



OFFICE OF LEGAL AFFAIRS

## ADVISORY OPINION

Advisory Opinion # AO – 2009-1007

**SUBJ:** “Incubator Program” Attorneys Status as Staff Attorneys

**DATE:** November 25, 2009

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### *Questions Presented*

Whether a person who worked on the staff of a recipient in connection with an “incubator program” intended to provide training and introduction to legal practice in the low income community would be a “staff attorney” for the recipient?

Whether a recipient would be prohibited from providing compensation to an attorney after that person was no longer serving on the staff of that recipient and/or charging that payment against the recipient’s private attorney involvement spending requirement under 45 CFR Part 1614?

### *Brief Answers*

Any attorney participating in the “incubator program” who earns more than one half of his or her professional income from a recipient qualifies as a staff attorney.

A recipient could not make a payment to any attorney who qualified as a staff attorney for two years after the attorney was a staff attorney and charge that payment against the recipient’s private attorney involvement spending requirement under 45 CFR Part 1614.

### *Factual Background*

A recipient would like to collaborate with a nearby law school to create an “incubator” program to provide training and assistance to law school graduates to establish independent law practice geared toward serving the low income community. As envisioned, the participants who would serve three to four internships at the recipient. Some of the participants, it is anticipated, would already be licensed attorneys. These persons would be hired and paid as program attorneys on a temporary employment basis. Others, however, would be persons who had just graduated from law school. For these participants, it is presumed that they would have taken the July bar exam, but would not be likely to have their results or (for those who passed) have been admitted to the bar during the majority of the period of internship with the recipient. Instead these persons would be hired and paid on a temporary basis as paralegals and would be permitted to perform some legal services under the supervision of recipient staff under state practice rules applicable to law students and recent graduates.

Following the period of employment with the recipient, the participants could then have several additional months of internship gaining legal practice experience in a structured community service setting organized under the auspices of the law school. Following the period of internship through the incubator program, the attorneys would be expected to establish independent private practices providing legal services to low income persons in the community. During the second internship period, and later on an ongoing basis in the lawyer's independent private practice, the recipient would like to be able to refer eligible clients to those lawyers and to pay those attorneys in accordance with its private attorney involvement (PAI) plan (and count the funds expended towards its PAI spending requirement under 45 CFR Part 1614.<sup>1</sup>

This advisory opinion addresses the question as to whether the recipient would be permitted under LSC's private attorney involvement (PAI) regulation at 45 CFR Part 1614 to provide compensation to attorneys who had served in the incubator program and count those funds towards its PAI spending requirement.

### *Analysis*

Under the terms of the PAI regulation, "no PAI funds shall be committed for direct payments to any attorney who for any portion of the previous two years has been a staff attorney as defined in §1600.1 of these regulations . . ." 45 CFR §1614.1(e). Staff attorney is defined in Part 1600 as "an attorney more than one half of whose professional income is derived from the proceeds of a grant from the Legal Services Corporation or its received from a recipient, subrecipients, grantee, or contractor that limits its activities to providing legal assistance to clients eligible for assistance under the Act." 45 CFR §1600.1. LSC considers its basic field programs to be "recipient[s] organized solely for the provision of legal assistance to eligible clients under [the LSC Act]." LSC Office of Legal Affairs External Opinion EX-2003-1004. Accordingly, any attorney employed by such a program who receives more than one-half of his income from the program's funds – whether they are LSC funds or non-LSC funds – is considered to be a "staff attorney." *Id.*

The key to the analysis as to whether any or all of the participants in the incubator program would be "staff attorneys" is whether they would be receiving more than one half of their professional income from the recipient. This is a determination the recipient will have to make on an individualized basis for each attorney. As we understand the incubator program as envisioned, it appears likely that some participants would not be likely to receive more their one half of respective professional incomes from the recipient, while others could be more likely to do so.

The persons most likely to qualify as staff attorneys are those participants who are already licensed attorneys as those attorneys would be on the staff of the recipient for several

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<sup>1</sup> As we understand it, the recipient is only contemplating, for the purposes of the PAI spending requirement, payments made to incubator program participants in connection with cases referred to licensed attorneys after they are no longer serving as temporary employees of the recipient. The recipient is not seeking to count towards its PAI requirement any salary paid to incubator program participants during the time they are employed by the recipient.

months, and then receive additional income from the recipient during the remainder of the year while completing the incubator program year. In particular, there appear to be two likely scenarios under which a participating attorney could end up having received more than one half of his/her income from the recipient; (1) if the salary the attorney receives from the recipient from his/her months of temporary employment itself constitutes more than one half of the attorney's professional income for that year; or (2) if the salary the attorney from the recipient from his/her months of temporary employment does not itself constitute more than one half of the attorney's professional income, but when combined with additional payments from the recipient for referred cases during the second period of the incubator program, the total of income received by the attorney from the recipient constitutes more than one half of the attorney's professional income. For that matter, if after leaving the incubator program the attorney continued to receive more than one half of his/her professional income from the recipient through referred cases (that is, if the attorney's income from the remainder of his/her private practice did not constitute more than one half of his/her professional income), the attorney would continue to fall under the definition of "staff attorney."<sup>2</sup>

For participants who are recent law school graduates, although it is still possible that they could ultimately receive sufficient professional income from the recipient so as to qualify as "staff attorneys," it appears less likely. As with participants who came to the program already licensed, if the participant earned more than one half of his/her professional income for a year from the recipient, that person would be a "staff attorney." The difference in this situation, however, is that recent law school graduates are most likely not going to have passed the bar and been admitted to practice in the state during the period of employment with the recipient (or at least during the bulk of that period). Rather, these persons are anticipated to be hired as paralegals and rather than attorneys. To the extent that these persons are not "attorneys"<sup>3</sup> while working for the recipient the income during their internship period, the money they receive from the program does not count toward their professional income under the definition of staff attorney in part 1600. Thus, the likelihood that such a participant is going to earn more than one half of his/her professional income as an attorney for that year from the recipient is smaller than it is for someone who comes to the incubator program already licensed.

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<sup>2</sup> Conversely, if the attorney did not earn more than one half of his/her professional income from the recipient, but rather from other external sources, the attorney would not qualify as a staff attorney. However, it is important to keep in mind that the attorney would have to be receiving that income directly from other sources, and not funneled through the recipient. Thus, if the incubator program was structured that the incubator program itself was an entity that could employ the participants or another partner in the program were to pay the participants, it could be less likely that a participant would receive more than one half of her/her professional income from the recipient.

<sup>3</sup> The term "attorney" is defined in the regulation at 45 CFR Part 1600 as "any person who provides legal assistance to eligible clients and who is authorized to practice law in the jurisdiction where assistance is rendered." 45 CFR §1600.1. Under the state court rules applicable to the recipient, although a recent law school graduate (who has not otherwise passed the state bar and been admitted to practice) can engage in some legal assistance activities, the graduate must do so under the supervision of a licensed attorney who is responsible for the graduate's work. The rules specify that the graduate cannot hold him or herself out as admitted to practice and do not confer any authorization to practice law independently. Accordingly, we do not think that the otherwise unlicensed law school graduates who would be working under the supervision of recipient staff attorneys in the incubator program qualify as "attorneys" for the purpose of the definitions of "attorney" and "staff attorney" in Part 1600 or for the purpose of Part 1614.

It is important to keep in mind, however, that once the graduate passes the bar and is admitted to practice in the state, that person would be an attorney, so any professional income earned by that person from the recipient would have to be counted. For example, if a graduate was working an internship period from September through December at the recipient, was notified in November that s/he had passed the bar, and was subsequently admitted and sworn in in early December, that participant would be employed as a paralegal from September until such time as s/he was admitted and as an attorney for the remaining time. The participant's income as an attorney (from December of that year) would count toward the overall calculation of that person's professional income as an attorney from all sources for that year, but the income earned as a paralegal would not. Further, any income that graduate-now-attorney earned from the recipient after leaving the recipient's direct employ from referred cases (either while the now-attorney was still in the incubator program or after in private practice) would be counted.

Applying the analysis set forth above, for any participant in the incubator program, if the participant earned more than one half of his/her professional attorney income for a year from the recipient, that participant would be considered a "staff attorney" and the recipient would be prohibited under §1614.1(e) from counting payments provided to such an attorney for cases referred to that attorney after the attorney had left the employment of the recipient toward the recipient's PAI requirement during the two year "cooling off" period. It is important to note that the prohibition is not on making payments to former staff attorneys *per se*, it is on counting such funds toward the recipient's PAI spending requirement.<sup>4</sup> The recipient could refer cases and provide payment to a private attorney who was a former staff attorney through participation in the incubator program, but the recipient could not count those payments toward its PAI spending requirement. Conversely, for any participant in the incubator program, if the participant did not earn more than one half of his/her professional attorney income from the recipient, that participant would not be considered a "staff attorney" and the recipient would be permitted to count payments provided to such an attorney for cases referred to that attorney after the attorney had left the employment of the recipient towards the recipient's PAI spending requirement.



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<sup>4</sup> This point is made clear in the preamble to the final rule in which the prohibition was adopted:

It should be noted that paragraphs (d) and (e) of §1614.1 apply only for the limited purpose of determining whether funds given to a particular lawyer should be counted towards a recipient's PAI requirement. There are many circumstances in which it would be best to give a client's case to someone who had been a staff attorney. Accordingly, paragraphs (d) and (e) do not prohibit such a practice. They simply establish that fees given a private attorney who has recently been a staff attorney cannot be credited toward the PAI requirement