, training, and support for local and statewide pro bono efforts. Mr. Bamberger and Ms. Carlso recommend allowing all of these services to be allocated as PAI expenses. Moreover, the PAI rule as currently written, they said, may be a disincentive to effective private attorney involvement. The current rule should be reviewed with an eye toward promoting innovation and allowing greater flexibility in meeting requirements

Laurie Tarantowicz and Matthew Glover LSC Office of the Inspector General (OIG)

The OIG prefaced its remarks by noting that it was difficult to offer comprehensive or conclusive comments on potential regulatory action in the absence of a definite proposal with specific language. As a result, its comments were necessarily provisional, and did not represent the OIG's final position on any proposed changes.

The OIG began with recommending evaluation of the PBTF proposals, the written comments, and the workshop discussions on the rule's purpose. The OIG noted that a change in purpose may be appropriate, but that it should be considered in a deliberative manner rather than by accretion. The current purpose of the PAI rule is to ensure that grantees involve private attorneys in the delivery of legal assistance. This is because, when effectively used, PAI expands the base of attorneys representing poor people, increases the range of choices for clients, and provides a higher degree of specialization. Therefore, the question for the rulemaking is whether the recommendations at issue are calculated to increase private attorney involvement. If they are not—as with the proposed counting of law students' work towards PAI—the question is whether these proposals promise the benefit of, for example, greater choice for clients. Additionally, if the focus of the PAI rule is to be broadened to include less traditional “private” attorneys, the rule should undergo a more systematic restructuring to account for the shift, rather than retain the “private attorney” rubric. The OIG noted that for FY 2013 and FY 2014, both the Senate and the House appropriations committees for LSC have included report language encouraging involvement of private attorneys.

The OIG's second major point involves balancing free pro bono services and compensated reduced fee services under the rule. The current rule has seen increased participation of attorneys generally in pro bono and compensated programs. The House appropriations reports for LSC in FY 2013 and FY 2014 refer to both cost and low-cost additional services. The proposed changes, appear intended to encourage pro bono over compensated activities. If such a shift is intended, it should be made explicit in the regulation after study by LSC. This is because shifting the balance toward pro bono may result in a reduction of involvement by private attorneys, as some lawyers may withdraw if they only participate in compensated projects.

The OIG's third major point involves the focus on direct legal services. The current rule requires direct delivery services to eligible clients and permits other support activities. The OIG recommends retaining its focus on direct delivery because it speaks to the core of LSC's mission.

The OIG's fourth major point involves the rule's limitation on allocating to PAI reduced fee payments to former staff attorneys within two years of their employment at a grantee. That



limitation does not apply when the former grantee attorneys participate in a PAI program on the same terms as other attorneys. Rather it prevents favoritism. The proposal involving incubator projects implicates this limitation because some incubators involve temporary employment at an LSC grantee. While not opposed to the idea of adjusting this rule, the OIG recommended retaining some mechanism for addressing concerns regarding apparent favoritism, including a perceived unfair advantage in securing compensated work, and the fact that former grantee attorneys have already been involved in providing legal services to the poor. The OIG also noted concerns about subsidizing the legal practice of former grantee attorneys who could handle LSC res(f(c)-6(e)0(s)-1(heh[gd)-nD1 Tmgd)-nD1.004 Tw4(i)-6(n)-6( t)-6(h)-ei((f(c)-6( p(n)-1c)-6(e)0(sv(a)4(t)

funds are primarily being used to serve the low-income community. She included a newspaper article profiling a clinic that OSLSA participates in with support from the local judiciary.

Charles Greenfield National Legal Aid and Defender Association

Mr. Greenfield wrote that NLADA is fully supportive of all of the PBTF's recommendations for changes to the PAI rule. NLADA also seeks, in a new PAI rule, a regulatory architecture that allows grantees the maximum flexibility to leverage resources of the legal community in order to do what each deems most effective locally. Mr. Greenfield commented that the focus of any PAI program should be on expanding the availability of legal assistance and legal information for people in poverty and the client community.

Regarding Topic 1, NLADA supports Recommendation 2(a), to leverage the work of law students, law graduates, deferred associates, paralegals, lay advocates, and others to expand the provision of legal assistance for the poor and legal information to the client community. Mr. Greenfield added a caveat that the primary focus of a PAI program should not be training law students. Lawyers should still have the central role of any PAI activity, with students, graduates, paralegals, and lay advocates working under their supervision. Mr. Greenfield suggested that non-lawyers could, with attorney supervision, support work at clinics, present at legal education sessions, or represent clients in administrative proceedings.

This broadening of the PAI rule would be made possible by changing the definit -1.15 Td (no 3)

Regarding Recommendation 2(c), Mr. Greenfield noted that the application of CSR requirements to PAI has not been a good fit. It has discouraged the expansion of pro bono opportunities. It is an odd result, he commented, to have LSC prohibit PAI credit for a case accepted by a private attorney merely because the client referred to him is not a client of the grantee. The focus of the PAI rule is to get attorneys to take cases as their own while the grantee provides assistance with the process. The grantee work could include recruitment, training, referrals, providing substantive expertise, and counseling. Mr. Greenfield suggested three approaches to report PAI case activity: (1) the current system of reporting PAI-referred cases that are also grantee CSR cases; (2) reporting PAI-referred cases as “other services” with the attorney who accepts the referral assuming all responsibility of handling the case and no requirement for detailed reporting of case data or outcomes; (3) reporting the time expended in conducting PAI referrals with no requirement for detailed reporting of case data or outcomes.

NLADA did not support any specific criteria regarding organizations that accept PAI referrals for placement with private attorneys. Rather, grantees should be allowed to leverage the legal community’s resources as they deem best for their programs. As long as the focus is on expanding legal assistance, resources expended in referrals, cooperation with, and direct support for placement programs should count towards PAI.

Regarding conflicts and referrals, Mrog-2(d c)4(ount)-2( t)-2(ow)2(t)-6,5(,)-4( M)-h1