

Outline of ABA Presentation

General Observations/Introduction

Private bar is an important partner with LSC in providing services

ABA has encouraged pro bono service through a variety of programs and policy statements

Providing grantees with flexibility will be critical in enabling the programs to develop creative and collaborative approaches for engaging pro bono volunteers

Examples:

Dealing with partner organizations

Addressing intake and priority variations

Finding ways to utilize volunteers in innovative capacities

LSC must take care to avoid providing too much specificity in the revisions

Potential to inhibit new approaches essential for increasing pro bono opportunities

Topic 1: Should resources spent supervising and training law students, law graduates, deferred associates, and others be counted toward grantees' PAI obligations, especially in "incubator" initiatives?

Law Students, Law Graduates, Deferred Associates and Others

Law students, law graduates, deferred associates and others play an important role in assisting to provide legal services to the poor - to conduct intake interviews, gather documents, engage in research, and draft documents such as simple wills and pleadings

Budget cuts have forced programs to reduce staff - the ability to utilize these volunteers has been of enormous benefit

LSC recipients benefit in less tangible ways - many of law students, law graduates and on behalf of t

Utilizing these volunteers requires a substantial dedication of LSC recipients.

The interpretation of the PAI rule in External Opinion #EX- impact on the willingness of some programs to fully utilize

The ABA believes LSC recipients should be able to receive supervising these volunteers.

“Incubator” Initiatives

As a result of recent retrenchment in the legal industry, some law schools and bar associations have created incubator programs to assist new attorneys in establishing their practices. Some LSC recipients have been asked by law schools or

The ABA supports an interpretation of 45 CFR 1614 or its amendment, if necessary, to enable

Name	Lisa Wood, Chair, ABA Standing Committee on Legal Aid and Indigent Defendants
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.	
X	How are legal service providers engaging new categories of volunteers? What are the needs of these new categories of volunteers?
X	What are the obstacles to LSC grant recipients' full use of these volunteers?
X	Should LSC implement conditions and guidelines to allow LSC recipients to claim PAI credit for the supervision and training of these volunteers?
	How can LSC ensure against fraud, waste, or abuse related to implementing this recommendation? What caution should LSC exercise to ensure against any unintended consequences?

X ~~How can LSC ensure~~ How can LSC ensure against fraud, waste or abuse related to implementing this

	recommendation? What caution should LSC exercise to ensure against any unintended consequences?
	To the extent applicable, discuss your organization's ability to execute any recommended approaches.
X	Other issues related to Topic 2 (please specify in your submitted outline).

Lisa Wood
Bio and Qualifications

Lisa is the Chair of the ABA Standing Committee on Legal Aid and Indigent Defendants, having served in that post since 2012. She previously served 2 years as a member of the Committee.

Lisa is a partner and Chair of the Litigation Department at Foley Hoag LLP in Boston, where she handles complex litigation matters involving accounting, securities and antitrust issues. Throughout her 29 years of practice, Lisa has been active in access to justice issues. Lisa served as a member of LSC's Pro Bono Task Force. Lisa served as Chair of the Massachusetts IOLTA Committee for the past 6 years, and served as a member of that Committee for four years previous to that. She has served as a Trustee and Grant Committee Member of the Boston Bar Foundation, one of the charities to whom the Massachusetts IOLTA Committee disburses funds for grant making purposes. Lisa has also served on the Board of the Volunteer Lawyers Project for 25 years, including three years as its Chair. VLP is currently the largest LSC recipient in Massachusetts, and was one of the first organized pro bono programs in the United States (funded in its early years by an ABA start-

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In addition to its longstanding support for ongoing federal funding of LSC, the ABA has a strong commitment to and keen interest in the full and robust involvement of the private bar in the delivery of legal services to the poor. While recognizing that pro bono volunteers can never replace the vital services provided by LSC grantees, the ABA views the private bar as an important partner with LSC in providing much needed services to those who cannot otherwise afford legal assistance.

The ABA has encouraged pro bono service through a variety of programs and policy statements for more than a century. The ABA Canons of Professional Ethics, adopted in 1908, as well as the ABA Model Code of Professional Conduct, adopted in 1969 both addressed the issue.¹ The ABA Private Bar Involvement Project (now known as the Center for Pro Bono) was established in 1979 to assist with the creation and development of pro bono programs.

In more recent times, the ABA adopted Model Rule of Professional Conduct 6.1

the ABA amended MRPC 6.1 to define pro bono in a multi-tiered and prioritized way, placing emphasis on the representation of low income people with no cost to the client.

The ABA has also been at the forefront of establishing criteria for effective pro bono programs. In 1996, the ABA adopted *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means (Pro Bono Standards)* to provide guidance regarding the most effective and efficient ways for pro bono programs to operate. The ABA is in the process now of revising the *Pro Bono Standards*, and the revised version is scheduled to be considered by the ABA House of Delegates at its Annual Meeting in August.

Several compelling reasons led to the revision of the *Pro Bono Standards* including new forms of delivery of pro bono legal services that were not prevalent in 1996, such as limited scope representation, assisted pro se models, and neighborhood and court-based clinics. In addition, the use and availability of technology by pro bono programs have grown exponentially since the

engage in research, and draft documents such as simple wills and pleadings. Given that a number of programs have had to reduce staff due to cuts in LSC and other funding sources, the ability to utilize these volunteers has been of enormous benefit to those programs.

LSC recipients benefit from the use of these volunteers in other, less tangible ways, as well. Due to the exposure that the law students, law graduates, and deferred associates receive to the critical legal needs of the poor, as staff, many will become dedicated pro bono attorneys with the program, as well as financial supporters, once they are engaged in private practice. In addition, some will become leaders within the legal community and the community at large and based on their experience will become strong advocates on behalf of the program.

Utilizing these volunteers is not without a substantial dedication of time and resources by the LSC recipients. The volunteers require training in a wide range of areas including client interview skills, substantive areas of the law, and the workings of various governmental agencies with which clients interact. These volunteers also need to be closely supervised so that there is no doubt that clients are receiving the high level of service they deserve.

Currently, as interpreted by External Opinion #EX-2005-1001, the PAI Rule does not permit the time spent by program staff training or supervising law students or law graduates who are not yet

had a negative impact on the willingness of some programs to utilize these categories of volunteers. Given the time and effort that is needed to fully utilize law students, law graduates, and deferred associates, as well as their potential to become long term volunteers and supporters of LSC programs, the ABA believes LSC recipients should be able to receive PAI credit for training and supervising these volunteers.²

who provides legal assistance to eligible clients and who is authorized to praKHedmm570rBDC BT7f(r1 21F300

establishing their practices. In some cases, LSC recipients have been asked by law schools or bar associations in their areas to become a partner in these efforts.

Under Advisory Opinion # AO- 2009-1007, any attorney participating in an incubator program who earns more than one half of his or her professional salary from a recipient is considered a

permitted to count as PAI any payment made to an attorney who is considered a staff attorney for two years after the attorney no longer serves in that capacity with the recipient.³

New attorneys who are just beginning a practice will not know if more than 50% of their income in the first year or two will come from the LSC recipient through the referral of clients. And even if they did, the best policy would be to make an exception to the current restriction at least for lawyers who interned through an incubator program with an LSC grantee. They have been trained specifically in issues of poverty law and are committed to serving the low income community. Few members of the private bar are thus better positioned to provide needed services to the clients that LSC recipients will be referring on a low-fee contract basis.⁴ As a result, the ABA recommends that the PAI Rule be amended to permit LSC recipients to receive PAI credit when they refer cases on contract to attorneys who are participating in incubator programs affiliated with the recipients, even if those contracts represent more than 50% of an first two years of practice.

Topic 2: Should grantees 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?

Response: The ABA, for the reasons stated below, fully supports an interpretation of 45 CFR 1614 or its amendment, if necessary, to enable LSC recipients to count towards their PAI spending requirement the time spent to: create an integrated intake and referral system; conduct intake; screen callers; and refer eligible clients to private attorneys, regardless of whether the recipient considers the case to be its own or provides oversight and follow-up to the volunteer attorney who accepts it.

There are several models of integrated intake and referral systems utilized by LSC recipients. In some geographical areas (cities, counties, or states) there is one number that is called by anyone seeking free legal services. Staff screen the calls for income and other eligibility criteria, obtain pertinent facts and then determine to which legal aid or pro bono program the case should be referred. In some cases, this type of intake system also includes brief advice for those eligible

³ Under the envisioned incubator program that was the subject of # AO 2009-

clients for whom brief services suffice. Another integrated intake and referral system is one that is specific to a given LSC recipient. In that case, the LSC recipient conducts intake and screening and then determines if the eligible client matter is one that should remain in-house or be referred to the pro bono volunteer lawyer program in the service area. In either type of integrated screening and referral system, pro bono programs and the volunteer lawyers that participate in them benefit by receiving carefully screened cases, saving both time and resources.

LSC has encouraged its grantees to collaborate with pro bono programs and to integrate them fully into the statewide delivery system. Integrated intake and referral systems are an excellent example of how grantees have heeded that call. However, given the views expressed in Advisory Opinion #AO 2011-001, some LSC recipients likely will reconsider the value of expending their resources on these systems, and others that may have considered taking part may reconsider participating. This is the case because under that opinion, recipients cannot count towards PAI the value of the time spent in intake, screening, and referral of LSC-eligible clients unless they counted the case as their own and engaged in oversight and follow-up.

In a memorandum to Victor Fortuno dated July 14, 2011, Robert Stein and A. Michael Pratt, the then chairs of SCLAID and the Pro Bono Committee, respectively, requested that the opinion

Topic 3: Should LSC 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?

Response: The ABA recommends that LSC re-examine said rule, as currently interpreted, but recognizes this topic involves nuances and requires more detailed analysis as set forth below.

Our response to Topic 2 above also contains our response to the question posed by this topic as it pertains to integrated intake and referral systems in which eligible clients are referred to pro bono programs. However, based upon the items for discussion listed under this topic in the Federal Register Notice of May 10, 2013, it appears that the emphasis here is on brief service clinics, which will be discussed below.

There are a wide range of brief service clinics that have been developed over the past few years that are sponsored by bar associations, community groups, or the local courts. Some focus on a specific group such as veterans or battered spouses; others focus on a specific area of the law such as divorces or evictions. Many are held in locations that are convenient for clients such as community centers, schools or churches, as well as at times (evenings and weekends) that respond to the needs of working people.

These clinics are often popular with lawyers because they are for a discrete period of time (an evening or an afternoon) and a discrete matter. In addition, some of the clinics focus in an area of the law that lawyers have expertise in, such as wills or divorce, rather than an area of the law for which specialized knowledge of poverty law is required.

A number of LSC grantees have played important roles in assuring the success of these brief service clinics in a variety of ways including taking p training of staff and volunteer lawyers who staff them and being available for consultations onsite, as needed. This involvement has enabled LSC grantees to work collaboratively with the bar, the courts and community groups to extend needed legal help to those who cannot otherwise afford it.

The ABA believes that to the extent that eligible clients are being assisted at these clinics, LSC grantees should receive PAI credit for any support they provide to the brief service clinics under the same reasoning expressed in response to Issue 2 above. As to permitting LSC recipients to obtain PAI credit for assistance provided to brief service clinics that do not engage in client eligibility screening, the ABA plans to study the issue further and provide comments at a later date. While we are supportive of the development of these clinics and view them as an innovative approach to engaging pro bono lawyers and serving the low-income community, we also recognize the complexities of permitting LSC recipients to count them as PAI, due to a number of considerations, including possible statutory constraints. Hearing the views of others during the Regulatory Workshop to be held in Denver on July 23, 2013, will help to inform the

Mr. Mark Freedman

June 21, 2013

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The ABA appreciates the opportunity to present these comments and looks forward to participating in the upcoming Regulatory Workshops at which these issues will be further explored.

MEMORANDUM

To: Victor M. Fortuno, General Counsel, Legal Services Corporation

Cc: James M. Sandman, President, Legal Services Corporation

From: Robert E. Stein, Chair, ABA Standing Committee on Legal Aid and Indigent Defendants
A. Michael Pratt, Chair, ABA Standing Committee on Pro Bono and Public Service

Re: Advisory Opinion # AO – 2011-001

Date: July 14, 2011

We write on behalf of the ABA Standing Committees on Legal Aid and Indigent Defendants (SCLAID) and on Pro Bono and Public Service (the Pro Bono Committee) to request withdrawal of LSC Office of Legal Affairs Advisory Opinion # AO – 2011-001. We believe that the opinion misinterprets 45 CFR 1614, makes broad statements that are likely to be misread, and inappropriately relies upon poorly conceived and otherwise unarticulated policy. The overall impact of the opinion will be to discourage and impede the delivery of pro bono legal services by private lawyers, at a time when Congress and others are calling for an increase in such services.

At the outset, we want to emphasize that the ABA fully supports an effective, but flexible, system for involving private lawyers in the delivery of legal services to the poor. To achieve this goal, LSC must allow recipients of its funding the ability to innovate and adopt creative approaches. The applicable regulations should be interpreted to permit flexibility in program design, so long as good-faith efforts are made to involve private lawyers with reasonable assurances of quality service for clients.

The situation described in the opinion constitutes a direct delivery system that complies with the regulation, and therefore recipient expenditures in connection with participation in that system are properly included within the recipient's PAI requirement.

The opinion, on page three, describes “a situation in which the recipient participates in a system with a number of volunteer lawyer programs in its service

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meantime, the language of the regulation should be enforced as written, and not as interpreted based on an otherwise unarticulated LSC “policy” as announced in an advisory opinion by the Office of Legal Affairs, particularly when that policy is inconsistent with the regulatory language and its purpose.

SCLAID and the Pro Bono Committee believe that there are both tangible and intangible benefits that result from the involvement of private attorneys in the work of legal aid programs. The activities of recipients to involve private attorneys must certainly be consistent with the clear requirements of the regulation, and should be in pursuit of the goal of quality service to clients. But local programs and governing boards should be allowed extensive flexibility in designing good-faith approaches to PAI.³ The approach should not be one based on an enforcement ideology that asks “can LSC be assured that such activities” effectuate the regulation. Instead, interpretation of Part 1614 should examine whether an activity that has been conducted in a good-faith effort to involve private attorneys and is consistent with the purposes of the regulation, is permitted by the plain language of the regulation. Moreover, this regulation should not be interpreted and applied in a manner that is inconsistent with its plain language and purpose.

For all the reasons set forth above, we urge that Advisory Opinion # AO – 2011-001 be withdrawn.

Thank you for your consideration.

³ See Part 1614.3(c), stating “The specific methods to be undertaken by a recipient to involve private attorneys in the provision of legal assistance to eligible clients will be determined by the recipient’s taking into account the following factors...” (emphasis added)