



January 25, 2002

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RE: Inquiries Regarding Representation of Reservists

Dear Mr. Summerlin:

I am writing in response to your recent inquiries of Cyndy Schneider, of LSC's Office of Program Performance, regarding potential representation of members of the National Reserve. You indicated that your state and local bar associations have inquired whether your program may assist in preparing wills and/or power of attorney documents for reservists who have been, or will likely be, called into active service. As a result of the inquiries received from the bar associations, you posed the three questions outlined below. For the purpose of simplicity, I will provide the answer to each question immediately following the inquiry presented.

- 1. Can LSC-funded staff, during the regular course of employment, assist reservists with wills and power of attorney documents, regardless of income, under some 'emergency' exception?*

Your first question requires an examination of both 45 CFR Part 1611, the LSC regulation governing eligibility, and 45 CFR Part 1620, governing priorities in use of resources.

LSC Regulation 1611 requires that grantees establish maximum income levels pursuant to which they can evaluate applicants for financial eligibility. Section 1611.3(b) prohibits those maximum income levels from exceeding one hundred and twenty-five percent (125%) of the current, official Federal Poverty Income Guidelines.¹ Section 1611.4(a) creates exceptions to this rule where an applicant's gross income exceeds the maximum income level established by a grantee but does not exceed 150 percent of the national eligibility level (125% of poverty), and 1) his

¹ Section 1611.3(e) specifies that this requirement "does not prohibit a recipient from providing legal assistance to a client whose annual income exceeds the maximum income level established . . . , if the assistance provided the client is supported by funds from a source other than the Corporation."

or her disposable income is substantially reduced by expenses such as medical bills, child care expenses, fixed debts, or other factors listed in §1611.5(b)(1), or 2) the applicant is seeking legal assistance to secure governmental benefits for the indigent. Regulation 1611 does *not* contain an emergency exception exempting entire categories of persons, such as reservists, from the requirement of financial eligibility, nor does it provide a grantee with discretion to waive the general requirement under unusual circumstances. It is also worth noting that the LSC Act, pursuant to which Part 1611 was promulgated, does not provide LSC with discretion to waive the requirement of financial eligibility.²

The only provision in the LSC Regulations that provides an ‘emergency exception’ in the acceptance of cases is 45 CFR § 1620.4. Section 1620.4 authorizes grantees to accept cases or matters that have not been prioritized by their respective boards of directors in circumstances where immediate legal action is required to “(1) secure or preserve the necessities of life, (2) protect against or eliminate a significant risk to the health or safety of the client or immediate family members, or (3) address other significant legal issues that arise because of new and unforeseen issues.” 45 CFR §1620.4. The regulatory history of this provision indicates that it was created to address “circumstances where action must be taken in a short period of time as well as unusual and infrequent circumstances where no action needs to be initiated quickly, but where inordinate harm is likely to be incurred by the client or client’s family members if action is not taken.” 62 FR 19406, *19407 (April 21, 1997). Examples of circumstances anticipated in the creation of this exception include “unusual circumstances, such as a natural disaster or an unanticipated change in the law, where issues which severely affect a large segment of the *client community* were not anticipated at the time priorities were set.” [Emphasis added.] *Id.*

While §1620.4 provides an emergency exception to the *types of cases and matters* to which grantees commit their time and resources, it does *not* provide an exception to *income eligibility* requirements in emergency circumstances. As emphasized in the preceding paragraph, the provision was created in anticipation of unexpected circumstances in the *client community*, rather than in the broader community of financially ineligible persons. Thus, while §1620.4 permits a grantee to assist a reservist with a will or power of attorney document notwithstanding the exclusion of that type of case from the grantee’s normal priorities, the reservist must first be determined financially eligible.

² In contrast, Congress *has* given LSC discretion to permit deviation from grantee requirements in some other circumstances. Section 1007(c) of the LSC Act, for example, requires that 60% of grantee board members be attorneys, but it also provides that “the Corporation . . . may grant . . . such a waiver for recipients which, because of the nature of the population they serve, are unable to comply with such requirement.” The presence of discretionary authority to waive grantee requirements in some sections of the LSC Act suggests that the absence of discretionary authority to waive financial eligibility requirements is not an oversight.

In conclusion, LSC-funded staff cannot assist reservists with wills or other matters if said reservists are financially ineligible.

2. *If LSC-funded staff volunteer during their personal time to prepare wills and power of attorney documents for individuals who are not income eligible, can LSC-funded equipment and facilities be used to prepare these documents?*

Your second question implicates an analysis of LSC’s regulation governing the outside practice of law. Attorneys³ employed by LSC grantees are generally prohibited from engaging in the outside practice of law. “Outside practice of law” is defined in 45 CFR §1604.2(b) as “the provision of legal assistance to a client who is not entitled to receive legal assistance from the employer of the attorney rendering assistance, but does not include, among other activities, teaching, consulting, or performing evaluation.” This restriction implements a strict underlying statutory provision, Section 1007(a)(4) of the LSC Act, which reads:

The Corporation shall . . . (4) insure that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from (A) any compensated outside practice of law and (B) any uncompensated outside practice of law except as authorized in guidelines promulgated by the Corporation.

Part 1604 enumerates five exceptions to the general prohibition against the outside practice of law. Section 1604.4 permits an attorney to engage in the outside practice of law for compensation when (a) the attorney is newly hired and is closing out cases from his or her previous practice; or (b) the attorney is acting pursuant to a court appointment, provided the program director does not deem the practice inconsistent with the attorney’s full time responsibilities. Section 1604.5 permits an attorney to engage in the outside practice of law without compensation when (a) the attorney is acting pursuant to a court appointment of equal applicability to all attorneys in the jurisdiction; or (b) the attorney is acting on behalf of a close friend or family member; or (c) the attorney is acting on behalf of a religious, community, or charitable group,⁴ provided the program director does not deem the practice inconsistent with the attorney’s full time responsibilities.

³ “Attorney” is defined in 45 CFR §1604.2(a) as “a person who is employed *full time* in legal assistance activities supported in major part by the Corporation, and who is authorized to practice law in the jurisdiction where assistance is rendered.” [Emphasis added.] Accordingly, the restriction on outside practice of law does not apply to part-time attorneys employed by LSC grantees.

⁴ Bar associations have not been found to qualify as a “community or charitable group” under the regulation.

Unfortunately, the voluntary representation of reservists during non-business hours does not fall into any of the excepted categories, and it is accordingly prohibited by Part 1604.

3. *Can a program Board of Directors amend its eligibility guidelines to raise the eligibility threshold from 125% of poverty to 187.5% of poverty ,limiting the increased threshold to reservists who are faced with being called up for active duty?*

As mentioned in the response to your first question above, LSC Regulation 1611 requires that grantees establish maximum income levels pursuant to which they can evaluate applicants for financial eligibility, and section 1611.3(b) prohibits those maximum income levels from exceeding one hundred and twenty-five percent (125%) of the current, official Federal Poverty Income Guidelines.⁵ Nothing in the regulation permits an exception to the imposed ceiling on maximum income levels, even when the exemption is applied to a limited category of persons. Accordingly, a program's Board of Directors does not have the discretion to amend its eligibility guidelines beyond one hundred and twenty-five percent (125%) of the current, official Federal Poverty Income Guidelines, even for a select category of persons like reservists.

I hope that this information adequately answers your questions. While we understand and share your desire to assist members of your community who have been, or will be, affected by recent world events, the existing LSC regulatory scheme does not permit the requested representation. If you have additional questions or would like to further discuss these issues, please feel free to contact me directly at (202)336-8871.

Sincerely,

Dawn M. Browning
Assistant General Counsel

Victor M. Fortuno
General Counsel

⁵Again, Section 1611.3(e) specifies that this requirement “does not prohibit a recipient from providing legal assistance to a client whose annual income exceeds the maximum income level established . . . , if the assistance provided the client is supported by funds from a source other than the Corporation.”