



February 1, 2000

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Re: Overlap of Board or Staff of Grantees and Subgrantees or Competing Organizations; External Opinion 99-31

Dear Mr. Thomas:

This letter is in response to your telephone inquiry of December 1, 1999. As I understand the relevant facts, Capital Area Legal Services Corporation (CALSC), an LSC grantee, currently makes subgrants to the Baton Rouge Bar Association *Pro Bono* Foundation (a program of the Baton Rouge Bar Association) and to the Martinet Society *Pro Bono* Project (a program of the Louis A. Martinet Legal Society). Both programs are Louisiana non-profit organizations that seek funding from other sources such as local courts and IOLTA funds. Each program is a separate legal entity from its host organization.

You asked for guidance on restrictions regarding staff or board members of any these organizations serving on the boards of the other organizations. Please note that this letter is limited to our opinion about the effect of LSC statutes and regulations on these arrangements.

Overlap of Board Members between Primary Grantee and Subgrantee

45 C.F.R. §§ 1607.5 (compensation) and 1607.3(h)(3) (actual conflicts) are the relevant LSC regulatory provisions. Generally speaking, LSC has not taken a stance on this issue. Instead, LSC has relied on local non-profit corporation law and the ethical rules governing attorney practice for grantee guidance in this area. Nevertheless, § 1607(h)(3) provides that recipients should consult with the board member 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.” 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 expects that through this consultation process, with guidance from the relevant legal and ethical sources, grantees can address conflicts issues involving board members. Attorneys interested in board membership should be equipped to examine the issues implicated by serving on the board of one organization awarding funds as well as another competing to receive those funds. Similarly they should be able to recognize the issues raised by simultaneously sitting on the boards of two organizations in competition for a limited pool of funds available for indigent legal services. Besides compensation, discussed below, the resolution of these issues is beyond the scope of current LSC regulations.<sup>1</sup> A coordinating committee, made up of board members and/or staff from the various organizations, is one way of maintaining institutional communication between the agencies without board member overlap.

#### Attorney Board Members of a Grantee are Prohibited from Receiving Compensation

45 C.F.R. §1607.5 (formerly §1607.6) prohibits a recipient from providing compensation to any attorney board member. Section 1607.5(a) provides that:

While serving on the governing body of a recipient, no attorney member shall receive compensation from that recipient, but any member may receive a reasonable per diem expense payment or reimbursement for actual expenses for normal travel and other reasonable out-of-pocket expenses in accordance with written policies adopted by the recipient.<sup>2</sup>

This restriction is intended to preserve the independence and impartiality of board members as well as avoid even the appearance of a conflict of interest. LSC has taken the position that a paid attorney employee of a subgrantee, by virtue of her salary, receives compensation coming from the grantee. External OGC Opinion,

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<sup>1</sup> Although not controlling for subgrants, LSC resolved a similar concern in the competitive bidding process for primary LSC grants. The definition for the review panel provides that “no person may serve on a review panel for an applicant with whom the person has a financial interest or ethical conflict; nor may the person have been a board member of or employed by that applicant in the past five years.” 45 C.F.R. §1634.2 (emphasis added).

<sup>2</sup> Subsection 1607.5 (c) allows board members under certain circumstances to accept referrals of fee-generating cases or participate in uncompensated private attorney involvement programs while accepting applicable out-of-pocket expenses from the grantee or applying for attorneys’ fees.

April 5, 1982.<sup>3</sup> Thus she cannot serve on the primary grantee's Board of Directors. Similarly LSC has determined that attorneys who accept funds from a grantee to provide legal services, even at reduced rates such as in judicare programs, cannot serve on the grantee board.<sup>4</sup> External OGC Opinion, March 15, 1984. Section 1607.5 prohibits any attorney paid by CALSC or a CALSC subgrantee from serving on the CALSC Board. Attorney employees of a subgrantee also cannot serve on that subgrantee's Board.<sup>5</sup>

Section 1607.5 does not apply to non-attorney board members (although previous versions of it did). LSC drafted the current version based on the determination that "it is consistent with the Act to permit a recipient to pay compensation to a client or other non-attorney board member for board service or other service to the recipient." 59 FR 65249, 65253 (1994) (Supplementary Information for §1607.5(a)).

Reasonable *per diems* for attorney board members are excluded from the compensation prohibition in §1607.5(a). A board member of a subgrantee can receive such a *per diem* without violating this section or disqualifying herself from serving on the primary grantee's board.

#### Primary Grantee Staff Serving on the Board of a Subgrantee

The LSC regulations do not address the question of the primary grantee's staff serving on the board of a subgrantee beyond §1607.3(h)(3) discussed above. Section 1607.5 does not apply because the board of the subgrantee has no power over the compensation for the staff of the primary grantee (his decisions would not affect his own pay). As with overlapping board members, he could face a situation in which the grantee, possibly through the employee himself, decides on funding for the subgrantee on whose board he serves. Similar concerns arise with regards to competition between the two organizations for other funding. LSC defers to the relevant legal and ethical resources for guidance on these difficult questions regarding

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<sup>3</sup> At that time §1607.6 applied to all board members; it was amended to apply only to attorneys.

<sup>4</sup> One analogous situation is that of a grantee board member whose law office performs legal work for the grantee. Section 1607.5 (b) allows for this practice if a §1607.6(b)(1) waiver is granted.

<sup>5</sup> This prohibition applies to any compensation regardless of the source of the funds. Section 1607.5 reaches the governing bodies of all recipients of LSC funds. The §1610.7(c) exemption for private attorney involvement subgrants applies only to the restrictions listed in §1610.2 (which does not include §1607.5).

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avoiding actual and apparent conflicts of interest. Footnote one describes how LSC has addressed this issue in the competitive bidding process for primary LSC grants.

Program Integrity Concerns

A final issue is maintaining program integrity. 45 C.F.R. § 1610 addresses LSC's concerns about overlap between grantees and other programs that engage in restricted activities. Although *pro bono* projects are allowed to use non-LSC funds for restricted activities under §1610.7(c), that exemption depends on maintaining the objective integrity and independence standards of §1610.8 (except for the transfer of funds provision). Staff and board overlap could be a relevant factor in any program integrity inquiry.

I hope that you find this information of assistance. Please contact me with any questions.

Very truly yours,

Mark Freedman  
Staff Attorney

Enclosures: External OGC Opinion, April 5, 1982  
External OGC Opinion, March 15, 1984