



OFFICE OF LEGAL AFFAIRS

EXTERNAL OPINION

External Opinion # EX-2003-1015

To: Andrew Harrington, Executive Director
Alaska Legal Services Corporation
1648 Cushman Street, Suite 300
Fairbanks, AK 99701-6206

Date: December 1, 2003

Subject: Program Integrity Analysis of Relationship Between LSC Recipient ALSC
and non-LSC entity APBP.

In the 2002 you contacted LSC for guidance on the program integrity implications of the proposed restructured *pro bono* program for Alaska. At the time I provided you with informal advice that the scenario presented was consistent with the LSC program integrity requirements. This opinion formalizes that advice.

Issues Presented

Alaska Legal Services Corporation (ALSC) restructured its relationship with the Alaska Pro Bono Program, Inc. (APBP) in 2002. You requested an advisory opinion regarding the new ALSC/APBP plan and the Legal Services Corporation (LSC) program integrity requirements under 45 CFR Part 1610 (Part 1610). Specifically, you asked if ALSC can maintain program integrity from APBP while engaging in the following activities:

1. purchasing a joint malpractice insurance policy with APBP;
2. sharing a non-attorney support staff employee with APBP; and
3. accepting a grant from APBP of Alaska IOLTA funds to handle LSC-permissible cases.

The boards of the two organizations overlap, but are no longer identical. APBP maintains separate physical offices from ALSC. Additionally you have asked if there are any restrictions on having the shared support staff employee work for APBP during paid leave time from ALSC.

Summary

Under Part 1610, ALSC can maintain program integrity from APBP if the entities are legally separate, if ALSC does not transfer LSC funds to APBP nor subsidize restricted activities with LSC funds, and if the totality of the relationship does not breach physical and financial separation between the entities. Based on the information provided, we can conclude that:

1. ALSC may purchase a joint insurance policy with APBP without transferring funds or subsidizing APBP under Part 1610 as long as ALSC pays no more than its fair share of the cost;
2. ALSC and APBP may share a non-attorney staff member whose work is clearly delineated between the two entities without transferring funds or subsidizing APBP under Part 1610 when ALSC does not support any APBP work;
3. ALSC can maintain overall physical and financial separation from APBP while having some shared board members, a joint insurance policy, a shared staff member and the described grant from APBP.

Furthermore, the applicable LSC authorities do not prohibit the shared staff member from working for APBP during paid leave time from ALSC. You have not raised any questions regarding the legally separate entity requirement. This opinion only addresses those matters explicitly discussed. In certifying program integrity pursuant to §1610.8(c), you should consider the totality of the relationship between ALSC and APBP.

Factual Background

In 1999 LSC issued two advisory opinions to ALSC regarding program integrity requirements for ALSC's relationship with a proposed separate organization, APBP. APBP would handle coordinating a *pro bono* program in Alaska with a PAI grant from ALSC consisting of Alaska IOLTA funds. APBP would also receive non-LSC grants from other sources. The two organizations would have the same board members. They would be physically separate from each other with APBP housed in a separate building from ALSC. The two names are clearly distinguishable from each other and not likely to cause confusion. The two organizations considered sharing a non-attorney support staff employee. LSC determined that ALSC's plan was consistent with the program integrity requirements set forth in Part 1610. See Opinion Letter from Suzanne B. Glasow, Senior Assistant General Counsel, Legal Services Corporation, to Robert Hickerson, Executive Director, Alaska Legal Services Corporation (September 16, 1999); Opinion Letter from Suzanne B. Glasow, Senior Assistant General Counsel, Legal Services Corporation, to Robert Hickerson, Executive Director, Alaska Legal Services Corporation (December 6, 1999).

APBP is currently facing severe financial problems due to a reduction in IOLTA funds, which are APBP's primary source of funding. Due to the decrease in IOLTA funds for 2003, ALSC decided to bring back in-house its PAI program and LSC-permissible cases previously routed to APBP. APBP will handle only LSC-impermissible cases. A part-time attorney working on a private contract basis and not employed by ALSC will administer APBP as a part-time Executive Director.

In order to reduce costs further, ALSC and APBP seek to purchase a joint malpractice insurance policy. The insurance carrier of ALSC and APBP informed the organizations that both individual policies would face a probable increase in premium costs by 10%. The insurer also informed you that a joint insurance policy will result in overall savings for ALSC and APBP. A

joint policy would cover both programs with the two programs sharing the policy limits. Each organization will pay a proportional share of the premiums based on respective caseloads. Currently the two organizations appear to have comparable risk factors.

ALSC will hire a non-attorney full time *pro bono* coordinator who would not handle cases. APBP would like to hire ALSC's *pro bono* coordinator to work 15 hours per month to provide board meeting support, administrative support, bookkeeping, and computer technical support for APBP. Consequently, this employee may, occasionally, need to take leave from ALSC in order to perform APBP duties during regular business hours. ALSC will ensure that this employee does not perform any APBP work on ALSC premises or on ALSC time and that this employee's APBP work does not interfere with ALSC work.

For 2003, the Alaska Bar Foundation awarded the entire IOLTA grant to APBP. APBP plans to provide a subgrant to ALSC for placement and handling of LSC-permissible *pro bono* cases. APBP would handle non-LSC-permissible *pro bono* cases with non-LSC funds. Additionally APBP's board has changed since inception. While some people serve on both boards, the two memberships are no longer identical.

Relevant Statutory and Regulatory Provisions

Under the LSC program integrity standard, a recipient "must have objective integrity and independence from any organization that engages in restricted activities." 45 CFR §1610.8(a). Such objective integrity and independence requires that:

1. The other organization is a legally separate entity;
2. The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and
3. The recipient is physically and financially separate from the other organization. Mere bookkeeping separation for LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on a totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include, but will not be limited to:
 - i. the existence of separate personnel;
 - ii. the existence of separate accounting and timekeeping records;
 - iii. the degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
 - iv. the extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

45 CFR §1610.8(a).

Analysis

In reviewing this arrangement, there are three areas of analysis: 1) are the organizations legally separate, 2) does any individual issue involve a Part 1610 transfer or subsidy, 3) is the totality of the circumstances presented consistent with the Part 1610 physical and financial separation requirement. The facts presented do not bring into question the legal separation between the organizations.

The joint insurance policy described would not constitute a Part 1610 transfer or subsidy under §1610.8(a)(2). The joint policy, as described, would entail full malpractice insurance for all cases handled by both organizations. Instead of each organization having its own policy limits, the organizations would share aggregate limits. Additionally, each organization would pay a proportional share of the premiums based on the relative caseloads of the organizations. If ALSC pays no more than its fair share of the premiums, it will not be subsidizing APBP in this arrangement. Using case numbers to estimate each organization's share of the premiums is appropriate so long as both organizations have similar risk factors. Nonetheless, if one organization develops a higher risk factor, or any other factor that would cause it to be more expensive to insure, then the division of premiums may need re-evaluation to ensure that ALSC does not subsidize APBP.

APBP can hire ALSC's non-attorney full-time pro bono coordinator to work part time (approximately 15 hours per month) as described consistent with the Part 1610 transfer and subsidy requirement. So long as ALSC ensures that this employee clearly delineates the work between the two organizations and is appropriately paid by each, there is no transfer or subsidy issue. It is worth noting that this non-attorney position is not covered by Part 1604, which generally prohibits any attorney working for a recipient from engaging in the outside practice of law.

Additionally, LSC authorities do not prohibit a recipient's employee(s) from taking leave to fulfill a part-time job commitment, regardless of the organization for which the employee works. As per your description of the situation, an employee shared with an organization engaging in restricted activities must be cautious not to use LSC resources to aid in the work for the non-LSC organization. Use of LSC funded resources by another organization may be considered a subsidy if the recipient does not receive fair market price for the use. *See Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27695, 27698 (1997) (preamble to Part 1610, final rule).* Nonetheless, this situation will be one factor in the physical and financial separation analysis under §1610.8(a)(3). *Id.*

The APBP subgrant to ALSC for placement and handling of LSC permissible pro bono cases does not create a Part 1610 transfer or subsidy if APBP pays a fair market price for these services. A Part 1610 subsidy question would arise if APBP underpaid for these services.

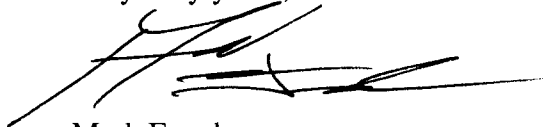
Section 1610.8(a)(3) specifies that physical and financial separation between an LSC recipient and a non-recipient engaging in restricted activities must be determined on case-by-case basis through review of the totality of the circumstances. As described above, ALSC and APBP would share an insurance policy and a non-attorney support staff employee. APBP will provide

an IOLTA subgrant to ALSC for handling LSC-permissible *pro bono* cases. ALSC will run its own PAI program. APBP will only handle cases that ALSC is prohibited from taking. In all these matters each entity will pay its fair share of the cost. A part-time attorney, who will not be an ALSC employee, will administer APBP. The combination of these factors demonstrates a close working relationship between the two organizations to provide a comprehensive *pro bono* program in Alaska. Nonetheless, as described, each organization is clearly operating separately and bearing its own costs. Furthermore, the two boards are no longer identical and APBP is described as maintaining physical separation from ALSC. Based on the information we have regarding these two programs, the totality of the circumstances does not appear to undermine physical and financial separation between the two entities. In order to maintain physical and financial separation, ALSC should continue to maintain a clear distinction between the two organizations as described in §1610.8(a)(3).


Please keep in mind that any transfer or subsidy from APBP to ALSC would contribute to the weight given to the arrangement in the §1610.8(a)(3) physical and financial separation analysis. This would occur if circumstances change and ALSC underpays for its share of the insurance, if the shared employee does work for ALSC that is paid for by, or uses the resources of, APBP, or if APBP overpays ALSC for work performed through the IOLTA subgrant.

I hope you find this information helpful. If we can be of any further assistance, please do not hesitate to contact us.

Very truly yours,



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