



External Opinion
File # 99-19

September 16, 1999

Robert Hickerson, Executive Director
Alaska Legal Services Corporation
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Dear Mr. Hickerson:

This letter is in response to your request for an advisory opinion from the Legal Services Corporation ('LSC' or 'Corporation') on whether a proposed relationship of Alaska Legal Services Corporation ('ALSC') with a separate organization that would engage in restricted activities would meet the program integrity requirements of Section 1610.8 of 45 CFR Part 1610. I have reviewed ALSC's plan and it is clear that ALSC has made a good faith effort to design a plan that meets both the spirit and the letter of the Corporation's law on program integrity. This opinion finds that the proposed plan meets Part 1610's program integrity requirements.

Proposed Plan. Under the plan you propose, ALSC would transfer its IOLTA funds¹ to another organization under an agreement that the funds be used to administer a pro bono program. The staff of the organization would consist of one coordinator and one support person who would coordinate the pro bono program, under which legal assistance would be provided by volunteer attorneys to the poor. The organization would be required to use the IOLTA funds to administer two distinct pro bono projects. Under one project, the organization would devote a percentage of the transferred IOLTA funds (12.5% of ALSC's basic field grant) to represent clients referred by ALSC. All such clients would be LSC-eligible and no cases would include any restricted activities. ALSC would co-counsel on these cases and would agree to take the cases back if the volunteer attorney could no longer represent the client. ALSC would count these cases toward its PAI requirement under 45 CFR Part 1614. Under the other project, the rest of the IOLTA funds would not be restricted to LSC-permissible cases. Pro bono attorneys accepting any non-LSC permissible cases under this project would not be eligible for any co-counseling

¹ IOLTA funds are non-LSC funds and are treated as public funds. See 45 CFR Section 1610.2(c) and (f).

assistance from ALSC; nor would ALSC accept any such case if the pro bono attorney could no longer represent the client.

Analysis. The program integrity provisions in Section 1610.8 require LSC recipients to maintain an objective independence from any organization that engages in restricted activities. They also set out the standards necessary to maintain such independence. Section 1610.8(a) provides that:

(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 separation 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.

ALSC's proposed plan is consistent with these requirements. First, under the plan the other organization would be a separate legal entity that would receive no LSC funds from ALSC and no LSC funds would subsidize the organization's activities. Section 1610.8(a)(1) and (2). Although the board of the other organization would be the same as ALSC's, overlapping boards is permissible under the program integrity requirements. *See* Preamble to final rule, 62 FR 27697 (May 21, 1997). However, the board should hold separate meetings for the each organization and keep the records of the two organizations separate.

Second, ALSC would be physically separate from the other organization. Section 1610.8(a)(3). The organization would be housed in a separate building and its name would be clearly distinguishable from ALSC's. In addition, ALSC would not share any employees, either full or part-time, with the organization.

Third, ALSC would be financially separate from the other organization. Section 1610.8(a)(3). Finances and accounting for ALSC and the other organization would be kept separately. In addition, the other organization would keep separate

records for its non-LSC permissible cases and its LSC permissible cases. The staff of the other organization would be required to complete time sheets differentiating time spent on LSC-permissible cases and time spent on other cases. In addition, the organization's overhead costs would be required to be pro-rated between LSC-permissible cases and other cases. Case related costs, including insurance coverage, would also be accounted for separately.

Finally, the proposal anticipates that clients served by attorneys under the other organization's *pro bono* program would be able to assign their attorney fee rights to the organization and the new organization would be able to claim, collect and retain attorneys' fees. This is permissible under the program integrity requirement and the Corporation's attorneys' fee regulation, 45 CFR Part 1642. The Corporation's attorneys' fee restriction would not be applicable to the organization's project that funds non-LSC permissible cases because the restriction does not apply to non-LSC funds transferred to an organization that receives no LSC funds. The restriction would apply, however, to the project that funds LSC-permissible cases allocated to LSAC'S PAI requirement except that the representation is provided *pro bono*.² Section 1642.4 permits attorneys who provide *free* representation to eligible clients under a program's PAI program to seek and collect attorneys' fees. Because the proposed plan envisions that representation will be provided *pro bono*, the attorneys' fee restriction would not apply. If any of the attorneys providing representation in such cases should be given any compensation for the representation, either the attorney could not seek and retain attorneys' fees or ALSC would not be able to count the case as a PAI case.³

In summary, the plan as set out in your May 21, 1999 letter is consistent with the LSC program integrity requirements. Please let us know if you need any additional assistance in this matter.

Sincerely,

Suzanne B. Glasow
Senior Assistant General Counsel

² It has long been the policy of the Corporation that a recipient may count only LSC-permissible activities toward PAI.

³ Compensation does not include payment of costs and expenses permitted under Section 1642.6. Please note that the attorneys' fee restriction would not apply to the private practice of any volunteer attorney but only to the cases they undertake and for which they are compensated pursuant to a recipient's PAI program.