



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
AO-2014-003

SUBJECT: Part 1610 Program Integrity Involving an Attorney Incubator Project

DATE: April 4, 2014

QUESTION PRESENTED

Whether Memphis Area Legal Services (MALS) may participate in a new incubator program involving newly admitted attorneys, the local bar association, and a local law school by renting some of its office space and providing limited support services to the participating attorneys, consistent with the program integrity requirements set forth in 45 C.F.R. § 1610.8.

BRIEF ANSWER

Based on MALS' description of its role in the incubator program, the arrangement proposed would comply with the program integrity requirements of section 1610.8. If the arrangement is implemented as proposed, then it will be structured in a manner that prevents MALS' subsidization of the other entities involved and avoids the appearance that the participating attorneys are employed by MALS.

BACKGROUND

ESQ.BUILD is an incubator project to help newly admitted attorneys start law practices in their first three years. The Memphis Bar Association (MBA), the University of Memphis Law School (Law School), and the Service Corps of Retired Executives (SCORE) created and will operate the program. MALS has offered to rent unused space to the attorneys in this program. The MBA will pay for the space. MALS has ongoing relationships with the MBA and the Law School. For example, Linda Seely, the MALS director of pro bono activities, is a past MBA president and currently sits on the MBA board. The MBA actively recruits private attorneys to volunteer with MALS and publicly recognizes their pro bono activities. MALS places clients with a Law School clinic as part of MALS' Part 1614 Private Attorney Involvement (PAI) program; those clients are processed as clients of both MALS and the Law School clinic. While MALS has ongoing working relationships with the MBA and the Law School, it does not share staff, offices, funding, or administrative services with them. MALS does not have any other relationship with SCORE.

ESQ.BUILD will provide training in the practice of law and law office management. Eight to ten participating attorneys will participate at a time. Each attorney will have a separate law practice and will not work for MALS. MALS is considering renting office space to each attorney. MBA and SCORE will provide the attorneys with mentors (both attorneys and business

managers) and offer seminars, CLE programs, and other services regarding solo or small firm law practice. These activities will take place outside of the MALS offices.

MALS' role would be limited to renting furnished office space to these attorneys for up to nine months. MALS has excess office space because of recent reductions in staff. ESQ.BUILD attorneys would each have an office along a hallway that is within the MALS space, but is not a hallway used by MALS staff and is separate from other hallways used by MALS staff. The hallway is on the third floor of a building in which MALS uses space on both the second and third floors. Signs and other forms of identification will make clear that these attorneys are not MALS employees. The attorneys will clearly identify themselves as not affiliated with MALS. They will have no use of MALS' infrastructure other than receptionist support for visitors (but not for phone calls), mail delivery, and access to bathrooms, hallways, a break room, and a conference room (if needed). The receptionist services will be limited to notifying ESQ.BUILD attorneys when someone arrives in the MALS reception area to see one of them. The receptionist will not be able to accept service of process for these attorneys. MALS staff will process incoming mail and separately direct mail to each ESQ.BUILD attorney. The attorneys will be encouraged to use meeting space outside of MALS, such as the courthouse, for meetings with clients, opposing counsel, etc. If any of the attorneys need to regularly use a MALS conference room for such meetings, then appropriate signage or identification protocols will be developed. The attorneys have to provide their own computers, phones, printers, and other office equipment, although the offices will be rented furnished. The attorneys will not use MALS' research resources (*e.g.*, Westlaw or LexisNexis accounts); they will use their own research subscriptions, the Law School library, or the courthouse library.

On August 14, 2013, The MBA sought guidance from the Tennessee Board of Professional Responsibility regarding any ethical issues that this arrangement might present. The Deputy Chief Disciplinary Counsel for Investigations provided an advisory, non-binding, opinion on August 21, 2013, that the arrangement did not present any particular ethical problems. He noted that "the participants should conduct themselves and hold themselves out as solo practitioners and not as participants or associates in some joint enterprise or firm." Furthermore, "[t]hey should conduct themselves and their practice in a manner so as to maintain the confidentiality of their clients." In the request for guidance, the MBA also noted that:

All participants will need to be cautioned to take the same kind of precautions that lawyers sharing office space are required to take – for example, to maintain confidentiality by ordinary security measures (*e.g.*, secured physical files, closed office or conference room doors for client conferences), to maintain separate trust accounts, to market or present themselves and their office relationships accurately (*e.g.*, by not inaccurately representing themselves as partners or part of a "firm"), and to, in other respects, act as independent solo practitioners not practicing as part of the same practice or firm.

The Memphis Bar Foundation (the philanthropic arm of the MBA and treated as part of the MBA in this opinion) will pay MALS the rent for each of these attorneys. The rent would be based on a determination of the fair market value of the furnished space with the support services

described above. MALS would document that determination. The MBA's auditor noted in an August 2, 2013, email that the MBA will need to provide each attorney with a 1099-MISC stating the total fair market value of the rental space for the period occupied. Each attorney must also commit to providing a minimum of five pro bono hours per week to MALS. The pro bono work will most likely occur at MALS outreach locations, not at the MALS office. Each attorney will sign a lease with MALS on these terms.

ANALYSIS

I. LSC's Regulations

Part 1610 includes the requirement "that recipients maintain objective integrity and independence from organizations that engage in restricted activities." 45 C.F.R. § 1610.1. To that end, section 1610.8 provides:

§ 1610.8. Program integrity.

- (a) A recipient must have objective integrity and independence from any organization that engages in restricted activities.

A recipient will be found to have objective integrity and independence from such an organization if:

- (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 separating of 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 the 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.
- (b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

II. Analysis Under 45 C.F.R. § 1610.8

For purposes of this opinion, it is presumed that every other entity involved in ESQ.BUILD intends to maintain the ability to engage in restricted activities. Thus, MALS intends to maintain program integrity regarding all of them.

The regulation establishes three separate requirements regarding program integrity: (1) legal separation; (2) the absence of transfers of or subsidies using LSC funds; and (3) physical and financial separation. The ESQ.BUILD proposal does not raise any concerns with the first two factors. MBA, the Law School, SCORE, and each of the ESQ.BUILD attorneys are all legally separate entities from MALS. MALS would not transfer any LSC funds as part of this project. MALS would determine and document that the rental payments cover the fair market value of the furnished offices and support services to ensure that MALS is not subsidizing the attorneys or any other entity. MALS does not intend to provide any other support to the project that would raise subsidy questions.

The third requirement—physical and financial separation—requires a review of the totality of the circumstances to determine if the entities actually operate with sufficient separation. The four factors listed in section 1610.8(a)(3) are not exhaustive, and none of them is determinative, but they provide a useful framework. Based on the information provided to LSC, MALS' participation in ESQ.BUILD would maintain physical and financial separation from all of the other entities. MALS' relationships with the other sponsoring organizations do not intertwine MALS' operations with any of them in a way that would require further analysis under the four identified factors or any other aspects of separation. MALS will not participate in any of the formal ESQ.BUILD mentoring and training and would not create any appearance that its staff is working for any of the other entities.

The location of the ESQ.BUILD attorneys within MALS' offices presents a concern about ensuring that they are not confused with MALS staff. This concern involves all four of the factors. The first and fourth factors are all addressed through the separation of office space, signage, and protocols. These actions reinforce the separation of these attorneys from MALS personnel (factor one) and provide signage and other forms of identification to distinguish MALS from the legal practices of these attorneys (factor four).

The ESQ.BUILD attorneys would use offices located on a separate hallway from offices used by MALS staff. MALS would establish clear signage distinguishing its space from the space used by the ESQ.BUILD attorneys. MALS would limit the attorneys' use of MALS' resources and infrastructure. The attorneys would clearly identify themselves as unaffiliated with MALS and would be encouraged to meet with clients and others outside of the MALS space. Furthermore, the attorneys will be independently obligated to make clear to their clients and others that they are not affiliated with MALS or with the other ESQ.BUILD attorneys in the same office space. MALS must ensure that these attorneys are aware of the separation issues and clearly identify their practices as unaffiliated with MALS. The pro bono work of the ESQ.BUILD attorneys will be performed through the same MALS programs that involve other

private attorneys and should not create any impression that the ESQ.BUILD attorneys have a closer relationship to MALS than other private attorneys.

The second factor involves “the existence of separate accounting and timekeeping records.” The proposed arrangement does not involve joint projects that raise accounting or timekeeping concerns. The ESQ.BUILD program is designed to support independent legal practices for each participating attorney, which would include maintaining their own accounting and timekeeping. The rental of space and some administrative services will be covered by the rental agreements and paid for by the MBA. As described, these agreements should clearly document and account for the arrangements as separate from space and services provided to MALS staff.

The third factor involves “the degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities.” The ESQ.BUILD attorneys may represent restricted clients in restricted cases (*e.g.*, ineligible aliens or prisoner litigation). This factor is addressed by the physical separation of their offices in a hallway different from the MALS offices and by the signs and protocols indicating the separation of their practices from the work of MALS. While these attorneys might occasionally use MALS conference space for meetings involving their cases, the expectation is that they will primarily use conference space outside of the MALS offices. Furthermore, the limited time of the arrangements (nine months), combined with the nature of private practice for newly admitted attorneys, minimizes the extent of restricted activities that might occur.

As the program proceeds, MALS should make sure that it maintains records that clearly document its separation from this program and the practices of the participating attorneys. MALS should account for the actual use of its space and infrastructure. In particular, MALS should periodically review the office rent payment to ensure that it reflects the fair market value of the lease and the services provided. MALS should regularly review the physical separation of the ESQ.BUILD attorneys’ offices and ensure that the signage and procedures are consistently followed. MALS should review and update the layout, signage, and procedures to reflect any changes (such as changes to MALS’ use of adjoining spaces). MALS should ensure that the attorneys primarily use space outside of MALS for meetings, or clearly designate a conference room for their use separate from the spaces used by MALS.

Lastly, MALS should include this arrangement in its annual program integrity review for section 1610.8(b) certification. As part of that review, MALS should look at the totality of the arrangement for any additional facts not discussed in this opinion that could alter the analysis. For example, if an ESQ.BUILD attorney had worked at MALS representing clients during her third year of law school, then MALS and the attorney may need to take additional steps to clearly indicate that she is no longer on staff at MALS.

CONCLUSION

MALS' involvement with the ESQ.BUILD program, as described, does not undermine MALS' program integrity under 45 C.F.R. § 1610.8. MALS should take the steps described above to further ensure its program integrity as the arrangement with ESQ.BUILD continues. MALS must include its participation in the ESQ.BUILD program in its annual program integrity review.

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