

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 August 2, 1985 voted to continue requiring recipients to spend 12½% of their annualized basic field awards on private attorney involvement (PAI). Although the Board has now resolved the issue of whether the 12½% standard is a requirement or a guideline, several major changes have been made in Part 1614 since the last publication of the proposed rule. Because of these changes the Board determined that Part 1614 should be published in revised form for further comment.

The revision makes six major changes in Part 1614. 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.

DATE: Comments must be received on or before September 25, 1985.

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. A revised draft of Part 1614 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, because of the amendments that had been made, to publish the regulation, in revised form, for further comment.

The major issues before the Board over the past half year 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 receive 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 went through the 180 audit files of the programs whose fiscal years ended on December 31, 1984, the first programs that were required to report PAI expenditures separately on their audits. The Office 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. Except for the deletion of the old waiver provision and for technical changes that make the mandatory nature of the 12½% standard clear, it has left § 1614.1 as it was.

Although the Board has resolved the issue of whether the 12½% standard is a requirement or a guideline, several major changes have been made in Part 1614 since the last publication of the proposed rule. It is with respect to these

LEGAL SERVICES CORPORATION

45 CFR Part 1614

Private Attorney Involvement

AGENCY: Legal Services Corporation.

ACTION: Proposal rule; revision.

SUMMARY: On January 4, 1985, the Legal Services Corporation republished Part

changes, detailed below, that the Board invites further comment.

A new paragraph (b) dealing with joint ventures has been added to § 1614.2. This provision makes clear that recipients whose case service areas are adjacent, coterminous, or overlapping may enter into joint venture agreements. For a joint venture to qualify, however, each of the conditions enumerated in paragraph (b) must be met: The Office of Field Services must approve the joint venture; the venture must meet certain expenditure requirements; each participant must be a bona fide participant; and the venture must provide opportunity for involving private attorneys throughout the entire joint service area. The expenditure requirements 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 spend at least 12½% of the aggregate of their basic field awards on private attorney involvement (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.

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.

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 time spent on PAI activities. It retains the provision excluding such employees as receptionists, secretaries, intake personnel or bookkeepers from the requirement of keeping timesheets, but with slightly different wording. The Operations and Regulations Committee 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 it 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 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.

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 consideration 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 expenses 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.

For the sake of clarity § 1614.5, prohibiting certain kinds of revolving litigation funds, has been entirely rewritten. New paragraph (a) defines a revolving litigation fund system. Under such systems recipients advance funds to private attorneys to enable them to pay costs, expenses or attorneys fees for representing clients. The private attorneys on their part agree to repay the money advanced from fees or monies awarded as a result of the case. Paragraph (b) makes it clear that recipients may not use LSC funds to establish or maintain systems that advance attorneys fees. 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.

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 the Office of Field Service (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 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%. Section

1614.6(c)(5) permits a waiver in the situation: 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%. Sixth, OFS may grant a 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 of PAI. This sixth type of partial waiver, however, may be granted only in two cases: Where a recipient has received substantial contributions from the private bar or other sources and, consequently, has handled and expects to continue handling at least 12½% of its cases through PAI programs; or where the recipient has been unusually efficient and has handled and expects to continue handling at least 12½% of its cases through its PAI programs.

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 within thirty days the Corporation respond in writing to requests for waivers (§ 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.

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 nor does it need good cause for requesting one.

List of Subjects in 45 CFR Part 1614

Legal Services, Private attorneys.

For the reasons set out above 45 CFR Part 1614 is proposed to be revised to read 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. 2996(a)(2)(C) and 42 U.S.C. 2996(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. Funds received from the Corporation as one-time special grants shall not be considered in determining the private attorney involvement (PAI) requirements.

(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 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) 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 following conditions:

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

(2) The recipients involved in the joint venture must 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 on PAI;

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

(4) The joint PAI venture must provide 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 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

(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 economical 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

Accounting Guide for Recipients
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.

The recipient shall develop a plan 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 funds are advanced to private attorneys to enable them to pay costs, expenses or attorneys fees for representing clients and under which the private attorneys agree to repay from fees or other money awarded as a result of the case any funds advanced to them.

(b) No funds received from the Legal Services Corporation shall be used to establish or maintain revolving litigation fund systems that advance funds to private attorneys for attorney fees.

(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.

§ 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 of 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; 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:

(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 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 their basis of efficiency, quality, creativity, and demonstrated commitment to PAI service delivery to low-income people.

Dated: August 20, 1985.

Richard N. Bagenstos,

Acting General Counsel.

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