



OFFICE OF LEGAL AFFAIRS  
EXTERNAL OPINION

External Opinion # EX-2003-1009

**To:** Legal Services of New York City, South Brooklyn Legal Services,  
Farmworker Legal Services of New York, c/o The Brennan Center.

**Date:** June 24, 2003

**Subject:** Part 1610 Program Integrity Configuration Proposal

---

ISSUES PRESENTED

Would the arrangement set forth in the April 25, 2003, "Configuration Proposal" from the Brennan Center, as clarified by the May 23, 2003, supplemental proposal, establish sufficient Part 1610 program integrity between an LSC grantee and a proposed affiliated entity engaged in LSC restricted activities?

SUMMARY

The Configuration Proposal, as clarified, does not meet the LSC program integrity standards under 45 CFR Part 1610. As described, none of the grantees would be physically and financially separate from its respective affiliate and therefore would not meet the program integrity requirements of the regulation.

FACTS

On April 25, 2003, the Brennan Center submitted, *inter alia*, a "Configuration Proposal" to the United States District Court for the Eastern District of New York regarding possible affiliation between certain LSC grantees and other entities engaged in LSC restricted activities. While the Proposal was not directed to LSC, it was copied to LSC's attorneys and was apparently meant as a submission for LSC's evaluation. Accordingly, the LSC Office of Legal Affairs issued External Opinion 2003-1008 (May 8, 2003) responding to the proposal. On May 9, 2003, counsel for LSC submitted a letter to the Court responding to the Brennan Center's April 25, 2003, submission to the Court, including EX-2003-1008 as an attachment and that opinion was posted to the LSC website. On May 22, 2003, the Brennan Center provided to the court a clarification of its April 23, 2003, Configuration Proposal. Again, while the clarification was not directly submitted to LSC it is apparently meant as a submission for LSC's further evaluation.

The original four-page proposal and the five-page clarification are attached and incorporated into this opinion.<sup>1</sup> In brief, the proposal is from LSNY, its subgrantee South Brooklyn Legal Services, and Farmworker Legal Services of New York, a former LSC grantee that apparently would re-apply for LSC funding if it could set up an affiliate as described therein. The proposal states that each of those three organizations “proposes to establish a legally separate Corporation ... in accordance with the laws of the State of New York.” The proposal then describes how the relationships between the LSC grantees and the non-LSC entities would be structured including many areas of overlapping staff, equipment, offices, governing bodies, etc.

## ANALYSIS

### Part 1610 Program Integrity Regulation

Section 1610.8(a) of the LSC regulations requires recipients to have “objective integrity and independence from any organization that engages in restricted activities.” The regulation specifies three separate factors, each of which must be met, for a recipient to be determined to have objective integrity and independence from such an organization.<sup>2</sup> First, the organizations must be legally separate entities. 45 CFR §1610.8(a)(1). Generally, this factor is simple to satisfy if the two organizations are legally created independent corporations, although the separation must be more than a legal fiction. Second, there can be no transfer of LSC funds from the recipient to the other organization and LSC funds cannot subsidize restricted activities. 45 CFR §1610.8(a)(2). For the purposes of Part 1610, a “subsidy” is

a payment of LSC funds to support, in whole or part, a restricted activity conducted by another entity, or a payment to another entity to cover overhead, in whole or in part, relating to a restricted activity. A recipient will be considered to be subsidizing the restricted activities of another organization if it provides the use of its LSC-funded resources to the organization without receiving a “fair-market price” for such use.

62 Fed. Reg. 27695, 27698 (May 21, 1997) (preamble to final rule).

---

<sup>1</sup> For the purposes of this opinion, the original proposal and the clarification shall be considered together and referred to as “the proposal.” References to specific paragraphs are to the paragraphs in the original proposal, with any clarifying information from the May 22 submission treated as an amendment of, or addition to, the original paragraph.

<sup>2</sup> Part 1610, it should be noted, does not affirmatively require grantees to establish or maintain separate organizations. Rather, it sets forth the parameters which grantees must abide by in their dealings with organizations that engage in restricted activities, including, but not restricted to, situations in which grantees choose to use their non-LSC funds to help establish or maintain such organizations. Grantees are always free to refrain from providing funds to, or otherwise working with, such organizations.

Finally, the organizations must be physically and financially separate. 45 CFR §1610.8(a)(3). Physical and financial separation is characterized by a variety of indicia, including but not limited to:

- (1) the existence of separate personnel;
- (2) the existence of separate accounting records;
- (3) the degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
- (4) the extent to which signs and other forms of identification which distinguish the recipient from the other organization are present.

Physical and financial separation is the most nuanced and complex of the three factors required by the regulation. Whether physical and financial separation exists is determined on a case-by-case basis, considering the totality of the circumstances. Individual factors present in one situation might be acceptable in the context of the overall relationship between the entities, although they might be unacceptable in another situation in which other factors weigh more heavily against a finding of sufficient separation. Each factor weighs for or against separation. Some factors are heavy, some are light. It is the total weight of all the factors together that LSC looks at in determining the strength of the grantee's physical and financial separation from the other entity. However, in all situations the separation between the organizations must be clear to clients, courts, agencies and others with whom the recipient comes into contact, and to the general public.

It is also important to note that the financial separation requirement is distinct from the non-subsidization requirement. While bookkeeping can provide evidence of a lack of subsidization, the regulation explicitly states that mere bookkeeping separation is insufficient to meet the physical and financial separation requirement. Taken together, the recipient and the other organization engaged in LSC restricted activities must operate as two separate entities (that may collaborate) and cannot operate as essentially one entity with administrative separation on paper. In addition to Part 1610, LSC has issued a program letter on October 30, 1997, with "Guidance in Applying the Program Integrity Standards" (attached to EX-2003-1008 and available at [www.lsc.gov](http://www.lsc.gov)) as well as numerous OLA program integrity opinions responding to questions from LSC grantees.

Actual Part 1610 compliance, as with most regulatory requirements, cannot be determined in advance. Even the best laid plans to ensure program integrity are dependant on implementation. LSC's advance evaluations can only say if the described situation, independent of any other factors not mentioned, would comply with Part 1610 if implemented as described.

#### Proposal of April 25, 2003, as Clarified by the May 22, 2003, Supplemental Proposal

##### *Legal Separation of Organizations*

The proposal states that the respective affiliate organizations would be legally separate corporations, each with its own articles of incorporation and bylaws, established in accordance

with the laws of the State of New York. In addition, the proposal states that the “membership of the boards of directors of the LSC and non-LSC affiliates will be coextensive at the outset, but this may change over time” and that the boards will meet separately and keep separate records. Part 1610 permits the overlap of governing Boards between recipients and other entities engaged in restricted activities. As stated in the preamble to the final rule, “because the standards will allow control at the Board level, recipients will have an avenue through which to engage in restricted activities as long as they comply with the program integrity standards.” 62 Fed. Reg. 27695, 27697 (May 21, 1997). In this situation, it would appear that the first factor, legal separation, would be met.<sup>3</sup>

### *Transfer and Subsidization*

Paragraphs 4 (Non-subsidization), 5 (Timekeeping), 7 (Equipment), 8 (Physical Premises), 9 (Time) and 10 (Intake) of the proposal implicate transfer and subsidization issues. As discussed above, Part 1610 prohibits a recipient from transferring LSC funds to an entity engaging in restricted activities or subsidizing restricted activities.<sup>4</sup> The proposal specifically states that there will be no transfer of LSC funds to the non-LSC entities. With respect to subsidization, a subsidy can occur if the non-LSC entity uses LSC funds or LSC-funded resources without paying the LSC grantee “fair-market value” for them. The cost-sharing goals in these specific paragraphs are consistent with the non-subsidization requirement of the regulation.<sup>5</sup>

---

<sup>3</sup> We note, however, that while a large degree of board overlap and control is allowed, the entities must continue to be legally separate. One indication of the failure of the legally separate entity requirement would be a piercing of the corporate veil such as if an LSC grantee so thoroughly controlled another entity that the grantee would be liable for the actions of the other entity. Further evaluation might be appropriate if LSNY or the other grantees plan to use LSNY’s “sole member membership corporation” model with an organization that engages in restricted activities.

<sup>4</sup> A transfer of LSC funds from an LSC grantee to another entity would cause the other entity to be subject to LSC restrictions. 45 CFR §1610.7. The only exception to this rule is for transfers of LSC funds for private attorney involvement activities pursuant to 45 CFR Part 1614. *Id.* at §1610.7(c).

<sup>5</sup> We caution, however, that to demonstrate compliance with Part 1610 in practice, the LSC grantee should be able to show that no LSC funded resources have, in fact, been used or are being used for restricted activities. For example, the proposed shared intake system must clearly be apportioned in a way that ensures that the LSC grantee is not providing intake services for non-grantee restricted activities. We remain concerned that the proposal confuses LSC’s lobbying restriction, timekeeping and cost accounting rules with Part 1610 requirements. As we noted in EX-2003-1008, LSC’s Cost Standards and Procedures regulations at 45 CFR Part 1630, while providing useful information on cost allocations standards for LSC funds, do not constitute an “approval” of any specific accounting procedures. For example, in order to assess 1610 compliance, information on how the affiliate organizations will apportion value for expenses would be useful. While certain expenses can be tracked with relative ease (such as use of fax machines, phones, copiers, etc.) other expenses may be harder to apportion (such as utilities, website costs, etc.), particularly to the extent that the organizations expect to share equipment and facilities. The proposal does not discuss how it is intended that those apportionments be made; merely documenting what apportionments are, in fact, made, is not a guarantor that those apportionments are reasonable to avoid subsidization. Thus, while the requirements of the Corporation’s cost accounting, timekeeping and lobbying restriction regulations may be helpful in determining program integrity, Part 1610 may require additional documentation beyond the requirements of these LSC regulations.

*Physical and Financial Separation*

Paragraphs 2 (Names), 5 (Timekeeping), 6 (Signage), 7 (Equipment), 8 (Physical Premises), 9 (Time) and 10 (Intake) of the proposal implicate physical and financial separation issues.<sup>6</sup> As noted above, the physical and financial separation analysis is a fact-specific, totality of the circumstances analysis that requires consideration of all of the different indicia of separation (the most important of which are identified in the regulation, as discussed above), taken together. On the basis of the information provided, the proposal does not meet the physical and financial separation standard, for many of the same reasons the 1997 Queens Legal Services situation was rejected.<sup>7</sup>

For the purpose of understanding which aspects of the proposal indicate a lack of physical and financial separation, the specific aspects of the proposal touching on physical and financial separation are discussed in greater detail below. The overall conclusion regarding the physical and financial separation analysis does not hinge on any single factor; rather the entire situation is considered as a whole.

Paragraph 2 (Names) provides proposed names for each of the non-LSC grantee affiliates which are intended to convey the respective affiliate's "separate legal, financial and programmatic status."

<u>LSC Grantee</u>	<u>Non-LSC Affiliate</u>
Legal Services for New York City	New York City Justice Center
South Brooklyn Legal Services	South Brooklyn Justice Center
Farmworker Legal Services of New York	Farmworker Justice Center

The names proposed are indicative of separate legal, financial and programmatic status and are sufficiently likely to convey that status to clients, courts, agencies, the public and others with whom the grantees and the affiliates would be dealing. In particular, each grantee has a "legal services" name while the non-LSC affiliates would all be "Justice Centers." This is exemplified in the disclaimer example on page four of the May 22, 2003, clarification letter: the LSC grantee is referred to as "SBLS" while the non-LSC affiliate is referred to as the "Justice Center."

---

<sup>6</sup> In EX-2003-1008 we placed the discussion of boards in the section of the Opinion on physical and financial separation. The issue of board overlap and control properly belongs in the legally separate entity section. Consequently, the discussion of Paragraph 3 of the proposal has been moved to the legally separate entity section of this Opinion.

<sup>7</sup> On August 12, 1997, LSNY asked for LSC's Part 1610 evaluation of a proposed affiliation between its subgrantee Queens Legal Services Corporation and a non-LSC program. John Tull, Director of the LSC Office of Program Operations, informed LSNY by letter on September 10, 1997, that the proposal did not meet the requirements of Part 1610.

Paragraph 5 (Timekeeping). The proposal implies, but does not explicitly state, that each organization will require its own legal employees to keep detailed time records of work performed.<sup>8</sup> Assuming that this is the case, this would be indicative of physical and financial separation.

Paragraph 6 (Signage), addresses signage and disclaimers the grantees and affiliates would plan to use to demonstrate the separate identities of the respective organizations. As described the signage and disclaimers would appear to indicate physical and financial separation. However, to the extent that the organizations plan to share all physical premises, equipment and staff, they would need extensive signage and other indicia of separateness to address the obvious perception that the respective organizations are not, in any but a superficial way, physically and financially separate.<sup>9</sup>

Paragraph 7 (Equipment) states that the “affiliates will share equipment, such as telephone lines, computers, case management systems, libraries, legal research facilities, office furnishings, printers, fax machines, and web sites.” As described, each grantee would essentially share one infrastructure with a non-LSC affiliate. This clearly indicates a lack of physical and financial separation. Although Part 1610 allows for organizations to share some equipment, such

---

<sup>8</sup> The ambiguity in this case is due to the language of the proposal that provides that employees will maintain time records/personnel activity reports, but does not specify which organization will be responsible for collecting the records and enforcing the recordkeeping requirements. For the purpose of this opinion we are assuming that the grantees intended to respond to our specific comment on this issue and that each organization will have and enforce recordkeeping requirements for its respective employees. If this is not the case, however, and the grantee is to have the responsibility for maintaining all time records/personnel activity reports, this would be indicative of a lack of physical and financial separation and might raise a subsidy issue as well.

<sup>9</sup> With respect to the specific language of the disclaimer, we are somewhat concerned that the proposed sentence “Congress has refused to allow LSC funds to be used to finance the work of the Justice Center” is potentially confusing because it focuses on Congress’ directive rather than how that directive is implemented by the grantee. Congress has no direct involvement with the proposed Justice Center. Rather, the disclaimer must make clear that the LSC recipient is not associated with any restricted activities. To the extent that the proposal is looking to the disclaimer language used by other grantees (footnote nine on page four of the May 22 clarification references the disclaimer on the Lane County Legal Services website), we would suggest that the Lane County website contains an even clearer statement of distinction as indicated here:

Lane County Legal Aid Service and Lane County Law and Advocacy Center  
are separate, independent non-profit corporations.

Senior Law Service is part of Lane County Law and Advocacy Center.

Lane County Legal Aid Service is funded by the Legal Services Corporation. Use of these funds is restricted. **Legal Aid does not engage in nor provide support for any restricted activities.**

Legal Aid and the Advocacy Center cooperate to serve the legal needs of low-income persons in Lane County.

<http://www.lanecountylegalservices.org/> (June 12, 2003) (emphasis added). Statements along these lines would be preferable to the formulation contained in the proposal.

as a copier and a library, a complete sharing of *all* office property, including telephones, furniture, case management systems, etc., would be a heavy indicia of a lack of physical separation. Although the proposal notes that the costs of the equipment is intended to be apportioned, that aspect speaks only to subsidization, but not to physical and financial separation. As the regulation states, “[m]ere bookkeeping separation of LSC funds from other funds is not sufficient.”

Paragraph 8 (Physical Premises) proposes that each grantee and its affiliate would operate in one physical location with no physical separation beyond that degree of physical separation required of other non-profit federal grantees by Presidential Executive Order No. 13279.” However, Executive Order No. 13279 does not apply to the Legal Services Corporation, nor its grantees. The E.O. expressly applies to “agencies that administer social service programs supported with Federal financial assistance.” Section 2. For the purpose of the E.O., “agency” is defined as “a department of agency in the executive branch.” Section 1(d). Under the Corporation’s organic legislation, LSC “shall not be considered a department, agency, or instrumentality of the Federal Government.” 42 U.S.C. §2996d. Furthermore, the LSC program is not a “social service program” covered by the E.O. *See* Section 1(b) for a list of programs included within the ambit of the E.O.

Rather, LSC is bound to apply, and grantees are bound to comply with, the physical and financial separation standards of Part 1610. As with the situation of equipment, the proposal describes each grantee and its affiliate as having essentially one infrastructure. The fact that the costs of the space would be shared speaks only to subsidization but not to physical and financial separation (mere bookkeeping separation is not enough). Allowing for the two entities to operate entirely out of one physical location without any physical separation between their respective offices would directly violate the Part 1610 requirement that they have physical and financial separation.

Paragraph 9 (Employee time) states that the two affiliates “propose to share all legal support and supervisory personnel (including an Executive Director, who will direct both programs).” As with other indicia discussed herein, relative staff composition is viewed in the overall context of the relationship. Although it may be consistent with Part 1610 for affiliate organizations to share *some* personnel, a 100% overlapping staff weighs heavily against true physical and financial separation. As described in the October 30, 1997 Program Letter:

There is no *per se* bar against a recipient employing part-time staff who are also employed part-time by an organization which engages in restricted activity. Generally speaking, however, the more staff ‘shared,’ or the greater the responsibilities of the staff who are employed by both organizations, the more danger that program integrity will be compromised. Sharing an executive director, for example, inappropriately tends to blur the organizational lines between the entities. Likewise, sharing a substantial number of recipient staff calls the recipients separateness into question.

“Program Integrity Guidance” at 3, attachment to October 30, 1997, LSC Program Letter “Certification of Program Integrity” attached to EX-2003-1008 and available at [www.lsc.gov](http://www.lsc.gov). In order to best demonstrate separation, the two organizations could clearly track and allocate the time and activities of all staff and volunteers.

The pledge that “no personnel will engage in LSC-funded activities while working in the capacity as an employee of a non-LSC grantee affiliate” does not ameliorate the problem that by having completely overlapping staffs, each grantee and its affiliate appear to be essentially one organization. In the same way that apportioning costs for overhead and equipment speaks only to the issue of subsidization and not to physical and financial separation, the fact that employees “on the clock” for the grantee would not be doing any work for the affiliate, and vice versa, serves only to prevent potential subsidization and is not sufficient to demonstrate physical and financial separation of the organizations.

Paragraph 10 (Intake) states that “the respective affiliates propose to share a common intake and allocation mechanism to refer clients and cases between the affiliates.” As the point of entry for clients, a shared intake mechanism must clearly differentiate between the two entities. The only description of how the intake system will work is a statement that the disclaimers described in the proposal will be provided to applicants for service and clients. By itself this does very little to give the clients a clear experience of being directed to one of two separate organizations rather than merely being routed within one entity. Considering the extensive degree of integration otherwise being proposed between the organizations, the shared intake system, absent more detailed procedures to distinguish the two affiliates, would only serve to reinforce the experience of the affiliates as essentially one entity with administrative separation on paper.

## CONCLUSION

As noted above, there are three separate factors which must each be met in order for a grantee to have “objective integrity and independence from any organization that engages in restricted activities.” As described, the proposal appears to meet the first two factors concerning legal separation of the entities and avoidance of any transfer of LSC funds or subsidization of restricted activities. However, the proposal fails to meet the final factor – physical and financial separation. Although certain elements of the proposal indicate such separation, other critical elements, in particular the proposed 100% sharing of physical space, equipment, and staffs, demonstrate that the proposal as a whole fails to provide physical and financial separation. On balance, the proposal presents a scenario in which although there may be separate signs, business cards, and other means of identification, the affiliated organizations would be so completely intertwined that they would in fact operate as one. The separation requirement clearly is not met. As such, notwithstanding the proposed signage, disclaimers, etc., identification of the recipient with the affiliate’s restricted activities would be inevitable. As stated in response to the 1997 Queens situation “[w]hat amounts to little more than bookkeeping separation between the organizations is insufficient to avoid the public perception that restricted activities are being conducted by [the recipient] staff out of [the recipient] offices.” Part 1610 requires that an LSC grantee “maintain objective integrity and independence from any organization that engages in



June 24, 2003

Page 9

restricted activities.” While the amended proposal could meet the requirements of legally separate entities, no transfer of LSC funds, and no subsidization of restricted activities with LSC funds, it fails to provide for sufficient physical and financial separation between the two organizations.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Victor M. Fortuno", written in a cursive style.

Victor M. Fortuno  
General Counsel

Attachments: April 25, 2003 Configuration Proposal  
May 22, 2003 Clarification

EX-2003-1009 Attachment #1  
April 25, 2003, Configuration Proposal

**Configuration Proposal**

Each grantee-plaintiff<sup>1</sup> submits for review by the Legal Services Corporation ("LSC") the following proposal designed to satisfy LSC's program integrity regulations, while respecting the First Amendment protection afforded to grantees and donors to utilize their non-LSC funds free from "undue burdens" imposed by the government.

1. **Legal separation:** Each grantee-plaintiff (the "LSC grantee affiliates") seeks permission to establish a legally separate, separately incorporated affiliate (occasionally referred to in this memorandum as the "non-LSC grantee affiliate") to receive and administer funds received from sources other than LSC. The non-LSC grantee affiliate will be authorized to provide all forms of legal representation to clients consistent with its mission. The LSC grantee affiliate will restrict its activities to forms of representation permitted by the LSC Act and LSC appropriations bills.
2. **Easily distinguishable names:** The non-LSC grantee affiliate will be named in a manner that conveys its separate legal, financial and programmatic status.
3. **Separate Boards of Directors:** The two affiliates will maintain separate governing structures, including separate Boards of Directors. The membership of the non-LSC grantee affiliate Board of Directors may consist of some or all of the persons who sit on the LSC grantee Board of Directors.
4. **Non-subsidization:** The two affiliates will ensure that LSC funds do not subsidize activities that the LSC Act or LSC appropriations bills bar LSC from funding. The actual economic cost of all other activities will be borne by the non-LSC grantee affiliate, unless LSC explicitly permits the LSC grantee to use non-LSC funds for those purposes. The two affiliates will adopt and utilize accounting procedures to ensure that each affiliate bears a fair and accurate proportionate share of all fixed and variable expenses incurred during the joint operation of the affiliates.

The accounting procedures that both affiliates will follow to ensure

---

<sup>1</sup>The phrase "grantee plaintiffs" includes the current grantees Legal Services for New York City and South Brooklyn Legal Services, each of which receives support from LSC, as well as substantial support from private and other government donors. The phrase "grantee plaintiffs" also includes the former grantee Farmworker Legal Services of New York, which now receives all of its support from private and other government donors, and which submits this proposal with the understanding that, if it is approved, or if the Court rules that LSC must permit the operation of this configuration, it will be eligible to re-apply for LSC funding.

that LSC funds do not subsidize activities that the LSC Act or LSC appropriations bills bar LSC from funding will include the following established procedures:<sup>2</sup>

- a) All procedures that the LSC grantee plaintiffs currently utilize to satisfy LSC's accounting regulation, which requires LSC grantees to ensure that "[n]o funds made available by the Corporation shall be used to pay for administrative overhead or related costs associated with" certain specified activities. 45 C.F.R. § 1612.10.
  - b) All procedures that the LSC grantee plaintiffs currently utilize to satisfy LSC's cost allocation regulation, which permits LSC grant recipients to allocate costs to their LSC grant only if they can demonstrate that the cost is "[i]n compliance with" the appropriations and LSC Act restrictions on grantee activities, and only if the costs benefit the grant. 45 C.F.R. § 1630.3(a)(4), (c).
5. **Employee timekeeping measures:** All legal personnel employed by either affiliate and spending any time on LSC-funded activities will maintain time records of their activities to ensure that accurate summaries of their activities are readily available in order to ensure that LSC funds are not expended for activities that the LSC Act or LSC appropriations bills bar LSC from funding. The records will be sufficient to satisfy LSC's timekeeping regulation, which requires that "[t]ime records must be created contemporaneously and account for time by date and in increments not greater than one-quarter of an hour which comprise all of the efforts of the attorneys and paralegals for which compensation is paid by the recipient." 45 C.F.R. § 1635.3(b). In accordance with LSC regulations, for accounting purposes employee time may be allocated based on personnel activity reports, which are prepared monthly, and which contain a reasonable, after-the-fact estimate of the distribution of the activities of each compensated employee whose time is charged directly to an LSC grant. 45 C.F.R. § 1630.3(d).

---

<sup>2</sup> LSC has already found these procedures to be adequate to ensure that LSC funds are not used to pay for certain non-LSC funded activities that are currently performed in the same offices and with the same personnel as are utilized to perform LSC-funded activities. See 62 Fed. Reg. 68219, 68221-68222 (Dec. 31, 1997) (acknowledging that the procedures mandated by the cost allocation regulation permit LSC grantees to account for both direct costs, such as attorney time, and indirect costs, such as a proportion of the cost of renting space used to serve clients under the LSC grant, so as to ensure that the LSC grant is charged for only those activities attributable to it); 45 C.F.R. § 1612.10 (requiring LSC grantees to use accounting procedures adequate to ensure that "[n]o funds made available by the Corporation shall be used to pay for administrative overhead or related costs associated with" certain specified activities).

6. **Signage and Disclaimers:** The two affiliates will ensure that clients, judges, government officials and the general public are informed that the affiliates are separate, independent non-profit corporations, and that LSC neither endorses nor funds any of the activities of the non-LSC grantee affiliate. Notification will include the prominent display of the separate names of the affiliates, including separate letterheads, business cards, and litigation backs. It will also include prominently displayed signage on the front doors, in the waiting areas, in conference rooms, and in attorney offices explaining that the affiliates are separate, independent non-profit corporations, and that LSC neither endorses nor funds any activities of the non-LSC grantee affiliate. A written explanation will be made available to all persons entering the premises of the program explaining that the affiliates are separate, independent non-profit corporations, and that LSC neither endorses nor funds any activities of the non-LSC grantee affiliate. Letters will be filed with courts, agencies and government officials that routinely come into contact with either affiliate explaining that the affiliates are separate, independent non-profit corporations, and that LSC neither endorses nor funds any activities of the non-LSC grantee affiliate. Contacts with the media will specify whether the activity in question is funded by LSC, and will explain the affiliates are separate, independent non-profit corporations, and that LSC neither endorses nor funds any activities of the non-LSC grantee affiliate.
7. **Equipment:** The two affiliates will share equipment, such as telephone lines, computers, case management systems, libraries, legal research facilities, office furnishings, printers, fax machines, and web sites. Each affiliate will bear its fair and accurate share of the costs attributed to any shared equipment, pursuant to the accounting procedures described in paragraph 4. Notices and disclaimers will be displayed making it clear that the non-LSC grantee affiliate is not expending LSC funds in connection with activities that the LSC Act or LSC appropriations bills bar LSC from funding, pursuant to the signage and disclaimer measures described in paragraph 6.
8. **Physical premises:** The two affiliates may operate in the same physical premises. The affiliates will utilize the accounting measures described in paragraph 4 above to allocate the cost of rental or ownership between the two affiliates in a fair and accurate manner that reflects usage.
9. **Employee time:** The two affiliates may share legal, support and supervisory personnel (including an Executive Director, who may direct both programs), who may work part-time for each affiliate. Pursuant to the accounting procedures described in paragraph 4, and the time records described in paragraph 5, the cost of personnel will be allocated between the LSC grantee affiliate and the non-LSC grantee affiliate in strict compliance with the nature of the activities undertaken. No activity that the LSC appropriations bills bar LSC grantees from performing

will be allocated to the LSC grantee. No employee may engage in activities barred by the LSC restrictions during time paid for with LSC funding.

10. **Intake:** The two affiliates may share a common intake and allocation mechanism to refer clients and cases between the two affiliates at the commencement of any representation, and as the representation proceeds. The affiliates will ensure that the LSC grantee does not bear more than its fair share of the intake and allocation mechanism in accordance with usage.

**EX-2003-1009 Attachment #2**  
**May 22, 2003, Clarification of Configuration Proposal**

**APPENDIX A**

**Clarification of April 25, 2003 Proposal**

May 22, 2003

The grantee-plaintiffs<sup>1</sup> each submit this document to clarify their April 25, 2003 Configuration Proposal in response to questions raised by the Legal Services Corporation ("LSC") in its May 9, 2003 letter to the Court.<sup>2</sup> Each of the grantee-plaintiffs desires authorization from LSC to operate affiliate organizations pursuant to their April 25, 2003 proposal as clarified herein:

1. **Legal separation** — Each of the grantee-plaintiffs (also referred to as "LSC grantee affiliates") proposes to establish a legally separate corporation (the "non-LSC grantee affiliate") with its own articles of incorporation and bylaws, in accordance with the laws of the State of New York.
2. **Easily distinguishable names** — The LSC grantee affiliates propose, at this time, to use the following names for each respective non-LSC grantee affiliate:<sup>3</sup>

LSC grantee affiliate  
 Legal Services for New York City  
 South Brooklyn Legal Services  
 Farmworker Legal Services of  
 New York

Non-LSC grantee affiliate  
 New York City Justice Center  
 South Brooklyn Justice Center  
 Farmworker Justice Center

3. **Separate boards of directors** — The boards of directors of the LSC grantee affiliates, and of the non-LSC grantee affiliates, will be separate: a) the boards of the respective LSC and non-LSC affiliates will meet separately and maintain separate records; and b) the membership of the boards of directors of the LSC and non-LSC affiliates will be

---

<sup>1</sup> The phrase "grantee-plaintiffs" refers to Legal Services for New York City ("LSNY"), South Brooklyn Legal Services, and Farmworker Legal Services of New York.

<sup>2</sup> As instructed by the Court, the grantee-plaintiffs each submitted their Configuration Proposal for review by LSC on April 25, 2003. See Ltr. from Burt Neuborne to the Hon. Frederic Block, U.S.D.J., dated April 25, 2003. Two weeks later, LSC rejected the grantee-plaintiffs' Configuration Proposal. See Ltr. from Stephen Ascher to the Hon. Frederic Block, U.S.D.J., dated May 9, 2003 (attaching LSC External Opinion # EX-2003-1008, LSC Office of Legal Affairs, dated May 8, 2003).

<sup>3</sup> The plaintiff-grantees are willing to confer with LSC, at its request, on the exact names of each non-LSC grantee affiliate.

coextensive at the outset,<sup>4</sup> but this may change over time depending on various factors. Moreover, plaintiff-grantee LSNY would prefer to operate through an affiliate structure in which LSNY would possess authority to determine the composition of the board of the New York City Justice Center.

4. **No subsidy** — No LSC grantee affiliate will transfer any LSC funds to a non-LSC grantee affiliate.<sup>5</sup> Affiliated organizations will apportion fair value for expenses in accordance with generally accepted accounting principles and the requirements of the LSC Accounting Guide for LSC recipients, the LSC Office of Inspector General Audit Guide for Recipients and Auditors, and LSC regulation 45 C.F.R. § 1630, Cost Standards and Procedures, which provides “uniform standards for allowability of costs” charged to LSC grants, including both direct costs (e.g., salaries) and indirect costs (e.g., utilities and other forms of overhead costs). In particular, affiliated organizations will allocate indirect costs pursuant to 45 C.F.R. § 1630.3(f), which governs the allocation of indirect costs by LSC grantees, and by separately identifying the total costs for restricted activities and treating these costs as disallowed costs pursuant to 45 C.F.R. § 1630.2(d).<sup>6</sup>
5. **Employee timekeeping measures** — Any employee in the category of “legal personnel” who is employed part-time by an LSC grantee affiliate and by a non-LSC grantee affiliate, will maintain detailed time records for the work performed for each affiliate. These records will comply with LSC’s timekeeping regulation, 45 C.F.R § 1635, including the requirement that an LSC grantee:

shall require any attorney or paralegal who works part-time for the recipient and part-time for an organization that engages in restricted activities to certify in writing that the

---

<sup>4</sup> LSC’s program integrity regulation expressly permits an LSC grantee to control the activities of its non-LSC grantee affiliate through such overlapping board membership, as is required by the First Amendment. *See Legal Aid Soc’y of Haw. v. Legal Servs. Corp.*, 981 F. Supp. 1288, 1297 (D. Haw. 1997); *Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity*, 62 Fed. Reg. 27695, 27697 (May 21, 1997) (codified at 45 C.F.R. § 1610) (stating that “because the [LSC program integrity] standards will allow control at the Board level, recipients will have an avenue through which to engage in restricted activities”); LSC, *Guidance in Applying the Program Integrity Standards*, attached to LSC External Opinion # EX-2003-1008 (“A recipient may have the same or overlapping Board of Directors as another organization which engages in restricted activity.”).

<sup>5</sup> *See* LSC External Opinion at 8 (requesting explicit statement concerning no transfer of LSC funds).

<sup>6</sup> *See* LSC External Opinion at 9 (requesting “some sense” of how apportionments will be made).

attorney or paralegal has not engaged in restricted activity during any time for which the attorney or paralegal was compensated by the recipient or has not used recipient resources for restricted activities. The certification requirement does not apply to a *de minimis* action related to a restricted activity.

45 C.F.R. § 1635.3(d).

Additionally, any employee in the category of "non-legal personnel" (i.e., support personnel) who is employed part-time by an LSC grantee affiliate and by a non-LSC grantee affiliate, will maintain personnel activity reports, pursuant to LSC regulation 45 C.F.R. § 1630.3(d), for work performed for each affiliate. The regulation, which provides standards governing allowability of costs under LSC grants or contracts, incorporates the detailed guidance about personnel activity reports contained in Office of Management and Budget ("OMB") Circular A-122, Cost Principles for Non-Profit Organizations, Attachment B, para. 6(l)(2) (Aug. 29, 1997), a copy of which is attached hereto as Ex. 1.<sup>7</sup>

No legal personnel, and no non-legal personnel, will engage in any LSC-funded activities while working as an employee of a non-LSC grantee affiliate.<sup>8</sup>

6. **Signage and disclaimers** — A "disclaimer" will be provided in writing individually to all clients, prospective clients, opposing attorneys and other visitors entering the premises of the LSC grantee affiliate and of the non-LSC grantee affiliate. The disclaimer will also be provided in writing individually to all clients and prospective clients who otherwise meet in-person with an employee of an affiliate. The written disclaimer will be printed on an 8.5 x 11 inch sheet of paper in 12-point type. It will also be published on web sites maintained by the affiliates, and in the places and manners described in paragraph six of the grantee-plaintiffs' April 25, 2003 proposal.

---

<sup>7</sup> LSC itself has determined that these timekeeping and cost allocation rules are adequate to ensure that no LSC funds are spent to directly or indirectly subsidize certain privately funded activities, such as lobbying a state legislature for increased legal services funding, that LSC grantees are permitted to conduct in the same offices and with the same employees as they conduct their LSC-funded activities. See Ltr. from Burt Neuborne to the Hon. Frederic Block, U.S.D.J., dated April 25, 2003, at 5-6 & nn.12, 13.

<sup>8</sup> This point responds to LSC's stated concern that "[i]f any personnel of the non-LSC affiliate engage in LSC-funded activities then the non-LSC affiliate is subject to LSC restrictions." See LSC External Opinion at 4 n.3. In fact, performance of work in such circumstances would seem to have the opposite effect, as it would constitute a subsidy of the LSC grantee by the non-LSC affiliate.



An oral disclaimer will be made in-person, and in telephone communications, to all individual clients and prospective clients. In addition to the written disclaimers to courts and government officials provided in paragraph six of the grantee-plaintiffs' April 25, 2003 proposal, disclaimers will also be made orally to all individual judges, opposing attorneys, government officials, journalists and others who come into contact with either affiliate.

For example, South Brooklyn Legal Services and the affiliated South Brooklyn Justice Center will present the following written and oral disclaimer (or a disclaimer containing similar text to the same effect) to all clients, prospective clients, and others identified above in this paragraph six:

South Brooklyn Legal Services ("SBLs") and the South Brooklyn Justice Center (the "Justice Center") are separate, independent non-profit corporations. SBLs receives funds from the Legal Services Corporation ("LSC") to provide certain approved categories of legal assistance. Use of these funds from LSC is restricted by federal law. The Justice Center does not receive any LSC funds. Congress has refused to allow LSC funds to be used to finance the work of the Justice Center. Nevertheless, SBLs and the Justice Center cooperate to serve the legal needs of low-income individuals and families in South Brooklyn.<sup>9</sup>

In addition, the non-LSC grantee will include the following disclaimer (or similar text to the same effect) in all client retainer agreements:

I have read and understood the following: The South Brooklyn Justice Center (the "Justice Center") is representing me. The Justice Center does not receive any Legal Services Corporation ("LSC") funds. Congress has refused to allow LSC funds to be used to finance the work of the Justice Center.

---

<sup>9</sup> This text derives in part from a disclaimer that the LSC Office of Inspector General ("OIG") has required to be published, in accordance with the LSC program integrity regulation, on a web site shared by an LSC grantee affiliate and a non-LSC grantee affiliate in Oregon. See Lane County Legal Aid Service and Lane County Law and Advocacy Clinic homepage, at <http://www.lanecountylegalservices.org/> (last visited May 19, 2003), attached hereto as Ex. 2; LSC OIG, Review of Grantee's Transfer of Funds, and Compliance with Program Integrity Standards, Grantee: Lane County Legal Aid Service, Inc., Report No. AU 02-01 (Oct. 2001), attached as Ex. 26 to Decl. of Laura K. Abel, dated Dec. 14, 2001.

In addition, the LSC grantee will include the following disclaimer (or similar text to the same effect) in all client retainer agreements:

I have read and understood the following: South Brooklyn Legal Services ("SBLs") is representing me. SBLs receives funds from the Legal Services Corporation ("LSC") to provide certain approved categories of legal assistance. Federal law restricts the use of these LSC funds and all other funds provided to SBLs.

Affiliates will produce these disclaimers in both English and Spanish, and will, pursuant to existing office policies, provide additional translation into other languages.

7. **Equipment** — The respective affiliates propose to share equipment and physical resources, including, telephone lines, computers, case management systems, libraries, legal research facilities, office furnishings, printers, fax machines and web sites.
8. **Physical premises** — The respective affiliates propose to operate in one physical location with no physical separation beyond that degree of physical separation required of other non-profit federal grantees by Presidential Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002), entitled Equal Protection of the Laws for Faith-based and Community Organizations. The standards contained in Executive Order No. 13279, applied in the context of legal services programs, would permit the LSC and non-LSC affiliates to operate in a single physical location, but would require the non-LSC grantee affiliate to provide LSC-restricted services "separately in time or location from any programs or services supported" with LSC funds. *Id.*

More specifically, these standards would require, for example, that a non-LSC grantee affiliate conduct its LSC-restricted activities either in a room separate from any room in which its LSC grantee affiliate is simultaneously conducting LSC-approved activities, or in the same room but at separate times. See White House Office of Faith-Based and Community Initiatives, Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government, p. 7 (Dec. 12, 2002), attached as Ex. B to Decl. of Laura K. Abel, dated March 6, 2003.

9. **Employee time** — The LSC and non-LSC affiliates propose to share all legal, support and supervisory personnel (including an Executive Director, who will direct both programs). No personnel will engage in LSC-funded activities while working in the capacity as an employee of a non-LSC grantee affiliate.
10. **Intake** — The respective affiliates propose to share a common intake and allocation mechanism to refer clients and cases between the affiliates. As described in paragraph six above, an individual disclaimer will be provided to each individual client or prospective client who contacts either affiliate.