



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

AO-2013-006

SUBJECT: Use of Paralegal Support for Outside Practice of Law

DATE: August 12, 2013

QUESTION PRESENTED

Whether the use of two to three hours of a paralegal's time at an LSC recipient by the Executive Director of that recipient, to support that attorney's outside practice of law in representing a family member, is a permissible use of recipient resources pursuant to 45 C.F.R. § 1604.

BRIEF ANSWER

Part 1604 of the LSC regulations requires recipients to issue written policies regarding the outside practice of law by full-time attorneys. Those policies *may* permit such outside practice of law in limited circumstances. Section 1604.6(b) permits a recipient's policy to allow attorneys to use "limited amounts" of recipient resources to support permissible categories of the outside practice of law, including providing representation to family members. The regulation does not define the "limited amounts" standard except by way of examples set forth in the preamble to the regulation. Neither the language of the regulation, nor the examples provided in the preamble, preclude a recipient from defining the use of two to three hours of a paralegal's time as falling within the term "limited use." Therefore, unless otherwise prohibited by the recipient's policy, such use of recipient resources is not precluded under the LSC regulations.

At the time the Executive Director engaged in the outside practice of law at issue here, the recipient's personnel manual included provisions permitting outside practice in certain specified circumstances. The personnel manual, however, "strictly prohibited" the use of recipient "resources" to support an outside practice matter: "Use of secretarial, clerical and/or corporate resources for any non-Corporation matter is strictly prohibited." Given this provision, the use of paralegal time in this instance was not permissible.

BACKGROUND

Following a referral from the Office of Inspector General (OIG), the Office of Compliance and Enforcement (OCE) has asked for an advisory opinion regarding the use of a

paralegal's time in support of the outside practice of law by the Executive Director of a recipient of LSC funding. Specifically, the Executive Director, who is a "full-time attorney" under the definition set forth in 45 C.F.R. § 1604.2, provided representation to a family member in a family law case and used two to three hours of a paralegal's time to support work on the case.

ANALYSIS

The LSC Act requires that "the corporation shall . . . 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." 42 U.S.C. § 2996f(a)(4).

Part 1604 of the LSC regulations implements the statutory provision on the outside practice of law by full-time attorneys. 45 C.F.R. Part 1604. Part 1604 "is intended to provide guidance to recipients in adopting written policies relating to the outside practice of law by recipients' full-time attorneys." *Id.* § 1604.1. "Under the standards set forth in [Part 1604], recipients are authorized, but not required, to permit attorneys, to the extent that such activities do not hinder fulfillment of their overriding responsibility to serve those eligible for assistance under the Act, to engage in pro bono legal assistance and comply with the reasonable demands made upon them as members of the Bar and as officers of the Court." *Id.*

In particular, section 1604.3(a) requires that "a recipient shall adopt written policies governing the outside practice of law by full-time attorneys . . ." The policies may permit the outside practice of law in limited circumstances, including representation of a family member, but only to the extent permitted by the LSC Act and Part 1604. 45 C.F.R. §§ 1604.3(b) and 1604.4(c)(2). In those situations, the recipient's executive director must determine that the representation of a non-recipient client is not inconsistent with the attorney's responsibilities to the recipient's clients:

§ 1604.4 Permissible outside practice.

A recipient's written policies may permit a full-time attorney to engage in a specific case or matter that constitutes the outside practice of law if:

- (a) The director of the recipient or the director's designee determines that representation in such case or matter is consistent with the attorney's responsibilities to the recipient's clients;
- (b) Except as provided in § 1604.7 [court appointments], the attorney does not intentionally identify the case or matter with the Corporation or the recipient; and
- (c) The attorney is –
 - (1) Newly employed and has a professional responsibility to close cases from a previous law practice, and does so on the attorney's own time as expeditiously as possible;
 - or

- (2) Acting on behalf of him or herself, a close friend, *family member* or another member of the recipient's staff; or
- (3) Acting on behalf of a religious community, or charitable group; or
- (4) Participating in a voluntary pro bono or legal referral program affiliated with or sponsored by a bar association, other legal organization or religious, community or charitable group.

45 C.F.R. § 1604.4 (emphasis added).

Subsections 1604.6(a) and (b) address the use of recipient resources to support a full-time attorney's outside practice of law, including representation of a family member as authorized under section 1604.4(c)(2):

§ 1604.6 Use of recipient resources.

(a) For cases undertaken pursuant to § 1604.4(c)(1) [carryover cases from prior employment], a recipient's written policies may permit a full-time attorney to use *de minimis* amounts of the recipient's resources for permissible outside practice if necessary to carry out the attorney's professional responsibilities, as long as the recipient's resources, whether funded with Corporation or private funds, are not used for any activities for which the use of such funds is prohibited.

(b) For cases undertaken pursuant to § 1604.4(c)(2) through (4) [including representation of family members], a recipient's written policies may permit a full-time attorney to use *limited amounts* of the recipient's resources for permissible outside practice if necessary to carry out the attorney's professional responsibilities, as long as the recipient's resources, whether funded with Corporation or private funds are not used for any activities for which the use of such funds is prohibited.

45 CFR § 1604.6(a) & (b) (emphasis added). Although recipients "may permit" these uses of recipient resources, they are not required to do so. Furthermore, section 1604.3(b) states that the recipient's written policies "may impose additional restrictions as necessary to meet the recipient's responsibility to clients."

Part 1604 does not distinguish between the use of human and non-human resources and defines neither the "*de minimis* amounts" standard referenced in section 1604.6(a) nor the "limited amounts" standard referenced in section 1604.6(b). The preamble to the regulation, however, provides guidance with respect to both terms:

Under the *de minimis* standard, an attorney could make a brief phone call or use the fax machine during working hours, but would have to take leave for court appearances.

Under the "limited" standard, in addition to whatever an attorney could do under the *de minimis* standard, the attorney could, for example, make a brief court appearance during normal working hours without taking leave. An attorney could also be permitted to use a program computer or typewriter to prepare pleadings or other documents, within reason. However, if the attorney participated in a long trial or extended negotiation, he or she would normally be required to take leave to do so.

If a recipient has a procedure to identify copying, postage and similar costs, and the attorney reimbursed the recipient, the use of those resources would also be permissible under either standard. This position is consistent with the longstanding LSC policy.

67 Fed. Reg. 67372, 67376 (Dec. 2, 2003) (paragraph breaks added).

In providing guidance concerning the term "limited amounts," the examples set forth in the preamble cover a broad spectrum of potential uses of recipient resources, some that are classified as "limited amounts" and some that are not. At one end of the spectrum, the preamble identifies uses of resources that would be considered "limited" – including a brief phone call or use of a fax machine during working hours or a "brief court appearance during normal working hours without taking leave." At the other end of the spectrum, the preamble identifies uses of resources that would not be considered "limited" – including participation in "a *long* trial or *extended* negotiation" (emphasis added). With respect to the portion of the resource-use spectrum in the middle – for example, resource uses falling between a *brief* court appearance and a *long* trial – the preamble is silent, apparently leaving it to recipients to craft policies more specifically addressing the permissible "limited" use of both human and non-human resources relating to the outside practice of law.

Turning to the question presented here, the "limited amounts" standard referenced in section 1604.6(b) (as opposed to the "*de minimis* amounts" standard referenced in section 1604.6(a)) would apply because the Executive Director provided representation to a family member in a family law case, pursuant to section 1604.4(c)(2). As discussed above, the face of the regulation does not define "limited amounts," but instead leaves it to recipients to craft policies governing the use of recipient resources in support of outside practice matters and more specifically defining the term "limited use." Given the language of the regulation, we cannot say that a recipient would be precluded from defining the use of two to three hours of a paralegal's time as falling within the term "limited use."

Application of the guidance provided by the preamble leads to the same conclusion. The examples set forth in the preamble cover a broad spectrum of uses of recipient resources, including a "brief court appearance" during normal working hours that is characterized as a "limited amount" of a recipient's resources, and a *long* trial or *extended* negotiation that is characterized as not being a limited use of such resources. Again, given the examples set forth

in the preamble, we cannot say that a recipient would be precluded from defining the use of two to three hours of a paralegal's time as falling within the term "limited use."

Having determined that the use of two to three hours of a paralegal's time is not precluded under the LSC regulations, we turn to the question whether such use was permitted under the recipient's policies. At the time the Executive Director engaged in the outside practice at issue here, the recipient's personnel manual included provisions permitting outside practice in certain specified circumstances. At least three of the limitations contained in the recipient's personnel manual are pertinent to the outside practice involved here.

First, Paragraph F.3. of the recipient's personnel manual "strictly prohibited" the use of recipient "resources" to support an outside practice matter: "Use of secretarial, clerical and/or corporate resources for any non-Corporation matter is strictly prohibited." Given this provision, the use of paralegal time in this instance was not permissible.

Second, Paragraph F.4. of the recipient's personnel manual provided that "[w]ork in connection with a matter permitted by an exception herein shall not be done during work hours (unless time is charged against annual leave or leave without pay for which approval has already been granted)." It is not clear on the present record whether, with respect to the paralegal's time (or his own time), the Executive Director complied with this requirement. If not, this would be an additional ground for concluding that the use of the paralegal time (and his own time) were not permissible.

Third, even where a recipient's policies permit outside practice, the recipient's executive director or a designee must determine, on a case-by-case basis, that the representation of a non-recipient client is not inconsistent with the attorney's responsibilities to the recipient's clients. 45 CFR § 1604.4(a). Consistent with this requirement, Paragraph F of the recipient's personnel manual required an attorney wishing to undertake an outside practice matter to notify the Executive Director in writing and to receive prior written approval of the Executive Director for the matter. Although both the LSC regulation, 45 CFR § 1604.4(a), and Section F of the recipient's personnel manual are silent on the issue, an executive director would have a clear conflict of interest in making a determination whether his or her own proposed outside matter would be inconsistent with the executive director's responsibilities to the recipient's clients. Accordingly, in such instances the executive director should designate someone else – not subject to the executive director's supervision, such as the chair or a member of the recipient's board – to make the determination. In the matter at issue here, the Executive Director undertook the outside matter without seeking approval of anyone other than himself.

Finally, *subsequent* to the Executive Director's use of paralegal time, and *after* OCE sent a letter to the recipient inquiring about the outside practice matter at issue here, the recipient amended Paragraph F.3. of its personnel manual to permit "limited use" of "Corporate resources":

Limited use of secretarial, clerical and of Corporate resources for any non-Corporation matter is allowed. However, any such time

must be voluntary time by any support staff and cannot be required of any . . . staff.

Likewise, the recipient amended Paragraph F.4. of its personnel manual to permit outside work during “working hours” under very limited circumstances:

Work in connection with a matter permitted by an exception herein should not be done during working hours unless it is absolutely unavoidable, such as phone calls or court appearances. Any such work conducted during regular working hours should be made up by the staff as soon as possible or designated as personal or vacation time by the staff member.

These post hoc amendments of the personnel manual do *not* alter our conclusion: the use of paralegal time in this instance was not permissible in view of the recipient’s personnel manual provisions in place at the time the outside practice matter was undertaken.

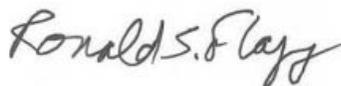
CONCLUSION

Recipients of LSC funds must adopt written policies governing the outside practice of law by their full-time attorneys. Those policies may permit some outside practice of law within certain limitations. Section 1604.6(b) of the LSC regulations permits a recipient’s policy to apply a “limited amounts” standard for the use of recipient resources to support an attorney’s permissible representation of family members. The “limited amounts” standard, however, is not defined except by way of examples given in the preamble. Neither the language of the regulation, nor the examples provided in the preamble, preclude a recipient from defining the use of two to three hours of a paralegal’s time as falling within the term “limited use.” Accordingly, the LSC regulations do not preclude a recipient from permitting such use of recipient resources as a “limited use” under its written policies.

In this instance, however, at the time the Executive Director engaged in the outside practice at issue, the recipient’s personnel manual “strictly prohibited” the use of recipient “resources” to support an outside practice matter. Accordingly, the use of paralegal time in this instance was not permissible.



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