



OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2002-1010

To: Robert A. Oakley, Esq.
Executive Director
Northwestern Legal Services
1001 State Street, Suite 1200
Erie, Pennsylvania 16501-1833

Date: October 8, 2002

Subject: Propriety of Judicial Custody Master Serving on NLS Board of Directors.

Dear Mr. Oakley,

You have asked the Office of Legal Affairs about the appointment of R. Christopher Brode by the Crawford County Bar Association to the Board of Directors of Northwestern Legal Services, Inc. You've described the situation as follows. Mr. Brode is a past staff attorney at your program who is currently in private practice. Mr. Brode is also a part time Judicial Custody Master for the Crawford County Common Pleas Court, compensated on a per diem basis. Your program represents clients in custody matters that come before this court. Mr. Brode has told you that he does not believe that this presents a conflict of interest, but is willing to recuse himself from cases involving your program if LSC determines that a conflict exists.

It has long been the position of LSC that representatives or employees of governmental agencies or bodies should not serve on the governing body of an LSC recipient. See OLA External Opinion of September 23, 1977 (enclosed). The primary reasons have been the statutory mandate that LSC funded activities be free from political influence and concerns regarding actual or apparent conflicts of interest. See 42 U.S.C. § 2996(5) ("the legal services program must be kept free from the influence of or use by it of political pressures") and 42 U.S.C. § 2996f(a)(1) (LSC shall insure the "protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients.") In applying this rule LSC has determined that a city mayor or a district attorney may not serve on recipient boards. OLA External Opinion of April 15, 1992 (city mayor) and OLA External Opinion of February 24, 1994 (district attorney) (both opinions enclosed). Nonetheless, LSC has considered situations in which the particular circumstances warrant allowing a government employee to serve on a recipient's board when these concerns are met. See OLA External Opinion of June 10, 1981 (government employees may serve on recipient boards in limited circumstances).

45 C.F.R. § 1607.3(h)(2) specifically addresses conflicts for recipient board members.

Recipients . . . should consult with the appointing organizations to insure that . . . [a]ppointees do not have actual and significant individual or institutional conflicts of interest with the recipient or the recipient's client community that could reasonably be expected to influence their ability to exercise independent judgment as members of the recipient's governing body.

Emphasis added. LSC has relied on local non-profit corporation law and the ethical rules governing attorney practice for grantee guidance in this area. This provision allows grantees to address such issues through consultation with the appointing organizations and through grantee bylaw provisions "that deal with board membership conflicts as long as the bylaws do not conflict with any requirements of the LSC Act or regulations." 59 FR 65249, 65252 (1994) (Supplemental Information for §1607.3(h)).

LSC has not considered before if a judge or quasi-judicial official falls under the government employee policy. In order to evaluate Mr. Brode's situation, we would need further information about the appointment process for the position of part time Judicial Custody Master. As a general matter, it seems to us that if this position is either elected or appointed, then this policy would most likely apply. As someone subject to future election or re-appointment, he would be subject to the kinds of political influences that LSC grantees are directed to stay free of.

We strongly recommend that you and Mr. Brode seek local ethical guidance on the conflicts aspect of this question. As you have mentioned, your program brings cases before Mr. Brode as the Judicial Custody Officer. We would be surprised if he was not required to at least recuse himself from those cases if he serves on your board (as he has offered to do). Clients in custody matters could question the independence of their attorney when the attorney's employer has on its board one of the Judicial Custody Masters who hear these cases. He may need to further recuse himself from any board decisions that would affect the acceptance or handling of cases that could come before him or other Judicial Custody Officers.

If your program frequently has cases before the Judicial Custody Master, then it seems likely that any Judicial Custody Master would have an institutional conflict that would prevent him or her from serving on your board. Your program needs to be free from any appearance of a conflict that would interfere with your freedom to differ with the judges in this forum during litigation and in appeals.

As a past staff member of your program and an attorney with private practice and judicial experience, Mr. Brode may have very significant contributions to make on your board. Nonetheless, it appears that his current role as a Judicial Master is highly likely to

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at least require his recusal from cases involving your program, and would quite possibly prevent him from serving on your board.

Please feel free to contact me with additional information if you feel that Mr. Brode's circumstances fall into the exception to our government employees prohibition, or if you need further LSC input on the conflicts question this situation presents.

Very truly yours,

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