



LEGAL SERVICES CORPORATION

45 CFR Part 1614

Private Attorney Involvement

AGENCY: Legal Services Corporation

ACTION: Notice of proposed rulemaking

SUMMARY: This proposed rule updates the Legal Services Corporation (LSC or Corporation) regulation on private attorney involvement (PAI) in the delivery of legal services to eligible clients.

DATE: Comments must be submitted by [INSERT DATE 60 DAYS AFTER PUBLICATION OF THIS NOTICE IN THE FEDERAL REGISTER].

ADDRESSES: Written comments must be submitted to Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007; (202) 337-6519 (fax) or pairulemaking@lsc.gov. Electronic submissions are preferred via email with attachments in Acrobat PDF format. Written comments sent to any other address or received after the end of the comment period may not be considered by LSC.

FOR FURTHER INFORMATION CONTACT: Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, (202) 295-1563 (phone), (202) 337-6519 (fax), pairulemaking@lsc.gov.

SUPPLEMENTARY INFORMATION:

I. Regulatory History

In 1981, LSC issued the first instruction (“Instruction”) implementing the Corporation’s policy that LSC funding recipients dedicate a percentage of their basic field grants to involving private attorneys in the delivery of legal services to eligible clients. 46 FR 61017, 61018, Dec. 14, 1981. The goal of the policy was to ensure that recipients would provide private attorneys with opportunities to give legal assistance to eligible clients “in the most effective and economical manner and consistent with the purposes and requirements of the Legal Services Corporation Act.” Id. at 61017. The Instruction gave recipients guidance on the types of opportunities that they could consider, such as engaging private attorneys in the direct representation of eligible clients or in providing community legal education. Id. at 61018. Recipients were directed to consider a number of factors in deciding which activities to pursue, including the legal needs of eligible clients, the recipient’s priorities, the most effective and economical means of providing legal assistance, linguistic and cultural barriers to effective advocacy, conflicts of interest between private attorneys and eligible clients, and the substantive expertise of the private attorneys participating in the recipients’ projects. Id. LSC reissued the Instruction without substantive change in 1983. 48 FR 53763, Nov. 29, 1983.

LSC subsequently promulgated the PAI policy in a regulation published at 45 CFR part 1614. 49 FR 21328, May 21, 1984. The new regulation adopted the policy and procedures established by the Instruction in large part. The rule adopted an amount equivalent to 12.5% of a recipient’s basic field grant as the amount recipients were to spend on PAI activities. Id. The rule also adopted the factors that recipients were to consider in determining which activities to pursue and the procedures by which recipients were to establish their PAI plans. Id. at 21328-29. Finally, the rule incorporated the

Instruction's prohibition on using revolving litigation funds as a method of engaging private attorneys. Id. at 21329.

LSC published a notice of proposed rulemaking (NPRM) to amend part 1614 in 1985. 50 FR 34510, Aug. 26, 1985. The NPRM proposed numerous revisions to the original rule. A major substantive change was the introduction of the mandatory direct delivery provision. Id. at 34511. LSC believed that “the essence of PAI is the direct delivery of legal services to the poor by private attorneys,” and consequently required recipients to incorporate direct delivery into their PAI programs. Id. However, LSC left to the recipients' discretion the determination of what percentage of a recipient's PAI program to dedicate to direct delivery. Id. The NPRM also introduced new provisions on joint ventures, waivers, and sanctions for failure to comply with the PAI requirement. Id. at 34511, 34512. Finally, the NPRM proposed simplified audit provisions and a significantly rewritten section prohibiting revolving litigation funds. Id. at 34511. The NPRM left the 12.5% PAI requirement unchanged. Id. at 34510.

After receiving comments, the Corporation published the revised part 1614 as a final rule with an additional request for comments. 50 FR 48586, Nov. 26, 1985. LSC requested comments on a new, previously unpublished definition of the term “private attorney.” Id. at 48586-87. The original definition of “private attorney” substantially mirrored the definition that exists today:

As of January 1, 1986, the term “private attorney” as used in this Part means an attorney who is not a staff attorney as defined in § 1600.1 of these regulations. In circumstances where the expenditure of funds with respect to a private attorney would violate the provisions of the Ethics in Government Act (18 U.S.C. 207) if the recipients or grantees were federal agencies, such funds may not be counted as part of the PAI requirement.

Id. at 48591. Although LSC is not a federal agency for purposes of the Ethics in Government Act, the Corporation chose to follow the Act because the Corporation uses taxpayer funds to make grants to its recipients. The purpose of the Ethics in Government Act, LSC stated, “is to keep people at federal agencies from transferring money to former colleagues of theirs who have retired into private practice.” Id. at 48587. The Corporation addressed two issues through the proposed definition. The first issue was that the purpose of the PAI rule was to reach out to attorneys who had not been involved previously in providing legal services to the poor – a purpose that was not accomplished by paying former LSC recipient staff attorneys to provide legal services. Id. The second was the appearance of impropriety created when a recipient paid a former attorney to handle the kinds of cases that the attorney worked on while employed by the recipient. Id. LSC recognized that there may be circumstances under which the most appropriate person to handle a given case would be an attorney previously employed by a recipient, and did not prohibit recipients from using funds to pay the former staff attorney in such cases. The only thing LSC proposed to prohibit was counting such funds toward a recipient’s PAI requirement. Id.

The last substantive change to Part 1614 came with the June 13, 1986 publication of the amended final rule. 51 FR 21558, June 13, 1986. In the amended final rule, the Corporation removed the reference to the Ethics in Government Act from the definition of “private attorney.” Id. However, LSC adopted the policy of the Ethics in Government Act by including a separate provision prohibiting recipients from including in their PAI requirement payments made to individuals who had been staff attorneys within the

preceding two years. Id. The definition of “private attorney” thus became the definition that exists today:

As of January 1, 1986, the term “private attorney” as used in this Part means an attorney who is not a staff attorney as defined in § 1600.1 of these regulations

45 CFR 1614.1(d).

LSC made a technical amendment to Part 1614 in 2013 to bring § 1614.7, which established procedures for addressing a recipient’s failure to comply with the PAI requirement, into conformity with the Corporation’s enforcement policy. 78 FR 10085, 10092, Feb. 13, 2013.

On January 26, 2013, the LSC Board of Directors (Board) voted to authorize LSC to initiate rulemaking to consider revisions to the PAI rule in response to the recommendations made by LSC’s Pro Bono Task Force (Task Force). The Task Force and its recommendations are discussed at greater length below. On April 14, 2013, the Board voted to convene two rulemaking workshops for the purpose of obtaining input from recipients and other stakeholders regarding the Task Force’s recommendations and potential changes to part 1614. Through a request for information published in the Federal Register on May 10, 2013, the Corporation invited comments on the recommendations pertaining to part 1614 and solicited participants for the two rulemaking workshops. 78 FR 27339, May 10, 2013.

The first workshop was held on July 21, 2013, in Denver, Colorado, immediately following the Board’s quarterly meeting. LSC subsequently published a second request for information, which posed new questions and solicited participants for the second and final rulemaking workshop. 78 FR 48848, Aug. 12, 2013. The second rulemaking

workshop was held on September 17, 2013, at LSC headquarters in Washington, DC. The closing date of the comment period for both requests for information was October 17, 2013.

The Corporation considered all comments received in writing and provided during the rulemaking workshops in the development of this NPRM. On March 3, 2014, the Operations and Regulations Committee (Committee) of the Board held a telephonic meeting to discuss the proposed text of the rule. On April 7, 2014, the Committee voted to recommend that the Board approve publication of the NPRM in the Federal Register for public comment. On April 8, 2014, the Board approved the NPRM for publication.

II. The Pro Bono Task Force

On March 31, 2011, the LSC Board of Directors (Board) approved a resolution establishing the Pro Bono Task Force. Resolution 2011-009, “Establishing a Pro Bono Task Force and Conferring Upon the Chairman of the Board Authority to Appoint Its Members,” Mar. 31, 2011, <http://www.lsc.gov/board-directors/resolutions/resolutions-2011>. The purpose of the Task Force was to “identify and recommend to the Board new and innovative ways in which to promote and enhance pro bono initiatives throughout the country[.]” Id. The Chairman of the Board appointed to the Task Force individuals representing legal services providers, organized pro bono programs, the judiciary, law firms, government attorneys, law schools, bar leadership, corporate general counsels, and technology providers.

The Task Force focused its efforts on identifying ways to increase the supply of lawyers available to provide pro bono legal services while also engaging attorneys to reduce the demand for legal services. Legal Services Corporation, Report of the Pro Bono

Task Force at 2, October 2012, available at <http://lri.lsc.gov/legal-representation/private-attorney-involvement/resources>. Members considered strategies for expanding outreach to private attorneys and opportunities for private attorneys to represent individual clients in areas of interest to the attorneys. In addition, the Task Force explored strategies, such as appellate advocacy projects or collaborations with special interest groups, to help private attorneys address systemic problems as a way to decrease the need for legal services on a larger scale than can be achieved through individual representation. Id. Finally, the Task Force considered ways in which volunteers, including law students, paralegals, and members of other professions, could be better used to address clients' needs. Id.

In October, 2012, the Task Force released its report to the Corporation. The Task Force made four overarching recommendations to LSC in its report.

Recommendation 1: LSC Should Serve as an Information Clearinghouse and Source of Coordination and Technical Assistance to Help Grantees Develop Strong Pro Bono Programs

Recommendation 2: LSC Should Revise Its Private Attorney Involvement (PAI) Regulation to Encourage Pro Bono.

Recommendation 3: LSC Should Launch a Public Relations Campaign on the Importance of Pro Bono

Recommendation 4: LSC Should Create a Fellowship Program to Foster a Lifelong Commitment to Pro Bono

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The Task Force also requested that the judiciary and bar leaders assist LSC in its efforts to expand pro bono by, for example, changing or advocating for changes in court rules that would allow retired attorneys or practitioners licensed outside of a recipient's jurisdiction to engage in pro bono legal representation. Id. at 25-27. Collaboration among LSC recipients, the private bar, law schools, and other legal services providers was a theme running throughout the Task Force's recommendations to the Corporation.

Recommendation 2 provided the impetus for the NPRM. Recommendation 2 had three subparts. Each recommendation focused on a portion of the PAI rule that the Task Force identified as posing an obstacle to effective engagement of private attorneys. Additionally, each recommendation identified a policy determination of the Corporation or an interpretation of the PAI rule issued by the Office of Legal Affairs (OLA) that the Task Force believed created barriers to collaboration and the expansion of pro bono legal services. The three subparts are:

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.

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.

2(c) – LSC should reexamine the rule 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.

Id. at 20-21.

The Task Force observed in Recommendation 2 that the “PAI regulation has resulted in increased collaboration between LSC grantees and private attorneys,” but that the legal market has changed since the rule’s issuance. Id. at 20. The Task Force suggested that “there are certain areas where the regulation might productively be revised to ensure that LSC grantees can use their grants to foster pro bono participation.” Id. at 20. For example, the omission of services provided by law students and other non-lawyers and the poor fit of the “staff attorney” construct in the definition of “private attorney” created complications for recipients attempting to fulfill the PAI requirement. Id. at 20-21. The Task Force encouraged LSC to undertake a “thoughtful effort to reexamine the regulation to ensure that it effectively encourages pro bono participation.” Id. at 22.

III. Public Comments

LSC determined that an examination of the PAI rule within the context of the Task Force recommendations would benefit from early solicitation of input from stakeholders. LSC therefore published two requests for information seeking both written comments and participation in two rulemaking workshops held in July and September 2013. The first request for information focused discussion specifically on the three parts of Recommendation 2. 78 FR 27339, May 10, 2013. The second request for information, published after the July workshop, supplemented the first with questions developed in response to issues raised at the July workshop. 78 FR 48848, Aug. 12, 2013. In particular, the August request for information posed more detailed questions about the issues identified in Recommendation 2.

LSC received a total of twenty-five responses from LSC recipients, the American Bar Association (ABA), through its Standing Committee on Legal Aid and Indigent Defendants, the National Legal Aid and Defender Association, and others involved in pro bono work, including a state court judge and a representative of the National Association of Pro Bono Professionals. The nature of the written comments and workshop presentations led LSC to consider the recommendations of the Task Force in the context of overlapping solutions that address more than one of the recommendations, rather than discrete responses to each recommendation. For example, LSC considered the definition of the term “private attorney” as an issue whose resolution would respond to both Recommendations 2(a) and 2(b). This preamble will identify and discuss the Task Force recommendations and the comments as the Corporation did—within the framework of cross-cutting issues.

The report of the Pro Bono Task Force, the responses to the requests for information, transcripts of workshop presentations, and other related materials are available at <http://www.lsc.gov/rulemaking-lscs-private-attorney-involvement-pai-regulation>.

The Definition of “Private Attorney”

The current PAI rule defines “private attorney” as “an attorney who is not a staff attorney as defined in § 1600.1 of these regulations.” 45 CFR 1614.1(d). “Staff attorney,” in turn, is defined as “an attorney more than one half of whose annual professional income is derived from the proceeds of a grant from [LSC] or is received from a recipient, subrecipient, grantee, or contractor that limits its activities to providing legal assistance to clients eligible for assistance under the [LSC] Act.” 45 CFR 1600.1. Finally, LSC has defined “attorney” as “a person who provides legal assistance to eligible clients and who is authorized to practice law in the jurisdiction in which assistance is rendered.” 45 CFR 1600.1.

The “private attorney” definition received considerable criticism in written responses to the requests for information and during the workshops themselves. Commenters called the definition “confusing and limiting” because the use of the word “private” seems to exclude government attorneys, in-house counsel, corporate attorneys, attorneys at other non-profits, law school professors, and adjunct law professors, even though the definition itself does not exclude them. They noted that the definition prevents recipients from allocating to the PAI requirement costs associated with involving law students, law graduates who have not yet become members of a state bar, and paralegals in the provision of legal information and legal assistance to eligible clients. Finally, they discussed the fact that because the definition is tied to the term “staff attorney,” with its

inclusion of an attorney who earns more than one-half of his or her professional income from an LSC grant, recipients cannot pay attorneys who are not otherwise employed, or not employed full-time (e.g., a retired attorney or a stay-at-home parent), to take cases at a discounted rate without turning them into “staff attorneys” whose activities are excluded from counting toward the PAI requirement. Commenters overwhelmingly recommended revising the term “private attorney,” with many of the recommendations being substantially similar to Recommendation 2(a) of the Task Force report.

In Recommendation 2(a), the Task Force recommended that LSC allow resources spent by recipients to supervise and train law students, law graduates, deferred associates, and others to be counted toward meeting recipients’ PAI obligations. Panelists expanded upon this recommendation by suggesting that LSC amend the rule to allow recipients to allocate to the PAI requirement costs associated with involving paralegals, retired attorneys, and other professionals who may assist the recipient in providing legal assistance, such as accountants or forensic investigators. Some commenters noted that paralegals and lay advocates can contribute to recipients’ PAI activities by participating in training events or representing clients in administrative proceedings where permitted by federal or state law. Other commenters described the contributions made by non-legal professionals to their delivery of legal services, such as financial experts conducting forensic accounting and providing expert testimony in recipient client cases. A few commenters advocated continuing to limit participation in PAI activities to licensed attorneys. On the whole, commenters supported including within the PAI rule services provided by non-lawyers that directly aid recipients in their delivery of legal assistance to eligible clients.

LSC considered Recommendation 2(a) and all of the comments relevant to the definition of “private attorney” and determined that a revision was in order. As noted by commenters, the existing definition excludes many individuals whose participation is instrumental in improving and expanding the availability of quality legal assistance to LSC-eligible individuals. LSC proposes to address the recommendation and comments in two ways. The first is to revise the definition of “private attorney.” The second is to expand the PAI rule to allow recipients to allocate to the PAI requirement costs associated with engaging law students, law graduates, or other professionals in the recipients’ provision of legal information and legal assistance to eligible clients.

LSC proposes to revise the definition of the term private attorney in three significant ways. First, LSC proposes to remove the reference to staff attorney as defined in § 1600.1 and replace it with affirmative statements about who a private attorney is. Second, LSC proposes to exclude from the term attorneys employed more than 1,000 hours per calendar year by LSC recipients or subrecipients. Finally, LSC proposes to exclude from the definition attorneys employed by non-LSC-funded legal services providers who are acting within the scope of their employment. 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.

In addition to revising the definition of the term private attorney, LSC proposes to add definitions for the new terms law graduate, law student, and other professional. As defined, individuals in these categories will be included along with private attorneys as individuals that recipients may involve in the delivery of legal services.

Defining Law Student Involvement

In Recommendation 2(a), the Task Force noted that “[c]ontributions from law school clinics can be counted only if a private attorney supervises the students” and encouraged the Corporation to “consider amending the regulation to allow grantee organizations to count as PAI expenses the funds they expend on training and supervising law students.” Report of the Pro Bono Task Force at 20. Under the current rule, recipients may allocate to the PAI requirement costs associated with law student activities only when a private attorney, including a professor overseeing a law school clinic, supervises the student. See OLA External Opinion EX-2005-1001. In its analysis, OLA noted that “[n]one of the support or indirect delivery activities listed in §1614.3(b)(2) expressly include the supervision of law students or discuss activities done solely as an ‘investment’ in potential future private attorney involvement[.]” EX-2005-1001 at 5. OLA concluded that because law students did not meet the definition of “private attorney,” any costs associated with services provided by the students could not be allocated to the recipient’s PAI requirement. Likewise, recipients could not count toward the PAI requirement the time recipient attorneys spent supervising the law students because the supervision could not be considered support provided by the recipient to a private attorney.

Participants in the rulemaking workshops and other commenters echoed Recommendation 2(a). One commenter described a new bar rule in New York that will require all applicants to the New York bar to provide fifty hours of pro bono legal services prior to applying for admission. The same commenter stated that allowing recipients to receive PAI credit for training and supervising law students will result in more effective and efficient integration of the “hundreds of thousands of new volunteer law student pro bono hours that are becoming available into their delivery systems.”

While commenters generally supported extending PAI to services provided by law students, they did so with some caveats. Some commenters were concerned that services provided by law students would become the focus of some recipients' programs, thus detracting from the rule's emphasis on engaging licensed attorneys in the delivery of legal services. Others suggested caps on the amount of the 12.5% that could be met by credit for supervising law students. Finally, others suggested that only those law student activities that involve substantive legal work that actually expand recipients' capacity—such as research or developing pleadings—should be included within the rule.

LSC considered this issue at length. A significant part of the discussion centered on the implicit suggestion in both the Task Force report and the comments that recipients should be able to allocate to the PAI requirement costs associated with their existing programs involving law students. LSC proposes to adopt the part of Recommendation 2(a) that advocates including law students within the rule. Interviewing clients, legal research, development of standard forms for posting on a legal resource website, and drafting briefs or memoranda are examples of law student work that supports the provision of legal information or legal assistance to eligible clients.

Defining Paralegal Involvement

The Task Force suggested that LSC recipients “consider ways in which they can involve other members of the law firm community in pro bono – including paralegals and other administrative staff.” Report of the Pro Bono Task Force at 11. Although the Task Force did not recommend explicitly that LSC consider amending part 1614 to include paralegals among the groups that recipients could engage in the delivery of legal services, it did suggest in Recommendation 2(a) that “resources spent supervising and training law

students, deferred associates, and others” should be counted toward the PAI requirement. Id. at 20.

Commenters recommended including paralegals within the definition of “private attorney.” Commenters pointed out that paralegals can represent clients in administrative proceedings and assist in will preparation under an attorney’s supervision. By taking on these types of duties, commenters continued, paralegals both expand the availability of services to eligible clients and relieve the supervising attorney of having to undertake those duties alone, thereby increasing her availability to provide legal services.

LSC is adopting the recommendation to include paralegals in the rule. LSC considered establishing paralegals as a separate category of individuals recipients may engage in activities under this part. LSC researched accrediting standards and job descriptions for paralegals and determined that the term “paralegal” can cover a wide range of roles, from purely administrative support staff to provider of substantive legal services under the supervision of a licensed attorney. Additionally, LSC found that there is no uniformity across states with regard to the education, licensing, or credentialing that an individual must have to be called a “paralegal.” See, e.g., National Federation of Paralegal Associations, Paralegal Regulation by State (updated 2012), available at <http://www.paralegals.org/default.asp?page=30>. Therefore, paralegals are included within the term other professional.

Support and Other Activities

Recommendations 2(b) and 2(c) of the Task Force report formed the basis for the most significant proposed changes to part 1614. These recommendations focused, respectively, on intake and referral programs and on case-handling requirements under

the existing regulations. Both recommendations touched on common issues: whether PAI activities must include screening for LSC eligibility, whether recipients must track the outcomes of all cases in which services are provided through private attorneys, and whether recipients must accept individual cases handled by private attorneys as their own cases. LSC proposes to address the issues raised by these recommendations and the relevant comments by introducing provisions governing three areas: screening, clinics, and intake and referral systems. LSC will discuss the three areas separately in this preamble.

Screening

Recommendation 2(c) of the Task Force report discussed two requirements. The first was that recipients accept individuals assisted through the clinic as their own clients in order to allocate costs associated with supporting the clinic to the PAI requirement. This requirement, stated in OLA External Opinion EX-2008-1001, is addressed below in the discussion regarding clinics and intake and referral systems.

EX-2008-1001 raised a second issue: whether recipient participation in an unscreened clinic could potentially subsidize restricted activities, such as providing legal assistance to aliens not eligible for LSC-funded services. To put this issue into context, we briefly review restrictions imposed by statutes and LSC's regulations.

The LSC Act requires LSC recipients to provide LSC-funded services based on financial eligibility criteria and priorities that are determined pursuant to LSC guidelines. 42 U.S.C. 2996f(a)(2). Recipients of LSC funding are subject to two types of restrictions under the LSC Act and LSC's annual appropriations: restrictions on the use of LSC funds and some other funds ("fund restrictions") and restrictions on all activities, regardless of

the source of funds (“entity restrictions”). Thus, while LSC recipients can use, for example, Older Americans Act funds for services to people who are not financially eligible (a funds restriction), LSC recipients cannot use any funds, other than Tribal funds, for ineligible aliens (an entity restriction). The applicability of these restrictions to non-LSC funds is governed by 45 CFR part 1610.

The LSC funds restrictions appear primarily in the LSC Act. See, e.g., 42 U.S.C. 2996f(b) (prohibitions on the use of LSC funds for various activities including criminal proceedings, political activities, and desegregation proceedings). The LSC entity restrictions appear primarily in LSC’s annual appropriation. Since the early 1980s, Congress has imposed restrictions on LSC grantees through riders in LSC’s appropriation. In 1996, Congress added the current set of appropriation restrictions and expanded them to apply to all activities of LSC grantees. See, e.g., sec. 504, Pub. L. 104-134, 110 Stat. 1321, 1321-53—1321-57. Before an LSC recipient may provide legal assistance to an individual, the recipient must ensure that the individual meets the LSC eligibility criteria or may be assisted by the recipient using non-LSC funds, and that the assistance will not involve a restricted activity.

LSC has further defined when recipients must screen for eligibility. LSC’s Case Service Report (CSR) Handbook describes two types of services that recipients may provide: legal assistance and legal information. The CSR defines “legal assistance” as “the provision of limited service or extended service on behalf of a client or clients that meets the criteria of the CSR Closing Categories contained in Chapter VIII. Legal assistance is specific to the client’s unique circumstances and involves a legal analysis that is tailored to the client’s factual situation. Legal assistance involves applying legal

judgment in interpreting the particular facts and in applying relevant law to the facts presented.” Legal Services Corporation, Case Service Report Handbook, at 3 (2008 ed., as amended 2011). By contrast, the CSR Handbook defines “legal information” as “substantive information not tailored to address a person’s specific legal problem. As such, it is general and does not involve applying legal judgment and does not recommend a specific course of action.” Id. LSC does not require recipients to determine whether an individual is eligible for services if the recipient is providing the individual only with legal information as defined in the CSR Handbook. Other Services Report FAQ, Nov. 2011, at 8, <http://grants.lsc.gov/rin/about-rin/grantee-guidance/other-services-report>.

With these statutory, regulatory, and policy requirements in mind, LSC has examined the issue whether recipient participation in an unscreened clinic could potentially subsidize restricted activities. The Task Force report did not discuss the issue of subsidies. When discussing screening in the clinic context, commenters expressed minimal concern about the potential for assisting clients who are ineligible for LSC-funded services. Most commenters focused on expanding the availability of private attorneys to provide pro bono legal services and not on the scope of LSC’s legal obligations to ensure that LSC resources are not used to subsidize restricted activities. One commenter suggested that the test for the PAI rule should be whether the activity is targeted at the base of eligible clients, even if the recipient cannot know whether every person assisted would be eligible. Another spoke about screened advice clinics, recommending that recipients should be able to count resources toward the PAI requirement for the time recipients spend supervising such clinics. The LSC Office of Inspector General (OIG) expressed concern that a relaxed screening requirement for

clinics would have the “unintended effect of increasing subsidization of restricted activity.” OIG urged LSC to exercise caution to “ensure that changes to the PAI rule do not make it more difficult to prevent and detect noncompliance with LSC regulations and do not increase the risk that LSC funds will be used to subsidize, whether intentionally or not, restricted activity.”

LSC considered the commenters’ views on screening and the burden that screening may place on recipients’ support for clinics operated solely by them or through the joint efforts of community organizations. LSC considered those views in light of the statutory restrictions Congress places on the funds appropriated to LSC and on recipients of LSC funds. LSC has concluded that, regardless of whether legal assistance is provided directly by a recipient or through PAI activities, to avoid impermissible subsidization, individuals must be screened for LSC eligibility and legal assistance may be provided only to those individuals who may be served consistent with the LSC Act, the LSC appropriation statutes, and the applicable regulations. Clinics that provide only legal information do not require screening.

The population to be served through the PAI rule is clearly stated in the introductory section of the existing rule: “This part is designed to ensure that recipients of Legal Services Corporation funds involve private attorneys in the delivery of legal assistance to eligible clients.” 45 CFR 1614.1(a). In its report, particularly Recommendation 2, the Task Force took no position on expanding the scope of the rule to allow recipients to provide legal assistance to serve populations beyond eligible individuals through their PAI programs. Rather, the Task Force emphasized changes to part 1614 that would improve recipients’ ability to reach out to individuals who wanted to become engaged in

providing legal services. LSC believes that the overall set of proposed changes to the PAI regulation promotes the Task Force’s recommendations and commenters’ expressed desire for increased flexibility to engage individuals and to support clinics while carrying out the Corporation’s obligation to ensure that recipients of Corporation funds comply with applicable statutory restrictions.

PAI Clinics

“Clinics,” as the term applies in the field, covers a diverse array of service delivery methods. Clinics have various screening mechanisms, levels of service provided, and involvement of recipients and other organizations, such as courts, churches, and community organizations. For example, both a training provided by a recipient attorney on a particular topic of law to private attorneys who are volunteering for a pro bono project and a scheduled, time-limited, session open to the public at which individuals can receive brief advice or extended representation from a private attorney may be called “clinics.” The varying nature of clinics made it difficult to draft a rule that would give recipients the flexibility they desire, and that the Task Force recommended, to achieve the goals of the PAI rule while simultaneously meeting the Corporation’s responsibility to ensure accountability for the use of LSC funds and observance of the LSC funding restrictions.

In Recommendation 2(c), the Task Force noted that recipients “are under strict guidelines about what cases they can and cannot handle. . . . Yet, under the PAI regulations they cannot count placement of any cases that they are not themselves able to accept.” Report of the Pro Bono Task Force at 21. The Task Force encouraged LSC to “reexamine the rule 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.” Id. The Task Force stated that “the regulation poses challenges to effective pro bono collaborations,” and pointed to OLA External Opinion EX-2008-1001 as an example. Id. EX-2008-1001, inter alia, concluded that individuals receiving direct services from a private attorney, even in a clinic setting, must be screened and must be accepted as clients of the recipient in order for the recipient to count the case toward its PAI requirement.

Commenters generally supported Recommendation 2(c). Commenters criticized the position set forth in EX-2008-1001 as a hindrance to recipients’ ability to collaborate effectively and efficiently with other providers in carrying out activities that attract the participation of private attorneys. One commenter stated that when another organization is the main organizer or “owner” of a clinic, it will often not want to follow another entity’s rules in operating the clinic. Additionally, the commenter noted that other organizations and volunteers would not want to participate in a clinic that has to meet all of LSC’s CSR requirements because private attorneys do not want to follow any more rules than they have to.

After consideration of Recommendation 2(c), comments at the workshops and in response to the requests for information, and EX-2008-1001, LSC is reversing the requirement that individuals receiving direct services from a private attorney, even in a clinic setting, must be accepted as clients of the recipient in order for the recipient to count the case toward its PAI requirement. LSC considers the organizational and technical support described in EX-2008-1001 to be more akin to support activities described in § 1614.3(b) than to direct delivery activities under § 1614.3(a). LSC

proposes to no longer require recipients to apply the CSR case-handling requirements to legal assistance provided by private attorneys through clinics supported by the recipient in order to allocate the associated costs to the PAI requirement.

LSC proposes to establish a new category of activities specifically for clinics. This new regulatory provision will allow recipients to allocate costs associated with support to clinics to the PAI requirement. The new provisions of part 1614 will govern only those clinics in which a recipient plays a supporting role. Recipients will remain responsible for complying with the screening and CSR case-handling requirements for those clinics at which recipient attorneys provide legal assistance to individuals.

Intake and Referral Systems

Recommendation 2(b) of the Task Force report proposed revisions to part 1614 that would allow recipients “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.” Report of the Pro Bono Task Force at 21. In its recommendation, the Task Force noted that under the existing PAI rule, “LSC grantees cannot count money spent to support centralized screening and referral services as PAI, even where those referral services are needed to support pro bono programs.” Id. The Task Force identified two OLA opinions, AO-2009-1004 and AO-2011-001, as creating obstacles to recipients’ efforts to maximize their resources by participating in integrated pro bono referral systems.

Panelists and commenters overwhelmingly supported Recommendation 2(b). Many of them echoed the Task Force’s conclusion that intake and referral systems are an especially efficient and effective way to reach large numbers of individuals seeking legal

assistance. Integrated systems in which recipients have already screened the cases and identified the individual's legal needs make it easier for the private attorney taking the case to simply begin work on the case. Intake and referral systems also are an attractive vehicle for collaborating with other providers and private attorneys because they allow participating individuals to help a large number of clients with little time commitment. Like the Task Force, many commenters and panelists urged LSC to reverse AO-2009-1004 and AO-2011-001 in the interest of removing barriers to collaboration and the efficient delivery of legal assistance.

AO-2009-1004 and AO-2011-001 stand for different propositions. In AO-2009-1004, OLA considered whether a recipient could count toward its PAI requirement costs associated with a hotline staffed by another legal services provider that referred cases back to the four LSC funding recipients within the state. OLA determined that because the hotline operator was another legal services provider that was either handling cases itself or referring the cases to other legal services providers including the recipient, the costs associated with the recipient's support for the hotline could not be counted toward the PAI requirement. As stated above, 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. Accordingly, LSC continues to believe that the result in AO-2009-1004 is correct and will not rescind the opinion.

In AO-2011-001, the recipient participated in an intake and referral system for which the recipient screened clients for eligibility and referred eligible cases out to volunteer attorney programs for placement. OLA concluded that the activity was not direct delivery under § 1614.3(a) because the recipient did not accept the cases as its own prior to

referring them out and did not track the cases in any way after making the referrals. OLA also concluded, based on an LSC policy decision, that the activity did not count as a permissible support activity under § 1614.3(b). The policy decision turned on the fact that the recipient did not track the referrals in any way, so the recipient could not determine whether the referred individuals received services or what the outcomes of those services were. “Under such circumstances, without the recipient involvement and oversight required by ‘1614 compliant’ direct delivery systems, LSC cannot be assured that such systems ‘generate the most possible legal services for eligible clients from available, but limited, resources.’” AO-2011-001, p. 5.

LSC has determined that the policy position relied on by OLA in AO-2011-001 was more stringent than necessary. LSC no longer believes that it is necessary for recipients to accept the clients being referred as their own and to track the outcome of the services provided by the private attorney. LSC proposes instead to require that recipients participating in intake and referral systems only report the number of LSC-eligible individuals referred to lawyer placement programs and the number of such individuals who actually are placed with private attorneys. If adopted in the final rule, these proposals would serve to overturn AO-2011-001.

Flexibility in Choice of PAI Activities

During the workshops and in the written comments, LSC heard differing opinions regarding whether LSC should prescribe or limit with some precision how recipients should meet their PAI requirement. For example, LSC received comments about whether recipients should be required to dedicate a certain percentage of the PAI requirement to the direct delivery of legal assistance. As another example, some panelists and

commenters expressed concern that allowing supervision of law students to count toward the PAI requirement would cause recipients to direct resources away from expanding opportunities to involve licensed attorneys in the delivery of legal assistance. As a further example, some panelists and commenters voiced reservations that allowing recipients to allocate costs associated with brief service clinics to the PAI requirement would result in fewer resources being spent to get licensed attorneys to accept individual cases for extended representation. Finally, some commenters opposed the Task Force recommendation to expand the PAI rule to allow recipients to engage law students, law graduates, and non-lawyer professionals. Commenters opposing the recommendation generally focused on the rule's purpose of engaging attorneys in the delivery of legal assistance.

The current rule requires recipients to provide direct delivery of legal services as part of their PAI activities; however, it does not mandate that recipients commit a certain amount of their PAI requirement to providing direct delivery. Nor does it place caps on the types of support or other activities in which recipients may engage to meet the 12.5% requirement. LSC has decided to continue this approach to the PAI rule. This determination rests on two bases. First, consistent with the recommendations of the Pro Bono Task Force, the Corporation decided to expand the categories of individuals that recipients may engage in the delivery of legal information and legal assistance. A principal purpose of the PAI rule was to engage private attorneys in the delivery of legal services, and LSC believes this remains a significant goal. However, LSC also believes helping to meet the unmet legal needs of eligible clients was and remains a significant purpose of the rule. The delivery of legal services has changed since the rule's inception,

and continues to change, in ways that encourage openness and inclusiveness toward other providers as additional resources to help meet currently unmet legal needs. As the Task Force remarked, law students, law graduates, paralegals, and professionals in non-legal fields can make significant contributions to LSC recipients' delivery of legal information and legal assistance. LSC wants recipients to think creatively about the best means for leveraging community resources to improve the delivery of legal information and legal assistance to eligible clients.

Second, 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 it has the data or the experience to identify a single optimal structure for PAI services. As with their priorities, recipients must 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.

IV. Section-by-Section Discussion of the Proposed Changes

1614.1 Purpose.

LSC proposes to revise § 1614.1 to state more clearly the purpose of the PAI rule. Proposed § 1614.1 states the Corporation's expectation that PAI will be "an integral part" of a recipient's delivery of legal services. It also states that that the Corporation has designed part 1614 to ensure that recipients involve private attorneys in the delivery of legal information and legal assistance to eligible clients, and encourages recipients to engage law students, law graduates, or other professionals in those activities.

LSC proposes to move the requirement that recipients expend an amount equal to 12.5% of their annualized basic field grants on PAI activities from existing § 1614.1(a) to the statement of general policy in § 1614.2(a). Existing § 1614.1(b), regarding the use of Native American or migrant funds for PAI activities, is being relocated to proposed § 1614.2(b). The Corporation proposes to delete existing § 1614.1(c), revise and move § 1614.1(d) to § 1614.3, and move § 1614.1(e) to proposed § 1614.5.

1614.2 General policy.

LSC proposes to revise § 1614.2 to contain the policy statements that govern the PAI rule. Proposed § 1614.2(a) is adapted from existing § 1614.1(a) and states the requirement that recipients expend an amount equal to at least 12.5% of their annualized basic field grants on PAI activities. Similarly, LSC proposes to move existing § 1614.1(b), regarding the involvement of private attorneys in the delivery of legal services supported by Native American or migrant funding, to § 1614.2(b). LSC proposes to add “law students, law graduates, or other professionals” in both sections to reflect the expansion of the rule to include these individuals in recipients’ delivery of legal information and legal assistance to eligible clients.

1614.3 Definitions.

The Corporation proposes to relocate all parts of existing § 1614.3 to new sections of part 1614 and create a new definitions section in § 1614.3.

Proposed § 1614.3(a) defines the term attorney for purposes of part 1614 only. LSC’s regulations define the term attorney at § 1600.1 to mean an individual providing legal assistance to eligible clients who is authorized to practice law in the jurisdiction in which services are rendered. 45 CFR 1600.1. This definition does not make sense within the

context of part 1614, the purpose of which is to engage attorneys who are not providing services to eligible clients. LSC therefore proposes to except part 1614 from using the definition of attorney in § 1600.1 of these regulations.

Proposed § 1614.3(b) defines the term law graduate to mean an individual who has completed the educational or training requirements required for application to the bar in any U.S. state or territory. The definition is intended to capture two types of individuals: those who have recently graduated from law school, but who are not yet licensed attorneys; and those who have completed a practical legal apprenticeship program that provided them with the necessary qualifications to become licensed in any jurisdiction that admits apprentices to the bar. LSC proposes to limit the term law graduate to those individuals who have completed their education or training within the preceding two years. The reason for this limitation is to capture individuals who have completed legal training and intend to enter a legal career, but who have not yet been admitted to the bar. If an individual defined as a law graduate under this part has not been admitted to the bar within two years of completing his or her education or training, that individual could fall under the definition of other professional in proposed § 1614.3(f)

Proposed § 1614.3(c) defines the term law student to include two groups. The first is individuals who are or have been enrolled in a law school that can provide the student with a degree that is a qualification for application to the bar in any U.S. state or territory. The second is individuals who are or have been participating in an apprenticeship program that can provide the individual with sufficient qualifications to apply for the bar in any U.S. state or territory. LSC recognizes that the delivery of legal education is evolving and that there are differences among the states with respect to the prerequisites

for admission to the bar. Some states may allow only graduates of law schools accredited by the American Bar Association (ABA) or the American Association of Law Schools (AALS) to apply. Others allow graduates of such schools plus schools that are not accredited by either the ABA or AALS, but that are approved by the state bar or state legislature, to apply. Some states allow individuals who have completed legal apprenticeship programs to apply for admission to the bar; others do not. LSC proposes to define law student broadly enough to give recipients the flexibility to engage individuals who are pursuing some form of legal education in the provision of legal information or legal assistance to eligible individuals under this part.

LSC proposes to limit the term law student to those individuals who are currently enrolled, full-time or part-time, in law school or in an apprenticeship program, or who have been so enrolled within the past year. The term is intended to capture both current enrollees and those who take a brief sabbatical from their legal education. LSC also proposes to limit the term to those individuals who have not been expelled from law school or terminated from a legal apprenticeship program.

Proposed § 1614.3(d) defines the term legal assistance. This definition is substantially adapted from the LSC CSR Handbook, and is different from the term legal assistance defined in the LSC Act and in § 1600.1 of these regulations. LSC proposes to adopt the CSR Handbook definition in the PAI rule for consistency in the treatment of legal assistance and compliance with eligibility screening requirements by both recipients and private attorneys.

Proposed § 1614.3(e) defines the term legal information as the provision of substantive legal information that is not tailored to address an individual's specific legal

problem and that does not involve applying legal judgment or recommending a specific course of action. This definition is also adapted substantially from the CSR Handbook for the same reasons stated above with respect to the definition of legal assistance.

Proposed § 1614.3(f) defines the term other professional. Other professional means any individual who is not engaged in the practice of law, is not employed by the recipient, and is providing services to an LSC recipient in furtherance of the recipient's provision of legal information or legal assistance to eligible clients. LSC intends this definition to cover a wide spectrum of professionals whose services will help recipients increase the effectiveness and efficiency of their programs. Such professionals include paralegals, accountants, and attorneys who are not authorized to practice law in the recipient's jurisdiction (such as an attorney licensed in another jurisdiction or a retired attorney who is prohibited from practicing by the bar rules). These individuals may provide services within their areas of expertise to a recipient that would improve the recipient's delivery of legal services. For example, a volunteer paralegal representing a client of the recipient in a Supplemental Security Income case or a volunteer accountant providing a legal information program on the earned income tax credit would constitute other professionals assisting a recipient in its delivery of legal information or legal assistance to eligible clients.

Proposed § 1614.3(g) defines the term PAI clinic as "an activity under this part in which private attorneys, law students, law graduates, or other professionals are involved in providing legal information and/or legal assistance to the public at a specified time and location." PAI clinics may consist solely of a legal information session on a specific topic, such as bankruptcy or no-contest divorce proceedings, that are open to the public

and at which no individual legal assistance is provided. Or, a PAI clinic may be open to the public for walk-in intake and screening, and either the provision of individual legal assistance or a referral for services from another organization. Some clinics are hybrids of the two models, and some clinics are aimed at providing technical assistance to pro se litigants, such as help understanding the court procedures or filling out pleadings. The common thread among the activities considered to be clinics is that they are open to the public and distinct from a recipient's regular legal practice.

Proposed § 1614.3(h) defines the term private attorney. LSC proposes to remove the definition of private attorney in existing § 1614.1(d) and replace it with an entirely new definition. Proposed § 1614.3(h)(1) will define private attorney as an attorney who is licensed or otherwise authorized to practice law in the jurisdiction in which the recipient is located, or an attorney who is employed less than 1,000 hours per calendar year by an LSC recipient or subrecipient, but only as to activities conducted outside the scope of his or her employment by the recipient.

The proposed definition of private attorney improves upon the current definition in multiple ways. It removes the link to the term staff attorney. By eliminating the reference to staff attorney, the Corporation is also eliminating the obligation of recipients to determine how much of a private attorney's income is derived from PAI compensation in order to determine whether the recipient may allocate costs associated with services provided by the private attorney to the PAI requirement. The proposed definition explicitly contemplates that any attorney licensed or otherwise authorized, by court rules or legislation, to practice law in a jurisdiction may provide legal assistance to eligible clients or legal information through a recipient's PAI program. The definition does not

identify specifically government attorneys, corporate attorneys, law professors, retired attorneys, and others who may be licensed or otherwise authorized to practice law in a particular jurisdiction. However, LSC believes that the revised definition makes clear that these categories of attorneys are included within the definition.

The proposed definition also allows attorneys who are employed less than 1,000 hours per calendar year at a recipient to be considered private attorneys with respect to legal services provided to the recipient outside of their employment. This aspect of the definition is intended to capture the attorney who is employed half-time or less by a recipient. A recipient may allocate to its PAI requirement costs associated with this attorney's provision of legal assistance or legal information on his or her own time.

The proposed rule establishes two exceptions to the definition of private attorney. The first exception is for attorneys who are employed more than 1,000 hours per calendar year by a recipient. The second is for attorneys employed by non-LSC-funded legal services providers who are acting within the terms of their employment. In both situations, the excepted attorney is already engaged, as part of their regular employment, in the provision of legal services to low-income individuals.

Proposed § 1614.3(i) defines the term screen for eligibility. The proposed definition makes clear that clients who will be receiving legal assistance through PAI activities must receive the same level of screening that recipients use for their own legal assistance activities. Screening for eligibility includes screening for income and assets, eligible alien status, citizenship, whether the individual's case is within the recipient's priorities, and whether the client seeks assistance in an area or through a strategy that is restricted by the

LSC Act, the LSC appropriation acts, and applicable regulations. Screening for eligibility can also include determining whether a client can be served using non-LSC funds.

1614.4 Range of activities.

LSC proposes to move existing § 1614.3(a), (b), and (d) to § 1614.4, and to combine the provisions governing the direct delivery of legal services in one paragraph. LSC also proposes to expand upon the types of other activities, including support activities, that recipients may engage in under this part. LSC proposes to move existing § 1614.3(c) to proposed § 1646.6, which will govern the procedure recipients use to develop their PAI plans. Finally, LSC proposes to move existing § 1614.3(e), regarding accounting and recordkeeping standards for the PAI program, to a new § 1614.7 Compliance.

Proposed § 1614.4(a) will set forth the requirements applicable to direct delivery activities under this part. Proposed § 1614.4(a)(1) adopts existing § 1614.3(a), which states that recipients' PAI programs must include the direct delivery of legal services by private attorneys, in its entirety and without change. Under proposed § 1614.4(a)(2), recipients may count toward the PAI requirement representation of an eligible client by a non-attorney in an administrative proceeding where permitted by law. For example, a recipient may count toward its PAI requirement a law student or paralegal's representation of an eligible client in a Supplemental Security Income case, as long as the representation is permitted by law and undertaken consistent with the jurisdiction's rules of professional responsibility. Proposed § 1614.4(a)(3) adopts existing § 1614.3(d), which states the minimum requirements that a direct delivery system must meet. LSC proposes to combine the provisions relating to direct delivery systems in one paragraph for ease of reference.

LSC proposes to expand § 1614.4(b) to cover support and other activities. The proposed rule introduces activities that received considerable attention from the Task Force, panelists during the rulemaking workshops, and commenters responding to the Requests for Information.

Proposed § 1614.4(b)(1) adopts existing §1614.3(b)(1) with one change. LSC proposes to change the current language from “support provided by private attorneys to the recipient in its delivery of legal assistance. . . .” to “support provided by private attorneys to the recipient as part of its delivery of legal assistance” LSC proposes this change to make clear that the support covered by the rule is support that inures primarily to the benefit of the recipient’s clients. For example, PAI support activities would not include a recipient obtaining pro bono legal counsel to defend the recipient in an employment discrimination action brought by one of its own employees.

Consistent with the expansion of the rule to allow recipients to involve paralegals and non-legal professionals in the provision of legal services under this part, LSC proposes to add a new § 1614.4(b)(2). Section 1614.4(b)(2) will authorize recipients to allocate to the PAI requirement costs associated with support provided by other professionals in their areas of professional expertise to the recipient as part of the recipient’s delivery of legal information or legal assistance to eligible clients. Support services would include, but not be limited to, intake support, research, training, technical assistance, or direct assistance to an eligible client of the recipient.

To qualify as support services under § 1614.4(b)(2), the services must inure to the benefit of the recipient’s clients. For example, an accountant who is reviewing financial records of a recipient client who has filed for bankruptcy is providing support to the

recipient as part of the recipient's delivery of legal assistance to an eligible client. Similarly, an accountant who is providing information at an earned income tax credit clinic organized by the recipient is providing support to the recipient as part of the recipient's delivery of legal information. An accountant who is reviewing the recipient's financial statements to ensure that they accurately reflect the recipient's financial activities is not providing support as part of the recipient's delivery of legal assistance because the support is provided to the recipient for its benefit as an organization, rather than for the benefit of its clients.

As a result of the introduction of proposed § 1614.4(b)(2), existing § 1614.3(b)(2), describing support provided by the recipient to private attorneys engaged in the delivery of legal services, will be incorporated and redesignated as § 1614.4(b)(3). The lists of activities in § 1614.4(b)(1), (2), and (3) are intended to be illustrative rather than exhaustive.

Proposed § 1614.4(b)(4) establishes the rules governing recipient support for PAI clinics. LSC does not intend this section to place any restrictions on recipients' use of funds to support PAI clinics beyond the restrictions contained in the LSC Act and the LSC appropriations acts.

Proposed § 1614.4(b)(4)(i) applies to clinics involving private attorneys, law students, law graduates, or other professionals that provide only general legal information. Individuals receiving general legal information through a PAI clinic do not need to be screened for eligibility for the reasons stated in the preceding discussion of the definition of legal information.

Proposed § 1614.4(b)(4)(ii) applies to PAI clinics providing individualized legal assistance. In order for a recipient to participate in or support a legal assistance clinic, the clinic must screen for eligibility and provide legal assistance only to those individuals who may be served consistent with the LSC Act and relevant statutory and regulatory restrictions. In other words, the clinic may only provide legal assistance to individuals who either meet the requirements to receive legal assistance from an LSC recipient using LSC funds (e.g., income and assets, citizenship or eligible alien status, case within the recipient's priorities, and assistance that is not otherwise restricted), or who are eligible to receive services from the recipient that may be supported by non-LSC funds. An example of the latter category is an individual who exceeds the income and asset tests for LSC eligibility, but is otherwise eligible for assistance. The rule makes clear that recipients may not allocate costs associated with the latter category of cases to their PAI requirements because the clients served are not eligible for LSC-funded legal assistance.

Some PAI clinics are hybrid clinics at which legal information is provided, either as a group presentation or on an individual basis, and individual legal assistance is also provided. These clinics are addressed under the provisions governing legal assistance clinics in proposed § 1614.4(b)(4)(ii)(C). Recipients may support hybrid clinics and allocate costs associated with their support to the PAI requirements, but only if the clinic screens for LSC eligibility prior to providing legal assistance and only provides assistance to individuals who may be served by an LSC recipient.

Consistent with Recommendation 2(c) of the Task Force report, recipients are no longer required to treat legal assistance provided through PAI clinics as direct delivery activities under proposed § 1614.4(a) and accept the individuals assisted as their own

clients. Recipients may, however, choose to treat legal assistance provided by private attorneys through PAI clinics as direct delivery activities.

Proposed § 1614.4(b)(5) establishes the rules governing intake and referral systems. This addition to the rule adopts Recommendation 2(b) by allowing recipients to allocate costs associated with intake and referral to private attorneys to their PAI requirement. Section 1614.4(b)(5) reflects the Corporation's decision to relieve recipients of the obligation to accept referred clients as part of their caseload and to determine the ultimate resolution of the clients' cases by considering intake and referral activities other activities. Cases screened and referred through these systems do not need to be accepted by the recipient as CSR cases and tracked in order for recipients to allocate costs associated with the system to the PAI requirement.

The rule establishes two requirements for allocating costs. First, recipients must screen applicants for services for LSC eligibility. Second, recipients must track the number of eligible persons referred to a program that places applicants for services with private attorneys and the number of eligible persons who were placed with a private attorney through the program receiving the referral. LSC believes these requirements are necessary to ensure that LSC funds are not being spent for restricted purposes and to ensure that programs using intake and referral systems to place eligible clients with private attorneys are satisfying this goal.

Proposed § 1614.4(b)(6) establishes the rules for allocating costs associated with the work provided by law students to the PAI requirement. The screening and other requirements of the rule apply to work provided by law students under this part.

Proposed § 1614.4(c) adopts existing § 1614.3(c) in its entirety. LSC proposes to revise the phrase “involve private attorneys in the provision of legal assistance to eligible clients” to include law students, law graduates, or other professionals. LSC proposes this change to reflect the rule’s inclusion of the other categories of individuals that recipients may engage in PAI activities.

Proposed § 1614.4(d) makes clear that the rule is not intended to permit any activities that would conflict with the rules governing the unauthorized practice of law in the jurisdiction in which a recipient is located.

1614.5 Compensation of recipient staff and private attorneys; blackout period.

LSC proposes to introduce a new § 1614.5 establishing rules for the treatment of compensation paid to private attorneys, law students, law graduates, or other professionals under the PAI rules. Proposed 1614.5(a) states that recipients may allocate to the PAI requirement costs for the compensation of staff for facilitating the involvement of private attorneys, law students, law graduates, or other professionals in the provision of legal information and legal assistance to eligible clients under this part. This section is intended to make clear that recipients may not allocate costs associated with compensation, such as salaries or stipends, paid to individuals employed by the recipient who are providing legal information or legal assistance to eligible clients as part of their employment. In other words, a recipient may allocate costs to the PAI requirement for compensation paid to a recipient attorney responsible for supervising law students or law graduates paid a stipend by the recipient, but may not allocate the costs of the stipends paid to the law students or law graduates. LSC believes this limitation is necessary to allow recipients to allocate costs associated with supervising law students and law

graduates to the PAI requirement, as recommended by the Task Force, without diluting the PAI requirement by allowing recipients to also allocate the costs associated with compensating those individuals.

Proposed § 1614.5(b) establishes limits on the amount of compensation paid to a private attorney, law student, law graduate, or other professional that a recipient may allocate to its PAI requirement. LSC proposes to limit the amount of compensation to the amount paid for up to 800 hours of service during a calendar year. The reason for this limitation is that compensation at a higher level is inconsistent with the goal of the PAI rule to engage private attorneys in the work of its recipients. It does not seem consistent with that goal for a recipient to count toward its PAI requirement compensation paid to individuals who are functionally recipient staff.

Proposed § 1614.5(c) adopts a revised version of existing § 1614.1(e), which prohibits recipients from allocating to the PAI requirement PAI fees paid to a former staff attorney for two years after the attorney's employment has ended, except for judicare or similar fees. LSC proposes to remove as obsolete the references to the effective date of the regulation and contracts made prior to fiscal year 1986. LSC also proposes to change the time period of the rule's coverage from attorneys employed as staff attorneys for any portion of the previous two years to any individual employed by the recipient for any portion of the current year and the previous year for more than 1,000 hours per calendar year, except for individuals employed as law students. The latter change is proposed to account for the expansion of the rule to allow recipients to engage individuals other than private attorneys in activities under this part. In recognition of the fact that law students

are primarily engaged in educational endeavors, even while working at a recipient, LSC proposes to exclude law students from the scope of this provision.

Additionally, LSC proposes to set the threshold for the blackout period at 1,000 hours or more worked for the recipient within a calendar year. This proposal represents a change from existing § 1614.1(e), which requires the two-year blackout period for staff attorneys. As discussed previously, whether an individual is a staff attorney within the meaning of the LSC Act and these regulations turns on whether the individual received more than one-half of the individual's income from a recipient.

The proposed rule eases the administrative burden on a recipient by allowing the recipient to consider how many hours of legal information or legal assistance to eligible clients an individual provides to the recipient, rather than inquiring into the individual's finances. Furthermore, the proposed rule allows recipients to allocate costs associated with the participation in incubator programs of private attorneys and law graduates who are not employed by the recipient. Finally, the rule allows recipients to count compensation paid to attorneys participating in incubator projects toward the PAI requirement, but only for those attorneys who are not within the blackout period for payments to individuals previously employed by the recipient.

1614.6 Procedure.

LSC proposes to move the text of existing § 1614.4, regarding the procedure recipients must use to establish their PAI plans, to § 1614.6. LSC proposes to include law students, law graduates, or other professionals as individuals that recipients may consider engaging in activities under this part during the development of their PAI plans. However, LSC is not revising proposed § 1614.6(b) to require recipients to consult with

local associations for other professionals. LSC believes that recipients are in the best position to know which other professionals they may attempt to engage in their PAI programs, and encourages recipients to determine which professional associations they may want to consult in developing their PAI plans.

LSC also proposes to relocate existing § 1614.2(b), regarding joint PAI efforts by recipients with adjacent, coterminous, or overlapping service areas, to § 1614.6(c) without substantive changes. The Corporation believes that existing § 1614.2(b) is more appropriately located in the section governing the procedure that recipients must follow to establish their PAI plans and that this proposed change will improve the structure and logic of the rule.

1614.7 Compliance.

As stated above, LSC proposes to move existing paragraph 1614.3(e) regarding compliance in its entirety to a separate section. LSC believes that separating the accounting and recordkeeping requirements for the PAI program from the section prescribing the types of activities that recipients may engage in will improve the comprehensibility of the rule. LSC also proposes to divide existing § 1614.3(e)(3) into two sections. Proposed § 1614.7(c) will contain the statement that in private attorney models, attorneys may be reimbursed for actual costs and expenses. Proposed § 1614.7(d) will state that fees paid for services under this part may not exceed 50% of the current market rate of the local prevailing market for the type of service provided. The proposed split of § 1614.3(e)(3) ensures that the 50% cap applies to fees paid to law students, law graduates, or other professionals, as well as to private attorneys.

1614.8 Prohibition of revolving litigation funds.

LSC proposes to move existing § 1614.5, prohibiting the use of revolving litigation funds to meet the PAI requirement, to new § 1614.8. The only proposed substantive change to this section is the inclusion of law students, law graduates, or other professionals.

1614.9 Waivers.

LSC proposes to move existing § 1614.6, governing the procedures by which recipients may seek full or partial waivers of the PAI requirement, to new § 1614.9 without substantive change. LSC proposes to make technical amendments by replacing the references to the Office of Field Services (OFS) and the Audit Division of OFS, which no longer exist, with references to LSC. The Corporation is making this change for ease of administration by obviating the need to revise the rule in the event an internal restructuring, which is purely an operational event that does not affect substantive rights of recipients, causes the responsibility for making waiver decisions to transfer from one component to another.

1614.10 Failure to comply

LSC proposes to move existing § 1614.7, establishing sanctions for a recipient's failure to comply with the PAI requirement or seek a waiver of the requirement, to new § 1614.10. LSC proposes to relocate existing § 1614.7(c), regarding funds withheld due to a failure to meet the PAI requirement or seek a waiver, to new § 1614.10(c) with one substantive change. Existing § 1614.7(c) requires LSC to conduct a competitive grant process for PAI services in the recipient's service area. LSC is concerned that the current recipient might be the only applicant for those funds, which would reduce the deterrent effect of withholding the funds and defeat the purpose of holding a competition for

additional funds for PAI activities. LSC proposes to revise this provision to allow LSC to reallocate those funds for any basic field purpose. This revision would be consistent with the provisions of 45 CFR 1606.13 regarding funds recovered in terminations, as well as LSC's practice for funds recovered through disallowed costs procedures pursuant to 45 CFR part 1630. Finally, LSC proposes to revise § 1614.10(d) to be consistent with the changes to the enforcement rules, 78 FR 10085, Feb. 13, 2013.

List of Subjects in 45 CFR Part 1614

Legal services, Private attorneys, Grant programs – law

For the reasons stated in the preamble, and under the authority of 42 U.S.C. 2996g(e), the Legal Services Corporation proposes to revise 45 CFR Part 1614 to read as follows:

PART 1614 – PRIVATE ATTORNEY INVOLVEMENT

Sec.

1614.1 Purpose.

1614.2 General policy.

1614.3 Definitions.

1614.4 Range of activities.

1614.5 Compensation of recipient staff and private attorneys; blackout period.

1614.6 Procedure.

1614.7 Compliance.

1614.8 Prohibition of revolving litigation funds.

1614.9 Waivers.

1614.10 Failure to comply.

Authority: 42 U.S.C. 2996g(e)

§ 1614.1 Purpose.

Private attorney involvement shall be an integral part of a total local program undertaken within the established priorities of that program in a manner that furthers the statutory requirement of high quality, economical, and effective client-centered legal assistance to

eligible clients. This part is designed to ensure that recipients of Legal Services Corporation funds involve private attorneys, and encourages recipients to involve law students, law graduates, or other professionals, in the delivery of legal information and legal assistance to eligible clients.

§ 1614.2 General policy.

(a) Except as provided hereafter, a recipient of Legal Services Corporation funding shall devote an amount equal to at least twelve and one-half percent (12.5%) of the recipient's LSC annualized basic field award to the involvement of private attorneys, law students, law graduates, or other professionals in the delivery of legal services to eligible clients; this requirement is hereinafter referred to as the "PAI requirement." Funds received from the Corporation as one-time special grants shall not be considered in calculating a recipient's PAI requirement.

(b) Funds received from LSC as Native American or migrant grants are not subject to the PAI requirement. However, recipients of Native American or migrant funding shall provide opportunity for involvement in the delivery of services by private attorneys, law students, law graduates, or other professionals in a manner that is generally open to broad participation in those activities undertaken with those funds, or shall demonstrate to the satisfaction of the Corporation that such involvement is not feasible.

§ 1614.3 Definitions.

Attorney, for purposes of this part, does not have the meaning stated in 45 CFR 1600.1.

Law graduate means an individual who, within the last two years, has completed the education and/or training requirements necessary for application to the bar in any U.S. state or territory.

Law student means an individual who is, or has been, enrolled, full-time or part-time, within the past year, and not expelled from:

- (1) A law school that can provide the student with a degree that is a qualification for application to the bar in any U.S. state or territory; or
- (2) An apprenticeship program that can provide the student with sufficient qualifications for application to the bar in any U.S. state or territory.

Legal assistance means service on behalf of a client or clients that is specific to the client's or clients' unique circumstances, involves a legal analysis that is tailored to the client's or clients' factual situation, and involves applying legal judgment in interpreting the particular facts and in applying relevant law to the facts presented.

Legal information means substantive legal information not tailored to address a person's specific problem and that does not involve applying legal judgment or recommending a specific course of action.

Other professional means an individual, not engaged in the practice of law and not employed by the recipient, providing services to a recipient in furtherance of the recipient's provision of legal information or legal assistance to eligible clients. For example, a paralegal representing a client in a Supplemental Security Income (SSI) case, an accountant providing tax advice to an eligible client, or an attorney not authorized to practice law in the jurisdiction in which the recipient is located would fit within the definition of other professional. An individual granted a limited license to provide legal services by a body authorized by court rule or state law to grant such licenses in the jurisdiction in which the recipient is located would also meet the definition of other professional.

PAI Clinic means an activity under this part in which private attorneys, law students, law graduates, or other professionals are involved in providing legal information and/or legal assistance to the public at a specified time and location.

Private attorney means:

- (1)(i) An attorney licensed or otherwise authorized to practice law in the jurisdiction in which the recipient is located; or
- (ii) An attorney employed less than 1,000 hours per calendar year by an LSC recipient or subrecipient, but only as to activities conducted outside the scope of his or her employment by the recipient.

(2) Private attorney does not include:

- (i) An attorney employed 1,000 hours or more per calendar year by an LSC recipient or subrecipient; or
- (ii) 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.

Screen for eligibility means to screen individuals for eligibility using the same criteria recipients use to determine an individual's eligibility for cases accepted by the recipient and whether LSC funds or non-LSC funds can be used to provide legal assistance (e.g., income and assets, citizenship, eligible alien status, within priorities, applicability of LSC restrictions).

§ 1614.4 Range of activities.

(a) Direct delivery of legal assistance to recipient clients. (1) Activities undertaken by the recipient to meet the requirements of this part must include the direct delivery of legal assistance to eligible clients by private attorneys through programs such as organized pro

bono plans, reduced fee plans, judicare panels, private attorney contracts, or those modified pro bono plans which provide for the payment of nominal fees by eligible clients and/or organized referral systems; except that payment of attorney's fees through "revolving litigation fund" systems, as described in § 1614.8 of this part, shall neither be used nor funded under this part nor funded with any LSC support.

(2) In addition to the activities described in paragraph (a)(1) of this section, direct delivery of legal assistance to eligible clients may include representation by a non-attorney in an administrative tribunal that permits non-attorneys to represent individuals before the tribunal.

(3) Systems designed to provide direct services to eligible clients of the recipient by private attorneys on either a pro bono or reduced fee basis, shall include at a minimum, the following components:

- (i) Intake and case acceptance procedures consistent with the recipient's established priorities in meeting the legal needs of eligible clients;
- (ii) Case assignments which ensure the referral of cases according to the nature of the legal problems involved and the skills, expertise, and substantive experience of the participating attorney;
- (iii) 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 recipient resources; and
- (iv) Access by private attorneys to LSC recipient resources that provide back-up on substantive and procedural issues of the law.

(b) Support and other activities. Activities undertaken by recipients to meet the

requirements of this part may also include, but are not limited to:

(1) Support provided by private attorneys to the recipient as part of its delivery of legal assistance to eligible clients on either a reduced fee or pro bono basis such as the provision of community legal education, training, technical assistance, research, advice and counsel; co-counseling arrangements; or the use of private law firm facilities, libraries, computer-assisted legal research systems or other resources;

(2) Support provided by other professionals in their areas of professional expertise to the recipient as part of its delivery of legal information or legal assistance to eligible clients on either a reduced fee or pro bono basis such as the provision of intake support, research, training, technical assistance, or direct assistance to an eligible client of the recipient; and

(3) Support provided by the recipient in furtherance of activities undertaken pursuant to this section including the provision of training, technical assistance, research, advice and counsel, or the use of recipient facilities, libraries, computer assisted legal research systems or other resources.

(4) PAI Clinics—(i) Legal information provided in PAI clinics. A recipient may allocate to its PAI requirement costs associated with providing support to clinics, regardless of whether the clinic screens for eligibility, if the clinic provides only legal information.

(ii) Legal assistance provided in PAI clinics. If the clinic provides legal assistance to individual clients, a recipient may provide support for the clinic if the clinic screens for eligibility and provides legal assistance only to clients who may be served consistent with the LSC Act and relevant statutory and regulatory restrictions.

(A) A recipient may allocate to its PAI requirement costs associated with its support of such clinics for legal assistance provided to individuals who are eligible to receive LSC-funded legal services.

(B) Where a recipient supports a clinic that provides legal assistance to individuals who are eligible for permissible non-LSC-funded services, the recipient may not allocate to its PAI requirement costs associated with the legal assistance provided to such individuals. For example, a recipient may not allocate to its PAI requirement costs associated with legal assistance provided through a clinic to an individual who exceeds the income and asset tests for LSC eligibility, but is otherwise eligible.

(C) For clinics providing both legal information to the public and legal assistance to clients screened for eligibility, a recipient may allocate to its PAI requirement costs associated with its support of both parts of the clinic.

(5) Screening and referral systems. (i) A recipient may participate in a referral system in which the recipient conducts intake screening and refers LSC-eligible applicants to programs that assign applicants to private attorneys on a pro bono or reduced fee basis.

(ii) In order to allocate to its PAI requirement costs associated with participating in such referral systems, a recipient must be able to track the number of eligible persons referred by the recipient to each program and the number of eligible persons who were placed with a private attorney through the program receiving the referral.

(6) Law student activities. A recipient may allocate to its PAI requirement costs associated with law student work supporting the recipient's provision of legal information or delivery of legal assistance to eligible clients. Compensation paid by the

recipient to law students may not be allocated to the PAI requirement.

(c) Determination of PAI activities. The specific methods to be undertaken by a recipient to involve private attorneys, law students, law graduates, or other professionals in the provision of legal information and legal assistance to eligible clients will be determined by the recipient's taking into account the following factors:

- (1) The priorities established pursuant to part 1620 of this chapter;
- (2) The effective and economic delivery of legal assistance to eligible clients;
- (3) The linguistic and cultural barriers to effective advocacy;
- (4) The actual or potential conflicts of interest between specific participating attorneys and individual eligible clients or other professionals and individual eligible clients; and
- (5) The substantive and practical expertise, skills, and willingness to undertake new or unique areas of the law of participating attorneys and other professionals.

(d) Unauthorized practice of law. This part is not intended to permit any activities that would conflict with the rules governing the unauthorized practice of law in the recipient's jurisdiction.

§ 1614.5 Compensation of recipient staff and private attorneys; blackout period.

(a) A recipient may allocate to its PAI requirement costs associated with compensation paid to its employees only for facilitating the involvement of private attorneys, law students, law graduates, or other professionals in activities under this part.

(b) A recipient may not allocate to its PAI requirement costs associated with compensation paid to a private attorney, law graduate, or other professional for services under this part for any hours an individual provides above 800 hours per calendar year.

(c) No PAI funds shall be committed for direct payment to any individual who for any

portion of the current year or the previous year has been employed more than 1,000 hours per calendar year by an LSC recipient or subrecipient, except for employment as a law student; provided, however:

(1) This paragraph (c) shall not be construed to restrict the use of PAI funds in a pro bono or judicare project on the same terms that are available to other attorneys;

(2) This paragraph (c) shall not apply to the use of PAI funds in an incubator project in which a person is employed for less than a year at an LSC recipient as part of a program to provide legal training to law graduates or newly admitted attorneys who intend to establish their own independent law practices; and

(3) This paragraph (c) shall not be construed to restrict the payment of PAI funds as a result of work performed by an attorney or other individual who practices in the same business with such former employee.

§ 1614.6 Procedure.

(a) The recipient shall develop a plan and budget to meet the requirements of this part which shall be incorporated as a part of the refunding application or initial grant application. The budget shall be modified as necessary to fulfill this part. That plan shall take into consideration:

(1) The legal needs of eligible clients in the geographical area served by the recipient and the relative importance of those needs consistent with the priorities established pursuant to section 1007(a)(2)(C) of the Legal Services Corporation Act (42 U.S.C.

2996f(a)(2)(C)) and 45 CFR part 1620 adopted pursuant thereto;

(2) The delivery mechanisms potentially available to provide the opportunity for private attorneys, law students, law graduates, or other professionals to meet the established

priority legal needs of eligible clients in an economical and effective manner; and

(3) The results of the consultation as required below.

(b) The recipient shall consult with significant segments of the client community, private attorneys, and bar associations, including minority and women's bar associations, in the recipient's service area in the development of its annual plan to provide for the involvement of private attorneys, law students, law graduates, or other professionals in the provision of legal information and legal assistance to eligible clients and shall document that each year its proposed annual plan has been presented to all local bar associations within the recipient's service area and shall summarize their response.

(c) In the case of recipients whose service areas are adjacent, coterminous, or overlapping, the recipients may enter into joint efforts to involve private attorneys, law students, law graduates, or other professionals in the delivery of legal information and legal assistance to eligible clients, subject to the prior approval of LSC. In order to be approved, the joint venture plan must meet the following conditions:

(1) The recipients involved in the joint venture must plan to expend at least twelve and one-half percent (12.5%) of the aggregate of their basic field awards on PAI. In the case of recipients with adjacent service areas, 12.5% of each recipient's grant shall be expended to PAI; provided, however, that such expenditure is subject to waiver under this section;

(2) Each recipient in the joint venture must be a bona fide participant in the activities undertaken by the joint venture; and

(3) The joint PAI venture must provide an opportunity for involving private attorneys, law students, law graduates, or other professionals throughout the entire joint service

area(s).

§ 1614.7 Compliance

The recipient shall demonstrate compliance with this part by utilizing financial systems and procedures and maintaining supporting documentation to identify and account separately for costs related to the PAI effort. Such systems and records shall meet the requirements of the Corporation's Audit Guide for Recipients and Auditors and the Accounting Guide for LSC Recipients and shall have the following characteristics:

(a) They shall accurately identify and account for:

(1) The recipient's administrative, overhead, staff, and support costs related to PAI activities. Non-personnel costs shall be allocated on the basis of reasonable operating data. All methods of allocating common costs shall be clearly documented. If any direct or indirect time of staff attorneys or paralegals is to be allocated as a cost to PAI, such costs must be documented by time sheets accounting for the time those employees have spent on PAI activities. The timekeeping requirement does not apply to such employees as receptionists, secretaries, intake personnel or bookkeepers; however, personnel cost allocations for non-attorney or non-paralegal staff should be based on other reasonable operating data which is clearly documented;

(2) Payments to private attorneys for support or direct client services rendered. The recipient shall maintain contracts on file which set forth payment systems, hourly rates, and maximum allowable fees. Bills and/or invoices from private attorneys shall be submitted before payments are made. Encumbrances shall not be included in calculating whether a recipient has met the requirement of this part;

(3) Contractual payments to individuals or organizations that undertake administrative,

support, and/or direct services to eligible clients on behalf of the recipient consistent with the provisions of this part. Contracts concerning transfer of LSC funds for PAI activities shall require that such funds be accounted for by the recipient in accordance with LSC guidelines, including the requirements of the Audit Guide for Recipients and Auditors and the Accounting Guide for LSC Recipients and 45 CFR part 1627;

(4) Other such actual costs as may be incurred by the recipient in this regard.

(b) Support and expenses relating to the PAI effort must be reported separately in the recipient's year-end audit. This shall be done by establishing a separate fund or providing a separate schedule in the financial statement to account for the entire PAI allocation.

Recipients are not required to establish separate bank accounts to segregate funds allocated to PAI. Auditors are required to perform sufficient audit tests to enable them to render an opinion on the recipient's compliance with the requirements of this part.

(c) In private attorney models, attorneys may be reimbursed for actual costs and expenses.

(d) Fees paid to individuals for providing services under this part may not exceed 50% of the local prevailing market rate for that type of service.

§ 1614.8 Prohibition of revolving litigation funds.

(a) A revolving litigation fund system is a system under which a recipient systematically encourages the acceptance of fee-generating cases as defined in § 1609.2 of this chapter by advancing funds to private attorneys, law students, law graduates, or other professionals to enable them to pay costs, expenses, or attorneys' fees for representing clients.

(b) No funds received from the Legal Services Corporation shall be used to establish or

maintain revolving litigation fund systems.

(c) The prohibition in paragraph (b) of this section does not prevent recipients from reimbursing or paying private attorneys, law students, law graduates, or other professionals for costs and expenses, provided:

(1) The private attorney, law student, law graduate, or other professional is representing an eligible client in a matter in which representation of the eligible client by the recipient would be allowed under the Act and under the Corporation's Regulations; and

(2) The private attorney, law student, law graduate, or other professional has expended such funds in accordance with a schedule previously approved by the recipient's governing body or, prior to initiating action in the matter, has requested the recipient to advance the funds.

(d) Nothing in this section shall prevent a recipient from recovering from a private attorney, law student, law graduate, or other professional the amount advanced for any costs, expenses, or fees from an award to the attorney for representing an eligible client.

§ 1614.9 Waivers.

(a) While it is the expectation and experience of the Corporation that most basic field programs can effectively expend their PAI requirement, there are some circumstances, temporary or permanent, under which the goal of economical and effective use of Corporation funds will be furthered by a partial, or in exceptional circumstances, a complete waiver of the PAI requirement.

(b) A complete waiver shall be granted by LSC when the recipient shows to the satisfaction of LSC that:

(1) Because of the unavailability of qualified private attorneys, law students, law

graduates, or other professionals an attempt to carry out a PAI program would be futile;
or

(2) All qualified private attorneys, law students, law graduates, or other professionals in the program's service area either refuse to participate or have conflicts generated by their practice which render their participation inappropriate.

(c) A partial waiver shall be granted by LSC when the recipient shows to the satisfaction of LSC that:

(1) The population of qualified private attorneys, law students, law graduates, or other professionals available to participate in the program is too small to use the full PAI allocation economically and effectively; or

(2) Despite the recipient's best efforts too few qualified private attorneys, law students, law graduates, or other professionals are willing to participate in the program to use the full PAI allocation economically and effectively; or

(3) Despite a recipient's best efforts—including, but not limited to, communicating its problems expending the required amount to LSC and requesting and availing itself of assistance and/or advice from LSC regarding the problem—expenditures already made during a program year are insufficient to meet the PAI requirement, and there is insufficient time to make economical and efficient expenditures during the remainder of a program year, but in this instance, unless the shortfall resulted from unforeseen and unusual circumstances, the recipient shall accompany the waiver request with a plan to avoid such a shortfall in the future; or

(4) The recipient uses a fee-for-service program whose current encumbrances and projected expenditures for the current fiscal year would meet the requirement, but its

actual current expenditures do not meet the requirement, and could not be increased to do so economically and effectively in the remainder of the program year, or could not be increased to do so in a fiscally responsible manner in view of outstanding encumbrances; or

(5) The recipient uses a fee-for-service program and its PAI expenditures in the prior year exceeded the twelve and one-half percent (12.5%) requirement but, because of variances in the timing of work performed by the private attorneys and the consequent billing for that work, its PAI expenditures for the current year fail to meet the twelve and one-half percent (12.5%) requirement; or

(6) If, in the reasonable judgment of the recipient's governing body, it would not be economical and efficient for the recipient to expend its full 12.5% of Corporation funds on PAI activities, provided that the recipient has handled and expects to continue to handle at least 12.5% of cases brought on behalf of eligible clients through its PAI program(s).

(d)(1) A waiver of special accounting and bookkeeping requirements of this part may be granted by the Audit Division with the concurrence of LSC, if the recipient shows to the satisfaction of the Audit Division of LSC that such waiver will advance the purpose of this part as expressed in §§ 1614.1 and 1614.2.

(2) As provided in 45 CFR 1627.3(c) with respect to subgrants, alternatives to Corporation audit requirements or to the accounting requirements of this Part may be approved for subgrants by LSC; such alternatives for PAI subgrants shall be approved liberally where necessary to foster increased PAI participation.

(e) Waivers of the PAI expenditure requirement may be full or partial, that is, the

Corporation may waive all or some of the required expenditure for a fiscal year.

(1) Applications for waivers of any requirement under this Part may be for the current, or next fiscal year. All such applications must be in writing. Applications for waivers for the current fiscal year must be received by the Corporation during the current fiscal year.

(2) At the expiration of a waiver a recipient may seek a similar or identical waiver.

(f) All waiver requests shall be addressed to LSC or the Audit Division as is appropriate under the preceding provisions of this Part. The Corporation shall make a written response to each such request postmarked not later than thirty (30) days after its receipt. If the request is denied, the Corporation will provide the recipient with an explanation and statement of the grounds for denial. If the waiver is to be denied because the information submitted is insufficient, the Corporation will inform the recipient as soon as possible, both orally and in writing, about what additional information is needed. Should the Corporation fail to so respond, the request shall be deemed to be granted.

§ 1614.10 Failure to comply.

(a) If a recipient fails to comply with the expenditure required by this part and if that recipient fails without good cause to seek a waiver during the term of the grant or contract, the Corporation shall withhold from the recipient's support payments an amount equal to the difference between the amount expended on PAI and twelve and one-half percent (12.5%) of the recipient's basic field award.

(b) If a recipient fails with good cause to seek a waiver, or applies for but does not receive a waiver, or receives a waiver of part of the PAI requirement and does not expend the amount required to be expended, the PAI expenditure requirement for the ensuing year shall be increased for that recipient by an amount equal to the difference between the

amount actually expended and the amount required to be expended.

(c) Any funds withheld by the Corporation pursuant to this section shall be made available by the Corporation for basic field purposes, which may include making those funds available for use in providing legal services in the recipient's service area through PAI programs. Disbursement of these funds for PAI activities in the recipient's service area shall be made through a competitive solicitation and awarded on the basis of efficiency, quality, creativity, and demonstrated commitment to PAI service delivery to low-income people.

(d) The withholding of funds under this section shall not be construed as any action under 45 CFR parts 1606, 1618, 1623, or 1630.

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