

LEGAL SERVICES CORPORATION**45 CFR Part 1614****Private Attorney Involvement****AGENCY:** Legal Services Corporation.**ACTION:** Advance notice of proposed rulemaking.

SUMMARY: On January 4, 1985, the Legal Services Corporation republished Part 1614 of its regulations for comment. (50 FR 509). Since that time, the Operations and Regulations Committee of the Corporation's Board of Directors, has begun the process of revising the regulation. At its May 23, 1985, meeting,

the Committee directed the Corporation staff to publish the current draft in the *Federal Register* to allow for wide distribution of before the next Committee meeting. This draft is published to inform interested parties of the progress that the Corporation has made in revising this regulation to date. The regulatory process is not complete. Comment is welcome; however this notice is not meant to replace formal publication of proposed amendments to the regulation. When the Board of Directors reaches a decision regarding proposed amendments, they will be published for formal comment. In this draft, language in the existing regulation that is recommended to be deleted is enclosed in brackets. New language recommended by the Corporation's staff is enclosed by arrows.

ADDRESS: Comments may be submitted to Office of General Counsel, Legal Services Corporation, 733 Fifteenth Street, NW., Room 601, Washington, D.C. 20005.

FOR FURTHER INFORMATION CONTACT: Richard N. Bagenstos, Acting General Counsel, (202) 272-4010.

SUPPLEMENTARY INFORMATION: Part 1614 of the Corporation's regulations, which concerns private attorney involvement, was adopted by the Corporation's Board of Directors on April 28, 1984. It was published in final form in the *Federal Register* on May 21, 1984, 49 FR 21328. Since September of 1984, the Corporation received comments concerning both substantive and procedural issues involving the adoption of this regulation. After deliberation, 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. Changes were recommended in response to the comments received. Since that time, the Board's Operations and Regulations Committee has been considering proposed amendments to the regulation. At the Committee's May 23, 1985, meeting, the Committee directed the Corporation staff to publish the recommendations which had been proposed. The purpose of this publication is to provide wide distribution of this proposal.

The entire regulation is being

published with brackets around sections that are recommended for deletion and arrows showing sections that are recommended for addition. The changes shown are not proposed amendments. They have not been adopted by either the Committee or the full Board. Currently, the staff of the Corporation is working to further refine the language in the recommended amendments. However, since, previously, the changes that have been recommended have, been distributed only with materials relating to Board and Committee meetings, they are now being published to ensure a wider distribution. When the Board adopts proposed amendments, the amendments shall be published for formal comment prior to finalization.

While this publication is informational in nature, comments are welcome and will be reviewed and considered. There is no deadline for comments, however, the regulation will be considered by the Committee at its June 27, 1985 meeting.

List of Subjects in 45 CFR Part 1614

Legal service.

For the reasons stated in the preamble, notice is given of recommendations of the staff of the Legal Services Corporation for amendments to 45 CFR Part 1614 as follows:

PART 1614—PRIVATE ATTORNEY INVOLVEMENT

Sec.

- 1614.1 Purpose.
- 1614.2 General policy.
- 1614.3 Range of activities.
- 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 [provide direction to] recipients of Legal Services Corporation funding [on allocating] ▶ allocate ◀ a substantial amount of the recipient's financial support from the Legal Services Corporation to encourage the involvement of private attorneys in the delivery of legal assistance to eligible

clients. At least twelve and one-half percent (12½%) of the recipient's LSC annualized basic field award shall be devoted to the involvement of private attorneys in such activities. Funds received from the Corporation as one-time special grants shall not be considered in determining the private [bar] ▶ attorney ◀ involvement ▶ (PAI) ◀ requirements. [The Corporation may in exceptional circumstances grant a waiver from the 12½% requirement upon application by a recipient and a demonstration to the satisfaction of the Office of Field Services that, because of the nature of the population served, and the available attorney population, the recipient is unable to comply with the requirement.] ▶ A recipient shall be deemed to have complied with this Part if it delivers at least twenty per cent (20%) of its cases through private attorneys, regardless of the level of expenditures for such purposes. ◀

(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.

§ 1614.2 General policy.

(a) This part implements the policy adopted by the Board of Directors of the Corporation on October 2, 1981, and ratified and modified by the Board on November 21, 1983, requiring 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 economical and efficient manner.

[(b) Effective January 1, 1985 recipients of national and state support grant awards shall apply the percentage requirement to that portion of their programs related to any direct advocacy activities on behalf of eligible clients.]

►(b) In the case of recipients whose service areas are 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 following conditions:

(1) The joint venture plan must be approved by the Office of Field Services.

(2) The joint venture must expend at least twelve and one-half percent (12½%) of the aggregate of the LSC Basic Field awards of the recipients involved in the joint venture.

(3) Each recipient in the joint venture must be a bona fide participant in the activities undertaken by the joint venture.

(4) The joint PAI venture must involve private attorneys throughout the entire joint service area(s).◄

(c) Private attorney involvement [(PAI)] 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 [might] ►must◄ include ►the◄ [, but are not limited to;]

[(1) D] ►d◄irect delivery of legal assistance to eligible clients through ►programs such as◄ organized *pro bono*-plans-, reduced fee plans, *judicare* panels, private attorney contracts, ►or◄ [and] 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 attorneys' 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◄

[(2)] ►(1)◄ Support provided by private attorney to the recipient in its delivery of legal assistance to eligible clients on either a reduced fee of *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,

[(3)] ►(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.

[(b)] ►(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 economical delivery of legal assistance to eligible clients;

(3) The linguistic and cultural barriers to effective advocacy;

(4) The actual or potential conflicts or 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.

[(c)] ►(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.◄

[(4)] Support and technical assistance procedures which are appropriate and, to the extent feasible, provide provision of access for participating attorneys to materials, training opportunities, and back-up on substantive law and practice considerations.

(d) The recipient shall utilize financial systems and procedures to account for costs allowable in meeting this Part. Such systems shall have the following characteristics:

(1) They shall meet the requirements of the Corporation's *Audit and Accounting Guide for Recipients and Auditors*;

(2) They shall accurately identify and account for:

(i) The recipient's administrative, overhead, staff, and support costs related to private attorney involvement activities;

(ii) Payments to private attorneys for support or direct client services rendered;

(iii) Contractual payments to individuals or organizations which will undertake administrative, support, and/or direct services to eligible clients on behalf of the recipient consistent with the provisions of this Part; and

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

(3) Income and expenses relating to the PAI effort must be reported separately in the year-end audit. This may be done by establishing a separate fund or by providing a separate supplemental schedule of income and expenses related to the PAI effort as part of the audit.

(4) Auditors will be required to perform sufficient audit tests to enable them to render an opinion on the recipient's compliance with the requirements of this Part.

(5) Programs must maintain internal records necessary to demonstrate that funds have been utilized for private attorney involvement consistent with this Part. Internal records should include:

(i) Contracts on file which set forth payment systems, hourly rates, maximum allowable fees, etc.;

(ii) Bills/invoices which are submitted before payments are made;

(iii) Job descriptions, program directives or provisions included in collective bargaining agreements which set forth specific program staff PAI requirements; and

(iv) Staff time records.

(6) If any direct or indirect time of staff attorneys or paralegals is to be allocated as a cost to private attorney involvement, such costs must be documented by detailed timesheets accounting for all of those employees' time, not just for the time spent on private attorney involvement activities. This time-keeping requirement does not apply to such employees as receptionists, secretaries, in-take persons or bookkeepers.

(7) Direct payments to private attorneys shall be supported by invoice and internal procedures performed by the program to ensure that the services billed have actually been delivered.

(8) Non-personnel costs shall be allocated on the basis of reasonable operating data. All methods of allocating funds shall be clearly documented.

(9) Contracts concerning transfer of LSC funds for PAI activities shall indicate that such funds will be accounted for by the recipient in accordance with LSC guidelines. The organization receiving funds will be considered a sub-recipient or sub-grantee and will be bound by all the accounting and audit requirements of the Audit Guide and 45 CFR Part 1627. These grants shall be accounted for on a cost-reimbursable basis so that the primary recipient will be responsible for unspent funds. This part does not pertain to contracts with individual lawyers or law firms who only provide legal services directly to eligible clients.

(10) Each recipient which utilizes a compensated private bar mechanism, whether judicare, contract, or some other form, shall develop a system which includes:

- (i) A schedule of uniform encumbrances for similar cases;
- (ii) A procedure to determine net encumbrances;
- (iii) A mechanism to relate specific encumbrances to specific cases; and
- (iv) A way to determine whether encumbrances assigned are an accurate estimate of actual costs incurred.

(11) Encumbrances shall not be included in the calculation of whether a program has met the requirements of this Part, nor should they be recorded as an expense for audit purposes. Only actual expenditures or those amounts shown as accounts payable or accrued liabilities according to generally

accepted accounting principles at the end of the fiscal period may be utilized to determine whether or not the program has met the requirements of this Part.

(12) In private attorney models, attorneys may be reimbursed for actual costs and expenses, but attorney fees may not be paid at a rate which exceeds 50 percent of the local prevailing market rate for that type of service.]

►(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 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 timesheets 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;

(ii) Payments to private attorneys for support or direct client services rendered. The recipient should maintain contracts on file which set forth payment systems, hourly rates, maximum allowable fees, and so forth. Bills and/or invoices from private attorneys should 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 Guide 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 to account for the entire PAI allocation. 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, but attorney fees may not be paid at a rate which exceeds 50% of the local prevailing market rate for that type of service.

(4) All records pertaining to a recipient's PAI requirements shall be made available for inspection and review by LSC auditors and monitors during regular business hours. ◀

§ 1614.4 Procedure.

(a) The recipient shall [incorporate the] ►develop a plan and budget [required by Instruction 83-6] 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)) 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.

§ 1614.5 Prohibition of revolving litigation funds.

(a) The Office of Field Services shall not endorse or approve revolving litigation fund systems which systematically encourage the acceptance of fee-generating cases by advancing funds to private attorneys for [costs, expenses and/or] attorney fees.

(b) This prohibition does not prevent reimbursement or payment of costs and

expenses incurred by private attorneys [in normal situations in which litigation may result in attorney fees, such as case assignments through a *judicare* or *pro bono* panel] ▶ where the private attorney is representing an eligible client in a matter in which representation by the recipient would be appropriate under the Act and Regulations. ◀

▶ § 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 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 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 encumbrances 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.

(5) 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:

(i) The recipient has received substantial contributions from the private bar and/or other sources, and, consequently, the recipient has handled and expects to continue to handle at least 12½% of its cases through its PAI program(s); or

(ii) The recipient has been unusually efficient in the use of its PAI resources, and, consequently, the recipient has handled and expects to continue to handle at least 12½% of its cases through its PAI program(s).

(d)(1) A waiver of the 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 and 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 OFS concurrence; 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) Waivers of any requirement under this Part may be for the current, or next 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). OFS shall make a written response to each such request postmarked not later than thirty (30) days after its receipt. Should OFS 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, the corporation shall withhold from the

recipient's support payments an amount to be calculated as follows:

(1) The difference between the amount expended on PAI and twelve and one-half percent (12½%) of the recipient's basic field award; or

(2) If the recipient has received a waiver of all or part of the PAI expenditure requirement, the difference between the amount expended and the amount required to be expended.

(b) Any funds withheld by the Corporation pursuant to this section shall be made available by the Corporation to be used by private attorneys in the recipient's service area to provide legal services to eligible clients in the recipient's service area. ◀

Dated: June 13, 1985.

Richard N. Bagenstos,
Acting General Counsel.

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