
LEGAL SERVICES CORPORATION

45 CFR Part 1614

Private Attorney Involvement

AGENCY: Legal Services Corporation.

ACTION: Final rule; request for comments.

SUMMARY: On January 4, 1985, the Legal Services Corporation republished Part 1614 of its regulations for comment. (50 FR 509). Based upon comments received and recommendations of the Board's Operations and Regulations Committee, the Board of Directors, on October 11, 1985, approved an amended version of Part 1614. Included in this amended version was a definition of the term "private attorney" that had not been included in prior publications in the Federal Register. The Board decided that Part 1614 as amended should be published as a final rule and go into effect at the expiration of the notice period required by the Act and the Appropriations Act. The Board also decided to request comments on the new definition in preparation for possible reconsideration.

The revision makes eight major changes in Part 1614. A new definition of the term "private attorney" has been added to the end of § 1614.1. Completely new provisions dealing with joint ventures, waiver, and failure to comply have been added to Part 1614. The audit provisions and the provisions on revolving litigation funds have been substantially rewritten. Section 1614.3 has been revised to require recipients to include the direct delivery of legal services by private attorneys in their PAI programs. Numerous technical changes have also been made which do not affect the substance of the regulation.

DATES: *Effective date:* December 28, 1985. Comments must be received on or before December 28, 1985.

ADDRESS: Comments may be submitted to the Office of the General Counsel, Legal Services Corporation, 400 Virginia Avenue SW., Washington, DC 20024-2751.

FOR FURTHER INFORMATION CONTACT: Thomas A. Bovard, Counsel to the Division of Policy Development, (202) 863-1842.

SUPPLEMENTARY INFORMATION: Part 1614 of the Corporation's regulations was adopted by the Corporation's Board of Directors on April 28, 1984 and published in final form in the Federal Register on May 21, 1984, 49 FR 21328. The Corporation's Board of Directors, at its December 20, 1984, meeting, decided to republish, for comment, certain regulations, including Part 1614. Part 1614 was republished in the Federal Register on January 4, 1985, 50 FR 509. Comments were received and reviewed, and changes were recommended in response to them. A revised draft was published in the Federal Register on June 18, 1985, 50 FR 25270, to inform interested parties of the progress the Corporation had made in revising the regulation. On August 2, 1985, the Corporation's Board of Directors, acting upon recommendations of its Operations and Regulations Committee, voted to continue requiring recipients to spend 12½% of their annualized basic field awards on PAI. It also voted to amend Part 1614 of the Regulations, and to publish the regulation, in revised form, for further comment. The revised regulation was published on August 26, 1985, 50 FR 34510. Fifty comments were received by the Corporation—35 within the 30-day period allowed and 15 thereafter. After considering these comments, the Board of Directors on October 11, 1985 approved an amended version of Part 1614. Included in this version was a definition of the term "private attorney," which had not been included in prior publications in the

Federal Register. The Board decided that Part 1614 as amended should be published as a final rule and go into effect at the expiration of the notice period required by the Act and the Appropriations Act. The Board also decided to request comments on the new definition in preparation for possible reconsideration.

Section 1614.1 Purpose.

The major issues before the Board with respect to Part 1614 were whether the 12½% standard should continue to be a requirement or should be considered simply a guideline and whether the standard should remain at 12½%. The Board received 83 comments on these issues and heard extensive public testimony on them. In addition it conducted an extensive study of the degree to which local programs have complied with the 12½% standard. At the May 23, 1985 meeting of the Operations and Regulations Committee, the Office of Field Services presented a preliminary, program-by-program study of the amount of money spent on PAI. To prepare this study, Corporation staff reviewed the 180 audit files of the programs whose fiscal years ended on December 31, 1984. These were the first programs that were required to report PAI expenditures separately on their audits. The Office of Field Services took a number of steps to doublecheck the preliminary figures presented at the May meeting. On May 17, before the meeting, the Corporation mailed a copy of the statistics to all LSC recipients and Regional Offices. On June 7, a draft copy of a revised and expanded PAI report, with a request for review and comment, was express mailed to all Regional Offices. Between June 1 and June 17, LSC staff in Washington, DC, contacted all nine regional offices and verified the statistics with them. The revised figures showed that 20.8% of the programs reviewed (37 out of 180) had fallen short of the 12½% level of compliance.

After considering the comments, the testimony at its meeting, and the statistics, the Board decided to continue employing the 12½% standard as a requirement. The Board believes that there have been very positive results from many of the PAI programs which have been implemented. PAI, when effectively used, expands the base of attorneys representing the poor, increases the range of choice for clients, and as demonstrated by the Delivery Systems Study, affords viable, cost effective service. In sparsely-populated areas, it is useful in extending outreach, and it is more cost effective than the occasional visits of a staff attorney. Widespread use of PAI promises to

make available to eligible clients a greater diversity in services and a higher degree of specialization than would be available through a necessarily limited number of staff attorneys.

The Board wishes to encourage the further investigation and development of creative, new approaches to the delivery of services, and it wishes to share positive results nationwide. It believes that retention of a concrete standard, the 12½% requirement, is the best way to ensure the continued success of PAI and to secure increased participation on the part of recipients that have fallen short of the standard. Requiring the use of only 12½% of funds for the development of creative forms of delivery still leaves 87½% of funds available for use in the traditional staff attorney model. Accordingly, the Board has decided to retain the 12½% expenditure requirement.

Except for the deletion of the old waiver provision and for technical changes that make the mandatory nature of the 12½% standard clear, there has been only one other change in § 1614.1: in response to a discussion at the August meeting of the Board of Directors, a new paragraph (d) defining the term "private attorney" has been added at the end of § 1614.1. The Board was informed that there were situations in which programs had laid off staff attorneys and then contracted to pay these attorneys for doing the same work they had done before as staff. Such a procedure clearly fails to meet the one of the major purposes of the Corporation's PAI requirement, which is expand the number of private attorneys involved in the delivery of legal assistance to poor people.

Paragraph 1614.1(d) provides that the term "private attorney" as used in Part 1614 is an attorney who is not a staff attorney as defined in 45 CFR 1600.1, and further provides that, where the expenditure of funds with respect to a private attorney would violate 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. Section 1600.1 defines a staff attorney as an attorney more than one half of whose annual professional income is derived from the proceeds of a grant from the Legal Services Corporation 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 Act.

The Board has chosen to invoke the Ethics in Government Act in this context because one of the purposes of the Act

is to keep people at federal agencies from transferring money to former colleagues of theirs who have retired into private practice. There is a reasonable fear that employees of a legal services program, when deciding what private attorneys to use, would naturally favor those with whom they had been most recently acquainted. The Board was informed that in several cases attorneys have left a recipient's staff and then been awarded contracts to do the same work they had been doing previously. There are at least two problems with arrangements of this type. First, one of the purposes of PAI is to bring people who have not been involved before into the delivery of legal services to the poor. Second, these sorts of arrangements create an appearance of impropriety. Accordingly, the Board decided that, although the Corporation is not a federal agency, the policies behind the Ethics in Government Act should apply in these cases since they involve the expenditure of taxpayer funds. The two year cooling off period of the Ethics in Government Act will be usefully employed in the context of PAI.

In referencing the Ethics in Government Act, the Corporation is adopting a provision with a detailed history behind it. Section 1614.1(d) provides that the Ethics in Government Act applies only for the limited purpose of determining whether funds given to a particular lawyer shall be counted toward a recipient's PAI requirement. The Board acknowledges that there are many circumstances in which the best thing to do is to give a client's case to someone who has been a staff attorney. Accordingly, § 1614.1(d) does not prohibit such a practice. It simply establishes that fees given a private attorney who has recently been a staff attorney cannot be credited toward the PAI requirement.

Section 1614.2 General policy.

The new paragraph (b) dealing with joint ventures added to § 1614.2 has been revised to include approval by the Office of Field Services in the main body of the paragraph rather than in subparagraph (1). The remaining subparagraphs have been renumbered as factors for OFS to consider. Paragraph (b) still makes clear that recipients whose case service areas are adjacent, coterminous, or overlapping may enter into joint venture agreements. Approval by OFS is subject to three conditions: The venture must meet certain expenditure requirements unless a waiver is obtained under § 1614.6; each participant must be a bona fide participant; and the venture must

provide opportunity for involving private attorneys throughout the entire joint service area. There was concern among the members of the Board that OFS should not be able to waive the requirements that such recipient participate in good faith and that a joint venture involve private attorneys throughout the joint service area. At the same time it was felt that there should be flexibility in cases in which one of the recipients in a joint venture fell short of the 12.5% requirement. The final language reflects both of these concerns.

The expenditure requirements of § 1614.2(b)(1) vary according to the nature of the joint venture. Where recipients whose case service areas are coterminous or overlapping enter into a joint venture, the recipients must plan to spend at least 12½% of the aggregate of their basic field award on PAI. Where a joint venture involves recipients whose service areas are adjacent but not coterminous or overlapping each recipient must spend 12½% of its basic field grant on PAI, although this requirement is subject to waiver under § 1614.6.

Section 1614.3 Range of activities.

The Board believes that the essence of PAI is the direct delivery of legal services to the poor by private attorneys and that all recipients ought to incorporate direct delivery into their PAI programs. Section 1614.3, accordingly, has been amended to make clear that the direct delivery of legal assistance is a mandatory part of PAI programs. The Board has declined to state what percentage of a PAI program ought to involve direct delivery. Local programs may make that determination. Under new paragraph (a) recipients must include the direct delivery of legal assistance by private attorneys in their PAI programs. Under new paragraph (b), at the option of recipients, PAI programs may also include support activities and other forms of indirect delivery of service. It should be noted, however, that it is not the Board's intent under § 1614.3 to permit recipients to meet their 12½% spending requirement by providing private attorneys with services from national and state support centers.

Comments on § 1614.3 showed little opposition to requiring local programs to provide direct delivery of legal services as part of the PAI programs. Some of those who wrote the Corporation saw, however, in this section a possible inference that, to satisfy the direct delivery requirement, recipients, rather than run PAI programs in-house, must fund or contract with outside entities through grants, subgrants, or contracts.

The Board wishes to make clear that this section does not require that direct delivery be done through outside entities. It is perfectly permissible for a program to administer an organized *pro bono* plan in-house, as long as outside lawyers actually do the substantive work.

The Corporation received numerous complaints about the burdensome paperwork requirements formerly contained in § 1614.3(d), the auditing provision. Upon study, the Board reached the conclusion that these paperwork and record-keeping requirements went beyond what was necessary. At the same time it recognized that any time the Corporation issues a regulation requiring an expenditure of funds for a certain purpose, it will be necessary to impose a certain number of accounting and bookkeeping requirements. The Board has entirely rewritten the auditing provision which now appears as § 1614.3(e) and has sought to impose only those record-keeping requirements needed to track the progress of recipients in implementing PAI.

Perhaps the most significant change in the auditing provision relates to documenting the time staff attorneys and other recipient employees spend on PAI. Old § 1614.3(d)(6) required that if a recipient allocated the time of staff attorneys or paralegals to PAI, it had to submit detailed timesheets accounting for *all* the time of those employees, not just the time spent on PAI activities. By contrast new § 1614.3(e)(1)(i) requires timesheets from attorneys and paralegals only for the time spent on PAI activities. It retains the provision excluding such employees as receptionists, secretaries, intake personnel or bookkeepers from the requirement of keeping time sheets, but with slightly different wording. The Board found the wording of the old provision to be ambiguous: it might mean either that a recipient could not allocate the time of these staff to PAI or that the recipient simply did not have to keep time records for these personnel. The amended language makes clear that the second meaning is the one intended, and that, although recipients do not have to keep time sheets for these personnel, they do not have to have some reasonable way of allocating their time between PAI and their regular staff duties.

The Board has also deleted from the auditing section the provision (formerly § 1614.3(d)(10)) requiring programs that use *Judicare* or another compensated bar mechanism to establish an encumbrance system. New

§ 1614.3(e)(1)(i), however, retains the requirement that encumbrances not be included in calculating whether a recipient has met its PAI requirement.

Some comments showed uncertainty as to whether the prior approval requirement of the subgrants regulation (45 CFR Part 1627) would continue to apply under § 1614.3(e)(1)(iii). The Board wishes to make clear that there is no intent to waive the prior approval requirement or any other of the provisions of section 1627.

Finally, the auditing provision now requires that in the year-end audit, recipients report PAI expenditures as a separate fund or on a separate schedule. (§ 1614.3(e)(2)). The approach of old § 1614.3(d)(3) which made establishing a separate fund or schedule optional raised considerable problems for the Corporation in collecting data on PAI. In their year-end audits, some programs explained their PAI activities and expenses in a footnote. Others programs, however, reported only a one-line item expense for PAI, making it impossible for the Corporation to determine how they had spent their PAI money. Still others gave no data about PAI in their audits at all, despite Corporation requirements. The Board has determined that, for the Corporation to track the progress of PAI, there must be more uniformity in the way programs report PAI. The new provision, accordingly, requires that programs highlight PAI expenditures in a separate column in their financial statements. It does not require that programs establish separate bank accounts or separate books to account for PAI expenditures. The words "a separate fund" are a technical phrase used by auditors and are intended to be synonymous with "a separate schedule", words that are perhaps clearer to non-auditors.

Section 1614.4 Procedure.

A new clause has been added to § 1614.4(b) requiring recipients to document that each year their proposed annual PAI plan has been presented to all local bar associations within their service area and to summarize the responses of these bar associations. A number of those who wrote the Corporation about this new provision apparently believed that it required recipients to submit a new plan each year with the refunding application. Section 1614.4(b), however, simply requires recipients to submit their PAI plans, whatever they may be, along with the their refunding applications; there is no intent to require programs to have a new plan each year, and programs may submit previously used plans. Some

comments suggested that it was cumbersome to submit plans to bar associations. The Board recognizes that, in cases where there may be many bar associations, there may be some logistical problems in submitting a program's plan to every bar association. In order to encourage widespread participation in and familiarity with PAI, however, it is the intent of the Board that the annual PAI plan be sent not only to the major bar associations with which a recipient works but also to all bar associations within its case service area. The requirements of this paragraph may be satisfied quite easily by affording proof that letters were sent to each of the relevant bar associations and by giving summaries of the answers in the refunding applications. Recipients need incur copying and postage expenses only once a year. This paragraph does not require them to meet with all bar associations concerned. It is not necessary for a recipient to send additional communications to bar associations if it alters its plan in the middle of a year. A recipient need not produce return receipts; carbon copies or photocopies of the letters sent will suffice.

Section 1614.5 Prohibition of revolving litigation funds.

Section 1614.5, prohibiting certain kinds of revolving litigation funds, has been entirely rewritten to make clear the Board's intent to prohibit the systematic encouragement of fee-generating cases. The Board agreed with the comments of those who found the previous version of § 1614.5 confusing. As a member of the comments pointed out, Part 1609 of the Corporation's regulations already prohibits anything that encourages fee-generating cases, including the types of revolving litigation funds that the Corporation finds objectionable. The Board decided, accordingly, to make specific reference to Part 1609 in order to make clear that the evil addressed by § 1614.5 is systematic violations of Part 1609.

New paragraph (a) of § 1614.5 defines a revolving litigation fund system as a system under which a recipient systematically encourages the acceptance of fee-generating cases as defined in § 1609.2 of the regulations by advancing funds to private attorneys to enable them to pay costs, expenses, or attorneys fees for representing clients. Paragraph (b) makes it clear that recipients may not use LSC funds to establish or maintain such systems. Paragraph (c) permits systems that advance costs and expenses as long as two conditions are met in each case: the private attorney involved is representing

an eligible client in a matter in which representation of the eligible client would be allowed under the LSC Act and LSC regulations; and the private attorney either spends funds in accordance with a schedule previously approved by the recipient's governing body or, prior to initiating action in the matter, requests the recipient to advance the funds. In response to comments, a new subparagraph (d) has been added to make clear that this section does not prohibit programs from recovering, from an award to a private attorney, any amounts advanced to the attorney for costs, expenses, or fees. The Board agreed that without this paragraph the language of § 1614.5 was too broad and could have been read as applying to judicare programs.

The Board intends that funds recovered by programs pursuant to § 1614.5 should go into the recipient's PAI account or into its general account. The new draft Audit and Accounting Guide provides that program income should go into the account that generated that income and should be subject to the same restrictions as any other money going into that account. Accordingly, the Board determined that it was not necessary to address the issue specifically in § 1614.5.

Section 1614.6 Waivers.

The Board determined that the old waiver provision contained in the last sentence of § 1614.1(a) was overly narrow. Replacing this provision, in accordance with the Board's concern for flexibility as well as accountability, is a completely new section on waiver, § 1614.6. It is the hope of the Board that this provision will address all the possible situations in which imposition of the 12½% requirement would cause hardship or would hinder the goal of the economical and effective use of Corporation funds.

Section 1614.6 provides for three kinds of waivers, a complete or full waiver of the expenditure requirement for a fiscal year, a partial waiver of the expenditure requirement, and a waiver of the special accounting and bookkeeping requirements. The two circumstances under which OFS will grant a complete or full waiver of the spending requirement are set forth in § 1614.6(b): where there simply are not enough qualified private attorneys to conduct a PAI program, or where all qualified private attorneys either refuse to take part in the program or have conflicts that render their participation inappropriate.

Section 1614.6(c) sets forth the six circumstances under which OFS will grant a partial waiver. First, OFS may

grant such a waiver where the pool of available and qualified private attorneys is simply too small to use all the PAI funds economically and effectively. Second, OFS may grant a partial waiver where, despite the recipient's best efforts, there simply are not enough qualified private attorneys willing to take part in the program. The third instance in which OFS may grant a partial waiver is where a recipient, despite its best efforts, finds itself unable to spend the full PAI allocation during a program year. In studying how recipients have complied with the PAI requirement, the Board was distressed to discover that, although a significant number of programs had not come near the 12½% standard, only about four programs had contacted or attempted to communicate with the Corporation about their problems with PAI. The Board believes that communicating with the Corporation about such problems is an affirmative duty that recipients incur when they accept a grant from the Corporation. Accordingly, in defining what constitutes a recipient's "best efforts" for the purposes of § 1614.3(c)(3), the Board included the requirement that the recipient communicate to OFS its problems spending its PAI allocation and that it request and avail itself of assistance or advice from OFS. Unless unusual circumstances caused the shortfall, a recipient is required under this subsection to accompany a waiver with a plan to avoid a shortfall in the future.

Programs sending out PAI cases to private attorneys at an even rate sometimes have little control over when the attorneys will perform work or when they will bill for their work. The third and fourth types of partial waivers address the problems that might arise because of the time a recipient is billed. Section 1614.6(c)(4) permits a waiver where, simply because attorneys have failed to bill a recipient during one fiscal year, the recipient's PAI expenditure for that year falls below 12½%. A clarifying amendment was made to this section by adding after the word "encumbrances", the first time it appears, the phrase "when added to projected expenditures". The word "encumbrances", which means commitments in the forms of orders, contracts and similar items that will become payable when goods are delivered or services rendered, is not to be understood to include encumbrances from a previous grant year.

The fifth kind of partial waiver, as detailed in § 1614.6(c)(5), will be granted where, simply because attorneys chose to bill a recipient during one fiscal year,

it is appropriate to permit PAI expenditures for the following fiscal year to fall below 12½%.

OFS may grant a sixth kind of partial waiver where a recipient can show that, in the reasonable judgment of its governing body, it would not be economical and efficient for it to expend its full 12½% allocation on PAI as long as the recipient has handled and expects to continue to handle at least 12½% of cases brought on behalf of eligible clients through PAI. For the sake of clarity, the two partial waivers contained in prior drafts of § 1614.6(c)(6) have now been condensed into one. The original language of this section granted waivers in cases where recipients received substantial contributions from the private bar and thus handled a substantial number of cases or where recipients used resources efficiently and thus handled a substantial number of cases. The addition of the 12½% caseload requirement to each of these provisions effectively condensed these provisions into one waiver and the new language reflects this reality. One technical amendment was made to this waiver as well. The word "its" before the word "cases" was stricken and the phrase "brought on behalf of eligible clients" was inserted after the word "cases." The reason for this change was that cases that are handled by private attorneys are not necessarily the recipient's cases, although they are cases brought on behalf of eligible clients.

The maximum amount of flexibility the Board was prepared to endorse was that contained in the sixth waiver, since other proposals did not contain a concrete standard and left too much discretion in the hands of OFS. Other partial waivers admittedly require OFS to exercise discretion. The first partial waiver requires OFS to determine whether the population of qualified lawyers is too small, and the second requires it to determine whether too few qualified lawyers are willing to participate. The words "too small" in the first waiver, however, mean "too small to get the work done" and the word "willing" in the second waiver meant "willing to do the work." With both of these waivers, OFS will use its fact finding discretion only to determine whether private resources were available to meet a concrete target, the 12½% standard.

Other proposals, by contrast, removed the 12½% target itself and left to OFS discretion what the target ought to be. The Board, accordingly, found none of the suggestions for new waivers persuasive. One proposal was that a

waiver should be granted where the local board establishes that PAI is not the most economical and efficient means of delivery. For many years, however, the local and national boards almost uniformly opposed PAI. It was because of this opposition that the Board and its predecessors had found it necessary to establish a national PAI effort. Another waiver proposal was that the regulation allow a program to average its PAI expenditures over a two or three year period. Such averaging, however, is already built into § 1614.7. Under that section, even if a program that applies for a waiver fails to receive one, the worst that happens is that it is required to make up its shortfall the next year, which is essentially a form of two-year averaging. A third waiver proposal was that the 12½% requirement should be waived if the local bar associations and the local program agree on a PAI program. The Board would have supported such an approach, as long as it really provided for substantial involvement of the private bar. The problem with most versions of the proposal, however, was that they failed to contain a concrete measure of what is substantial involvement. Accordingly, the Board believed it best to require that recipients using such alternative programs handle 12½% of cases brought on behalf of eligible clients through PAI. That standard provides a concrete measurement of what substantial involvement is.

It was suggested that there might be situations in which a program and a bar association had worked out an excellent PAI program but had failed both to meet the 12½% expenditure requirement and the 12½% caseload requirement. One example given was that a program might wish to contract for lawyers with special expertise to handle a few important cases and areas. The purpose of PAI, however, is to involve the greatest number of the bar in all kinds of cases, not specialized ones.

Section 1614.6(d) permits the Audit Division with the concurrence of OFS to grant waivers of the special accounting and bookkeeping requirements. Except with respect to subgrants, it is expected that such waivers will be rarely granted. As discussed above, the auditing requirements have been rewritten to require only the minimum record-keeping necessary for the Corporation to monitor PAI. In most instances, therefore, granting a waiver of these requirements would make it impossible for the Corporation to track a recipient's compliance with the PAI requirement.

Recipients, as set forth in § 1614.6(e)(1), may apply for a waiver

for the current or for the next fiscal year. All applications must be in writing. Applications for waivers for the current fiscal year must be received by the Corporation during the current fiscal year. At the expiration of a waiver, a recipient may seek a similar or identical waiver.

In drafting the new waiver provision, the Board has required that the Corporation respond in writing to requests for waivers within thirty days (§ 1614.6(f)). If the Corporation fails to meet this thirty day deadline, the recipient will automatically receive a waiver. The Board determined that it is necessary for the Corporation to rule speedily on waiver requests so that recipients denied waivers late in the year will still have time to comply with the spending requirement.

Section 1614.7 Failure to comply.

In addition to the new waiver provision, an enforcement provision has been added to Part 1614. This new provision, § 1614.7, details the penalties assessed against recipients who fail to meet the 12½% spending requirement and who fail to take advantage of the liberal waiver provision. Under paragraphs (a) and (c) of § 1614.7, if a recipient falls short of the 12½% spending requirement and also fails without good cause to seek a waiver, it loses the unspent money to qualified PAI programs in its service area. In any case where a recipient applies for a waiver, however, or, in cases where it fails with good cause to seek a waiver, the recipient does not lose its money; it must simply spend the required amount of money during its next fiscal year. To avoid losing its money under the penalty provision in § 1614.7(c), all a recipient need do is apply for a waiver. It does not actually have to receive a waiver. A new paragraph (d) was added to § 1614.7 and provides that the withholding of funds under this section shall not be construed as a termination of financial assistance under Part 1606 of the regulations or a denial of refunding under Part 1625 of the regulations.

Under § 1614.7(a), the Board intends for staff to answer only the concrete question of whether a program has good cause for failing to seek a waiver. Staff does not have the authority to determine whether programs had good cause for failing to meet the PAI requirement. If a program fails to seek a waiver, but has good reason for its failure, then paragraph (b) would apply.

A number of letters suggested that § 1614.7 places too much discretion in the hands of Corporation staff. The

Board, however, intends for this section to minimize staff discretion. The only determination left to staff under § 1614.7 is whether or not a recipient has failed, without good cause, to seek a waiver during the term of the grant. If a program asks for a waiver, but fails to receive one, it is automatically required to make up the short-fall the next year. The classic case of good cause for failure to seek a waiver is the case where a program has come close to spending 12½% on PAI but has failed to discover that it had missed the 12½% requirement until it received its yearly audit. The Board decided, however, not to address this situation specifically in the regulation. In the interest of flexibility, it decided to opt for the more general language of "good cause" because it did not want to exclude other good reasons for failing to seek waivers.

Some comments complained that, under the waiver and failure to comply provisions in §§ 1614.6 and 1614.7, programs that did not know how close they were to meeting the 12½% requirement would have to file waiver requests every year out of self defense. This Board like previous Boards believes that PAI is a good thing, that substantial PAI is even better, and that 12½% is a minimum requirement. If a program tries to hit the minimum target on the dot and does not leave itself much leeway, it might have to file for a precautionary waiver every year. If, however, it agrees with the Board that PAI is a good thing and that substantial PAI is an ever better thing, the program will come closer to 15% or 20% and will not have to worry about waivers. The ABA's Standing Committee on Legal Aid and Indigent Defendants expressed concern that subparagraph (c)(3), with its reference to contacting OFS, might discourage programs from contacting the ABA's PBI (Private Bar Involvement) project and from using its expertise. The regulation, however, requires consultation with OFS but does not prohibit consultation with other groups. Recipients should contact anyone who might be of use to them in developing effective PAI programs.

List of Subjects in 45 CFR Part 1614

Legal services, Private attorneys.

For the reasons set out above 45 CFR Part 1614 is revised to read as follows:

PART 1614—PRIVATE ATTORNEY INVOLVEMENT

Sec.

- 1614.1 Purpose.
- 1614.2 General policy.
- 1614.3 Range of activities.

Sec.

- 1614.4 Procedure.
- 1614.5 Prohibition of revolving litigation funds.
- 1614.6 Waivers.
- 1614.7 Failure to comply.

Authority: Sec. 1007(a)(2)(C) and sec. 1007(a)(3); 42 U.S.C. 2996f(a)(2)(C) and 42 U.S.C. 2996f(a)(3).

§ 1614.1 Purpose.

(a) 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. Except as provided hereafter, a recipient of Legal Services Corporation funding shall devote an amount equal to at least twelve and one-half percent (12½%) of the recipient's LSC annualized basic field award to the involvement of private attorneys in such delivery of legal services; this requirement is hereinafter sometimes referred to as the "PAI requirement". Funds received from the Corporation as one-time special grants shall not be considered in determining a recipient's PAI requirement.

(b) Recipients of Native American or migrant funding shall provide opportunity for involvement in the delivery of services by the private bar in a manner which 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.

(c) Because the Corporation's PAI requirement is based upon an effort to generate the most possible legal services for eligible clients from available, but limited, resources, recipients should attempt to assure that the market value of PAI activities substantially exceeds the direct and indirect costs being allocated to meet the requirements of this Part.

(d) 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.

§ 1614.2 General policy.

(a) This part implements the policy adopted by the Board of Directors of the Corporation which requires that a substantial amount of funds be made available to encourage the involvement of private attorneys in the delivery of

legal assistance to eligible clients through both *pro bono* and compensated mechanisms, and that such funds be expended in an economic and efficient manner.

(b) In the case of recipients whose service areas are adjacent, coterminous or overlapping, the recipients may enter into joint efforts to involve the private attorneys in the delivery of legal services to eligible clients, subject to the prior approval of the Office of Field Services. 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 (12½%) of the aggregate of their basic field awards on PAI. In the case of recipients with adjacent service areas, 12½% of each recipient's grant shall be expended to PAI; provided, however, that such expenditure is subject to waiver under § 1614.6;

(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 throughout the entire joint service area(s).

(c) 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. Decisions concerning implementation of the substantial involvement requirement rest with the recipient through its governing body, subject to review and evaluation by the Corporation.

§ 1614.3 Range of activities.

(a) Activities undertaken by the recipient to meet the requirements of this part must include the direct delivery of legal assistance to eligible clients 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 § 1614.5 of this part, shall neither be used nor funded under this part nor funded with any LSC support;

(b) 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 in its delivery of legal assistance to eligible clients on either a reduced fee or *pro bono* basis through 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; and

(2) 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.

(c) The specific methods to be undertaken by a recipient to involve private attorneys in the provision of legal assistance to eligible clients will be determined by the recipient's taking into account the following factors:

(1) The priorities established pursuant to Part 1620 of these regulations;

(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; and

(5) The substantive and practical expertise, skills, and willingness to undertake new or unique areas of the law of participating attorneys.

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

(1) Intake and case acceptance procedures consistent with the recipient's established priorities in meeting the legal needs of eligible clients;

(2) 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;

(3) 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

(4) Access by private attorneys to LSC recipient resources, including those of LSC national and state support centers, that provide back-up on substantive and procedural issues of the law.

(e) 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 and Accounting Guide for Recipients and Auditors and shall have the following characteristics:

(1) They shall accurately identify and account for:

(i) 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;

(ii) 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;

(iii) 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 and Accounting Guide for Recipients and Auditors and 45 CFR Part 1627;

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

(2) 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.

(3) In private attorney models, attorneys may be reimbursed for actual costs and expenses. Attorney's fees paid may not exceed 50% of the local prevailing market rate for that type of service.

(4) All records pertaining to a recipient's PAI requirements which do not contain client confidences or secrets as defined by applicable state law shall be made available for inspection and review by LSC auditors and monitors during regular business hours.

§ 1614.4 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 Part 1620 of the Regulations (45 CFR Part 1620) adopted pursuant thereto;

(2) The delivery mechanisms potentially available to provide the opportunity for private attorneys 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 in the provision of 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.

§ 1614.5 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 these regulations by advancing funds to private attorneys 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 for costs and expenses, provided:

(1) The private attorney 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 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 the amount advanced for any costs, expenses, or fees from an award to the attorney for representing an eligible client.

§ 1614.6 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 the Office of Field Services (OFS) when the recipient shows to the satisfaction of OFS that:

(1) Because of the unavailability of qualified private attorneys, an attempt to carry out a PAI program would be futile; or

(2) All qualified private attorneys 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 OFS when the recipient shows to the satisfaction of OFS that:

(1) The population of qualified private attorneys 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 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 OFS and requesting and availing itself of assistance and/or advice from OFS 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 (12½%) 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 (12½%) 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 12½% of Corporation funds on PAI activities, provided that the recipient has handled and expects to continue to handle at least 12½% 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 OFS, if the recipient shows to the satisfaction of the Audit Division of OFS 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 the Audit Division with the concurrence of OFS; 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 the Office of Field Services (OFS) 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.

§ 1614.7 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 (12½%) 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 use in providing legal services in the recipient's service area through PAI programs. Disbursement of these funds 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 a termination of financial assistance under Part 1606 of these regulations or a denial of refunding under Part 1625 of these regulations.

Dated: November 20, 1985.

John H. Bayly, Jr.,

General Counsel.

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