



OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2005-1004

To: Hadassa Santini Colberg, Esq.
Compliance Officer
Servicios Legales De Puerto Rico, Inc.
1859 Ave. Ponce de Leon, Pda. 26
Santurce, Puerto Rico 00909

Date: June 10, 2005

Subject: 1618 Compliance; 1604 Outside Practice of Law – Notary Service

Pursuant to the requirements of 45 CFR Part 1618, you asked this Office for an opinion on whether you are correctly interpreting the Corporation's regulations on the outside practice of law at 45 CFR Part 1604 prior to taking disciplinary action against an attorney on your staff for an alleged violation of Part 1604. Specifically, you ask whether a full-time attorney employed by your program who performed notarial services for private persons has violated the outside practice of law requirements of Part 1604.

Brief Answer

Yes, a full-time attorney employed by your program who performs notarial services in Puerto Rico for private persons has violated the outside practice of law requirements of Part 1604.

Background

We understand the facts to be as follows: An attorney employed full time with Servicios Legales De Puerto Rico's ("SLDPR"), provided civil law notarial services to over fifty persons who were not clients of SLDPR. In Puerto Rico, notarial services include services beyond those of notary publics in the United States. In Puerto Rico, a notary is:

a legal professional who practices a public function, authorized to attest and authenticate pursuant to the laws the juridical businesses and other acts and extrajudicial events executed before him, without prejudice of what is provided in the special laws. His function is to receive and interpret the will of the parties giving it a legal format, draft the notarial documents and deeds for such purpose and confer authority to them.

1987 Puerto Rico Notarial Act (Act No. 75), Section 2 (July 2, 1987)("Notarial Act"). The Notarial Act further explains that the Puerto Rican notary:

is not a lawyer for any one of the [parties to a transaction], nor does he represent any client whatsoever; he represents public faith, *he represents the law to all parties.*

1987 Puerto Rico Notarial Act (Act No. 75), Statement of Motives (July 2, 1987) (emphasis added).

To become a notary in Puerto Rico a person must be an attorney admitted to practice in Puerto Rico. 1987 Puerto Rico Notarial Act (Act No. 75), Section 7 (July 2, 1987). Authorization to practice as a notary is conferred by the Supreme Court of Puerto Rico. *Id.* As we understand it from the information you provided, notwithstanding the fact that the notary represents the transaction, rather than a particular party to the transaction, because the notary must be an attorney and because the notary is obligated to represent the law to all parties in the transactions, providing notarial services is considered the practice of law in Puerto Rico.¹

The SLDPR attorney provided the notarial services for a number of transactions outside of SLDPR premises on his own time. He was paid for his services in these transactions. He never requested authorization from the Director of SLDPR to provide notarial services in these transactions and no authorization was given by the SLDPR director. Nor was the SPDPR attorney acting pursuant to a court appointment. SLDPR believes his participation in these activities to be a violation of 45 C.F.R. Part 1604 and is prepared to take disciplinary action against him on that basis.

Analysis

Your interpretation of Part 1604 is correct. Generally, under the LSC Act and regulations, full-time attorneys employed by recipients are prohibited from engaging in the outside practice of law, subject to a few exceptions. Section 1007(a)(4) of the LSC Act states that:

The Corporation shall...insure that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from (A) any compensated outside practice of law and (B) any uncompensated outside practice of law except as authorized in guidelines promulgated by the Corporation.

This general prohibition is implemented in LSC's regulations at 45 CFR Part 1604. More specifically, 45 C.F.R. § 1604.3(b) provides that a recipient's outside practice of law policies may permit the outside practice of law by full-time attorneys only to the extent allowed by the LSC Act and [LSC's outside practice of law regulations]."

¹ See also Nicholas Karambelas, "Civil Law Notary: An office whose time has come?" *Washington Lawyer*, March 2005, 28, at 30 ("Because the civil law notary is an attorney, he or she can render legal services in connection with any transaction for which the civil notary is performing a notarial function.")

Section 1604.4(a) makes clear that a recipient's outside practice of law policies may only permit a full-time attorney to engage in the outside practice of law when the director of the recipient (or his/her designee) has determined the activity is consistent with the attorney's responsibilities to the recipient's clients. Section 1604.5 further specifies that a recipient's policies may not permit the *compensated* outside practice of law, except in very limited circumstances (which are not applicable to this case).²

The "outside practice of law" is defined in the regulation as "the provision of legal assistance to a client who is not entitled to receive legal assistance from the employer of the attorney rendering assistance...."45 C.F.R. § 1604.2(b). The determination of whether an activity constitutes the "outside practice of law" is fact-specific and must be made on a case-by-case basis. EX-2003-1003 (February 10, 2003). In making such determinations, LSC considers multiple factors including, but not limited to: the definition of the "practice of law" in the relevant jurisdiction; whether a non-lawyer could perform the work in question; whether the attorney, in performing the given activity, is holding herself out as a lawyer or by another title; how the attorney is paid (e.g. at an hourly attorney's rate or by a flat fee per service); and whether that attorney is working directly with clients or whether she is hired by a firm or company. *Id.* Among the factors used to assess whether a given activity amounts to the "outside practice of law," whether the activity in question is considered the "practice of law" in the given jurisdiction is perhaps the most important. *Id.*

In Puerto Rico, only attorneys may provide notarial services and authorization to provide such services is granted by the Supreme Court of Puerto Rico. In addition, although notaries do not represent individual parties to a transaction as advocates, they have professional responsibilities to all parties and perform services (such as drafting legal instruments and advising all parties as to the nature and the legal consequences of the instrument and transaction) otherwise performed by lawyers. We understand that notaries are hired and paid by private parties on an individual basis. Finally, and most importantly, we understand that the provision of notarial services is considered the practice of law in Puerto Rico. Accordingly, although notaries in Puerto Rico do not represent individual "clients" in the traditional way that term is used in the United States, it appears clear that notaries in Puerto Rico are attorneys providing legal assistance to the parties to the transaction in which they are providing services. As such, it does appear that attorneys providing notarial services in Puerto Rico are engaging in the practice of law.

Under the facts as we understand them, the SLDPR attorney appears to have violated Part 1604. By providing notarial services, he was providing legal assistance to persons who were not receiving legal assistance by SLDPR. Thus, he was engaged in the outside practice of law. By failing to seek and obtain authorization from SLDPR's

² Sections 1604.5 only allows a recipient to permit an attorney to engage in the compensated outside practice of law if the attorney is a new attorney with a professional responsibility to close ongoing cases (§ 1604.4(c)(i)). However, as we understand the facts, this condition does not apply.

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director before engaging in the outside practice of law, and by accepting compensation for performing notarial services he violated the general limitation set forth in §1604.3. Accordingly, SLDP may pursue whatever disciplinary actions as may be appropriate under its applicable employment policies and bargaining agreements, if any.

Very truly yours,



Mattie C. Condray
Senior Assistant General Counsel
Office of Legal Affairs



Victor M. Fortuno
General Counsel
Office of Legal Affairs

mcondray@lsc.gov
(202) 295-1624