



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

Advisory Opinion # AO – 2009-1004

SUBJ: Subgrants to Staff-Model Legal Services Provider; Qualification as PAI under 45 CFR Part 1614

DATE: June 19, 2009

Question Presented

May a recipient which makes a grant of non-LSC funds to a staff-model legal services provider who provides direct legal assistance to eligible clients count those funds towards its PAI requirement and count those cases as PAI cases in its Case Service Report (CSR)?

Brief Answer

A recipient may not generally count towards its PAI spending requirement funds provided as a subgrant to a staff-model legal services provider used for the provision of direct legal assistance by the attorneys employed by that provider. Similarly, a program may generally not report such cases as PAI in its CSR.

Factual Background

A recipient contracts with another state-wide, non-LSC legal services provider, which itself is a component of a former, but not current LSC grantee, which provides legal assistance to the low income community. The non-LSC legal services provider (hereinafter referred to as “the hotline”) conducts hotline services for four other staff-model legal services programs within the recipient’s state. The hotline is staffed by attorneys who conduct intake screening and then, depending on the case, will either provide direct service in the form of advice or will refer the caller to one of the appropriate programs with which the hotline contracts. The recipient currently uses non-LSC funds for its contract with the hotline. The recipient had been reporting these cases in its CSR. However, with the 2008 CSR Handbook, it is clear that the recipient can no longer do this and the recipient is not disputing this. However, the recipient has now asked whether they can consider the funds they spend on the hotline contract towards the recipient’s PAI requirement, which would allow them to report these cases in their CSR.

Analysis

The key to the question presented is whether the attorneys working for the hotline may be considered “private attorneys” under Part 1614. The term “private attorney” is defined in the PAI regulations as “an attorney who is not a staff attorney as defined in §1600.1 of these

regulations.” 45 CFR §1614.1(d). The definition of “staff attorney” in Part 1600 is “an attorney more than one half of whose annual professional income is derived from the proceeds of a grant from the Legal Services Corporation or is received from a recipient, subrecipient, grantee, or contractor that limits its activities to providing legal assistance to clients eligible for assistance under the [Legal Services Corporation] Act. 45 CFR §1600.1.

Definition of Staff Attorney and Subrecipient

Before turning to its application in the PAI context, it is necessary to first examine the meaning of the second prong of the definition of staff attorney in some detail.¹ Under that prong, a staff attorney is an attorney more than one half of whose professional income is received from a recipient, subrecipient, grantee, or contractor that limits its activities to providing legal assistance to clients eligible for assistance under the Act. The scope of this definition is not necessarily obvious on its face. OLA External Opinion EX-2003-1004 sets forth a lengthy and nuanced discussion of the definition, focusing on the distinction Congress was making between the staff-delivery model for the provision of legal assistance and the fee-for-service/judicare-model for the provision of legal assistance. EX-2003-1004 concludes that, *as staff-delivery model entities*, all LSC-funded basic field programs are encompassed within the definition, such that attorneys receiving one half of their professional income from an LSC recipient are staff attorneys.

The second prong of the definition of “staff attorney” however, is not limited to basic field program recipients, but includes “subrecipients” which limit their activities to providing legal assistance to clients eligible for assistance under the Act. Although Part 1600 does not contain a definition of “subrecipient,” that term is defined in Part 1627, Subgrants and Membership Fees or Dues. In that part, “subrecipient” is defined as “any entity that accepts Corporation funds from a recipient under a grant contract, or agreement to conduct certain activities specified by or supported by the recipient related to the recipient’s programmatic activities.” 45 CFR §1627.2(b)(1). That section goes on to note that programmatic activities include things that the recipient “might otherwise be expected to be conducted directly by the recipient itself, such as the representation of eligible clients, or which provide direct support to a recipient’s legal assistance activities” *Id.* The definition also notes, however, that “programmatic activities” generally do not include fee-for-service arrangements such as those provided by attorneys and law firms on a contract or judicare basis.² *Id.*

¹ For the purposes of this analysis, since the recipient is not using LSC funds for its subgrant to the hotline, the hotline attorneys are not impacted by the first prong of the definition involving LSC funds.

² This distinction is made not because providing direct legal assistance to clients is not an activity a recipient would otherwise ordinarily do, but rather to acknowledge the distinction between the staff-model delivery system and the contract or judicare model of service involving a number of individual attorneys and law firms providing legal assistance in connection with private attorney involvement activities. See, 48 Fed. Reg. 54206, 54207 (November 30, 1983). LSC chose not to require subgrant approval for each of these judicare or PAI-fee cases. It should be noted, however, that section 1627.2(b)(1) does include as “programmatic activities” contract/judicare arrangements valued at over \$25,000, making them subject to the subgrant rule. The Corporation considered that a subgrant in such a large amount to one contract or judicare attorney would significant enough to merit requiring subgrant approval *Id.*

Whether a subrecipient “limits its activities to providing legal assistance to eligible clients under the [LSC] Act” requires reference back to of EX 2003-10004. As noted above, in that Opinion, OLA concluded that Congress meant to include all LSC recipients, as staff-model entities, even if they provided services to over-income clients or others not covered by the LSC Act. Similarly, in this limited context for PAI purposes, OLA reads this phrase to generally refer to staff-model legal services programs that primarily provide legal assistance to low income persons. Thus a subrecipient which is a staff-model entity is included in the definition, such that attorneys of subrecipients of LSC funds which are staff-model entities are staff attorneys. This reading is consistent with the general understanding of the distinction between staff-model legal services providers and more conventional market rate private attorneys.

Subrecipient for PAI Purposes

Taking the definitions of “staff attorney” and “subrecipient” together, that the term staff attorney includes any attorney, more than one half of whose professional income is received from a staff-model entity which accepts LSC funds from a recipient to perform programmatic activities. Thus, such attorneys could not qualify as “private attorneys” under Part 1614 and the programmatic activities carried out by such attorneys could not generally be considered to be PAI activities (and the funds spent on such subgrants could not be considered toward a recipient’s PAI spending requirement).³ Practical experience generally bears out that this is how the definitions have been understood and applied; LSC recipients have not, to OLA’s knowledge, subgranted LSC funds to other staff-delivery model legal services providers for the provision of legal assistance to clients by attorneys of the provider and sought to consider the attorneys providing those services as “private attorneys” or classify such activities as PAI activities.

The discussion above raises an obvious question. The definition of staff attorney in Part 1600 is connected to the use of LSC funds (either directly or indirectly via employment by an LSC recipient or staff-model subrecipient of LSC funds). However, what if the recipient is using non-LSC funds (as the recipient is doing to fund its contract with the hotline)? On its face, if a recipient used non-LSC funds to fund programmatic activities by a staff-delivery model provider, the attorneys working for that provider would not appear to be staff attorneys under the definition at Part 1600 and the those attorneys would, by definition, be considered “private attorneys” for the purposes of the PAI requirement. However, if this is so, whether or not an attorney would be a private attorney for PAI purposes would hinge on the source of the funds being used by the recipient to fund the purported PAI activity. Making a distinction about the source of the funds for the purpose of determining who is a private attorney for PAI purposes would, however, produce an absurd result clearly inconsistent with the remainder of the regulation. Non-LSC funds, when used for PAI purposes, are functionally treated as if they were LSC funds with all of the restrictions applicable to the LSC funds attached.⁴ There is no

³ Thus echoing the distinction Congress appeared to be making between the staff-delivery and fee-for-service/judicare legal assistance models discussed in EX-2003-1004.

⁴ For example, clients served by PAI attorneys must be LSC eligible regardless of the source of funds supporting the provision of those services; and PAI attorneys who are compensated are prohibited from claiming, collecting or

indication in the regulatory history that the Board of Directors had any intention to treat non-LSC funds differently than LSC funds for this one particular aspect of the regulation.

Thus, this Office believes that the most appropriate interpretation of the regulation is as follows: *For the purposes of the PAI rule*, where a staff-model legal services provider receives funds from an LSC recipient (regardless of the original source of the funds) to perform programmatic activities, an attorney who receives more than one half of his/her professional income from that staff-model legal services provider is not a “private attorney.”⁵ As such, direct legal assistance provided by those attorneys cannot qualify as PAI activity and a recipient may not report such cases as PAI cases on its CSR.⁶ Indeed, it appears, based on LSC’s practice and experience, that this is how the regulation has been understood and applied by grantees since its adoption.

Application of the Analysis to the Recipient and the Hotline Contract

In the instant case, the recipient is using non-LSC funds to support a program in which a significant number of cases handled directly by the hotline attorneys, with little or no referral attempted and the cases which are referred are referred back to either the recipient or one of the other staff-delivery model providers which also have contracts with the hotline. As such, neither the cases handled directly by the hotline attorneys nor those referred to the other providers who have provided funding to the hotline cannot be considered as having been handled by private attorneys. The recipient cannot, therefore, consider such cases as PAI cases, cannot report them on their CSR as such and cannot count the funds spent on the hotline contract towards its required PAI spending requirement.



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retaining attorneys’ fees, regardless of whether the compensation was derived from the grantee’s LSC or non-LSC funds. See, 45 CFR §1614.1; 45 CFR §1642.4(b).

⁵ The corollary to this would also appear to apply individual attorneys under the first prong of the definition of “staff attorney.” Under the first prong, any attorney more than half of whose professional income is derived from an LSC grant is a “staff attorney.” Applying the analysis above, any attorney who is receiving more than one half of his/her professional income derived from funds provided by an LSC recipient for the purpose of engaging in programmatic activities would not qualify as a “private attorney” for PAI purposes.

⁶ It should also be noted that there are certain programmatic activities which “staff attorneys” may perform the dollar value of which a recipient may count towards its PAI spending requirement. Nothing in this Opinion is intended to change or interfere with that authority. Thus, for example, nothing in this Opinion would preclude a recipient from allocating toward its PAI spending requirement the value of time spent by an attorney who qualifies as a “staff attorney” under this Opinion on intake and referral of cases involving eligible clients to private attorneys though a qualifying PAI program.