



OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2003-1008

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

Date: May 8, 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 establish sufficient Part 1610 program integrity between an LSC grantee and an entity engaged in LSC restricted activities.

SUMMARY

The Configuration Proposal fails to offer sufficient details for a full Part 1610 program integrity analysis. Such an analysis would require more specific descriptions of how the arrangement would work, as were provided in the referenced 1997 Queens situation. The Queens inquiry contained definite statements as to how Legal Services of New York City (LSNY), Queens Legal Services, and Queens II would work together. This proposal fails to do so. Instead, many critical factual areas are left unspecified or allow that the entities "may" overlap.

Given these vagaries, LSC can only evaluate the proposal with the conservative assumption that the two entities would have the minimum of separation possible within the description. In that situation, the grantee would fail to have program integrity from the other entity due to a lack of physical and financial separation and insufficient specificity as to the other program integrity factors. Nonetheless, the proposal is so broadly phrased that it might be implemented in a way that would maintain program integrity.

FACTS

On April 25, 2003, the Brennan Center submitted a "Configuration Proposal" (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. The Brennan Center also attached a copy of the 1997 Queens Legal Services proposal from LSNY to LSC and the response from LSC to LSNY.

The four-page proposal is attached and incorporated into this opinion letter. 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 “seeks permission to establish a legally separate, separately incorporated affiliate . . . to receive and administer funds received from sources other than LSC” and provide services that may include LSC restricted activities. 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

Unlike the 1997 Queens Legal Services situation, this proposal is generally conclusory in nature and lacks sufficient facts and details for a full program integrity analysis. It states that the other organization(s) will be established and the relationship between the recipients and other respective organizations will be maintained in such a manner as to meet the program integrity tests set forth in the regulation, but it provides very little in the way of specific factual detail as to how those goals are to be accomplished. In light of the highly fact-specific nature of a program integrity analysis, as described below, LSC cannot provide a definitive assessment of whether the proposal could satisfy the requirements set forth at 45 CFR Part 1610. Furthermore, the Queens proposal was an actual situation presented to LSC by LSNY. This proposal is a blanket hypothetical from a group that includes a non-grantee (Farmworker Legal Services), rather than something that contains actual plans.

Part 1610 Program Integrity Regulation

Section 1610.8(a) 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.¹ 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

¹ 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.

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. 27698 (May 21, 1997) (preamble to final rule).

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 that the regulation requires be met. Whether physical and financial separation exists is determined on a case-by-case basis, based on 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. 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 demonstrate 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) 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

Legal Separation of Organizations

Paragraph 1 (Legal separation) of the proposal addresses this factor, seeking “permission” from LSC on behalf of certain recipients to establish legally separate incorporated affiliates. LSC does not grant “permission” to recipients to establish separate incorporated affiliates. The grantees have the authority to do this on their own; many grantees have either done so or have close relationships with non-LSC entities. If a recipient chooses to establish an affiliate organization that intends to engage in restricted activities, then the recipient must ensure that the affiliate is a legally separate entity in order for the recipient to be in compliance with Part 1610. We understand the proposal to mean that the affiliate organization would be a legally separate corporation, with its own articles of incorporation and bylaws, established in accordance with the laws of the State of New York. If this is the case, it would appear that the first factor, legal separation, would be met.

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.² The proposal does not specifically state that there will be no transfer of LSC funds to the non-LSC entities, but it appears that no transfer is planned.³ A subsidy can occur directly, as through the payment of LSC funds to the entity for any reason, or indirectly, as through permitting the use by the entity of LSC-funded resources without receipt of a “fair-market” value for the use. The cost-sharing goals in these specific paragraphs are consistent with the non-subsidization requirement of the regulation. More specific information on accounting for non-legal personnel time would be, however, necessary, as Paragraph 5 (Employee timekeeping measures) does not address timekeeping for non-legal (i.e., support) personnel. The timekeeping provisions of the proposal do not state if there will be any effort to document the work done at the non-LSC entity by

² 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).

³ For purposes of this analysis, we assume that Paragraph 5 (Timekeeping) contains a misstatement. It begins “[a]ll legal personnel employed by either affiliate and spending any time on LSC-funded activities will maintain time records” If any personnel of the non-LSC affiliate engage in LSC-funded activities then the non-LSC affiliate is subject to LSC restrictions and further program integrity analysis would be moot. We will assume that the proposal meant that any legal personnel working for both the LSC grantee and the non-LSC affiliate will maintain required time records for their work at the LSC grantee. If this is in error, then clarification is necessary.

employees who work for both organizations. Such information would be useful as further indicia that the LSC grantee is not subsidizing the non-LSC entity by documenting that work on restricted activities is being undertaken by the shared employees only in their capacity as employees of the non-LSC entity. Similarly the LSC grantee should be able to show that no LSC funded resources are used for restricted activities. 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. It would be helpful to us in conducting a Part 1610 assessment to have some sense of how it is intended that those apportionments be made.

The proposal inaccurately cites 45 CFR Part 1612 as if it were a general accounting regulation and mischaracterizes Part 1630 as an accounting regulation. Part 1612 deals with specific restrictions on the use of LSC funds for lobbying on legislative and regulatory proposals and §1612.10 sets forth recordkeeping requirements to document compliance with that Part. Part 1612 and §1612.10 do not impose generally applicable accounting requirements related to other restrictions. LSC's general accounting standards are found in the LSC Accounting Guide for LSC Recipients. Moreover, 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. Regardless of any Part 1610 issues, all grantees must fully comply with Parts 1612 and 1630. The requirements of these, and other regulations, may be helpful in determining program integrity, but Part 1610 may require additional documentation beyond the requirements of other LSC regulations. For example the LSC timekeeping requirements are not structured to provide the kind of information that might be necessary to demonstrate compliance with the transfer, subsidy, and physical and financial separation standards.

Physical and Financial Separation

Paragraphs 2 (Names), 3 (Boards), 5 (Timekeeping), 6 (Signage), 7 (Equipment), 8 (Physical Premises), 9 (Time) and 10 (Intake) of the proposal implicate physical and financial separation issues. 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. The proposal does not contain sufficient detail regarding several of the indicia to make a definitive determination. LSC must evaluate the proposal based on the minimum amount of separation consistent with the broad parameters that it sets out. 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. Nonetheless, LSC is prepared to reevaluate this proposal if sufficient additional detailed information is provided that clarifies or eliminates some of the issues discussed below.

For the purpose of understanding which aspects of the proposal are either lacking in detail or 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) states that the “non-LSC grantee affiliate will be named in a manner that conveys its separate legal, financial and programmatic status.” While this is good as a stated goal, LSC needs the actual names of the grantee and the new entity to make a determination whether the names to be used will, in fact, sufficiently convey the separate legal, financial and programmatic status of the affiliate organization. In the Queens situation, the affiliate organization was named “Queens Legal Services II” – a name which LSC found insufficient, in light of the other ways in which the organizations were not separate, to convey separate legal, financial and programmatic status to clients, courts, agencies, the public and others with whom Queens Legal Services would be dealing.

Paragraph 3 (Boards) states that 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” (emphasis added). Part 1610 permits the overlap of governing Boards between recipients and other entities engaged in restricted activities. However, the proposal gives no indication of the extent of the intended overlap and explicitly contemplates that there could be 100% overlap. Again, relative Board composition is viewed in the overall context of the relationship, but a 100% overlapping Board would indicate far less physical and financial separation than would Boards having less than 50% overlap, for example. Moreover, the proposal does not speak to the independence of action between the two Boards. For example, would each Board meet separately and maintain separate records? To what extent, if at all, would the Board of one organization have the ability to direct the policies, employees and activities of the other? Would there be a Memorandum of Understanding between the organizations setting forth the contractual obligations between the parties? Would the board of one have the power to appoint the members of the other? What would it say? Clarification of these issues would be needed before LSC could adequately determine how this factor would weigh in the overall physical and financial separation analysis.⁴

Paragraph 5 (Timekeeping). As described in the *Transfer and Subsidization* section above, the proposal appears to state that legal personnel working on LSC funded matters will keep time in a manner consistent with the LSC timekeeping regulation. To demonstrate physical and financial separation, it would be helpful for *each* organization to require *its own* legal employees to keep detailed time records of work performed. Such an arrangement would bolster the case for physical and financial separation as described above. This paragraph, however, does

⁴ For example, LSNY is currently restructuring itself in a way that would raise considerable Part 1610 issues if it were to extend to entities engaged in restricted activities. As LSNY has explained to LSC, the new structure will make the former grantees “child” corporations to LSNY as the corporate “parent.” LSNY will be the sole member of the child corporations, will have extensive control over their management and will directly employ staff at the child corporations. While this structure is completely permissible among entities that do not engage in restricted activities, it could be problematic for LSNY to apply it to an entity doing LSC restricted work depending on the totality of the circumstances.

not address timekeeping for non-legal (i.e., support) personnel. It would be helpful to have clarification of this issue. Furthermore, as mentioned above, Part 1610 compliance may require tracking information beyond what the LSC timekeeping regulation mandates (and which would be unnecessary if imposed on all LSC grantees, even those without affiliations raising Part 1610 questions).

Paragraph 6 (Signage), similar to paragraph 2, contains a conclusory statement that signage and disclaimers will be sufficient to demonstrate the separate identities of the respective organizations, but fails to describe sufficiently what the signage and disclaimers would say or where they would be placed. Some of the information provided, such as the statements regarding signage to be displayed on the front doors and waiting areas and contacts with the media would be positive indicia of separation. However, there are other aspects which need clarification. For example, the proposal states that a “written explanation will be made available to all persons entering the premises” Is it contemplated that a pamphlet will be provided individually to clients and prospective clients, or merely that a statement will be posted somewhere in the building (and, if the latter, where)? Is there provision for the explanation to be in languages other than English? How will the disclaimer be transmitted to persons who contact the recipient by telephone? The adequacy of signage is also related to the degree of separation of the physical offices and other indicia of separation to other people, discussed below. Once those factors are better specified, the sufficiency of the signage can be better evaluated.

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.” (emphasis added) Although Part 1610 allows for organizations to share some equipment, such as a copier and a library, a complete sharing of *all* office property, including telephones, furniture, case management systems, etc., would be strong 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.” Without further clarification of the extent of shared physical resources, LSC must assume that all equipment is shared and the two organizations have essentially one infrastructure.

Paragraph 8 (Physical Premises) provides that the “two affiliates *may* operate in the same physical premises” (emphasis added). As the proposal does not actually describe what is anticipated in regard to physical premises, it is impossible to determine the extent of physical and financial separation. Affiliates operating on separate floors of the same building would demonstrate greater separation, while affiliates operating out of the very same offices would indicate a lack of physical separation. Alternatively, having offices on the same floor (perhaps with some shared space, such as a library), but with separate entrances for each organization might be consistent with Part 1610, depending on the totality of the circumstances. We note that if the affiliates *will* share “equipment, such as telephone lines, computers, case management systems, libraries, legal research facilities, office furnishings, printers, [and] fax machines” it seems likely that it is contemplated that the affiliates would be operating in the same premises. If this is the case, as with equipment, then it would be strong indicia of a lack of physical

separation. And, again as with equipment, 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). As such, absent further clarification, LSC must treat this proposal as allowing for the two entities to operate out of one physical location without any physical separation between their respective offices, which would directly violate the Part 1610 requirement that they have physical separation.

Paragraph 9 (Employee time) states that 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”⁵ (emphasis added). As with other indicia discussed herein, although it may be consistent with Part 1610 for affiliate organizations to share *some* personnel, the proposal gives no indication of the extent of the intended overlap and explicitly contemplates that there could be 100% overlap. Like the other indicia, relative staff composition is viewed in the overall context of the relationship, but a 100% overlapping staff would likely be less indicative of true physical and financial separation than would staffs having, for example, less than 10% overlap. In addition, the proposal states in a conclusory manner that no restricted activity will be “allocated” to the recipient and that “no employee may engage in activities barred by the LSC restrictions during time paid for with LSC funding.”⁶ The proposal does not provide, however, any indication of how those goals would be accomplished. Absent further clarification, LSC must treat this proposal as allowing for the two entities to have a single group of employees, all of whom work part time for each entity.

Paragraph 10 (Intake) states that the “two affiliates may share a common intake and allocation mechanism to refer clients and cases between the two affiliates.” Once again, the proposal does not offer any details about how the intake system would work, thus rendering a reasoned analysis impossible. Depending on the system, a shared intake might make clear that it involves two separate cooperating entities or it might completely blur the distinction. The design of the intake system will also be impacted by the extent of shared staff, shared office, signage, etc.

CONCLUSION

In conclusion, then, the proposal is very broad and encompasses scenarios that would fail to provide sufficient objective integrity and independence for a grantee from an entity engaging in LSC restricted activities. Rather than a recitation that the elements of the regulation will be satisfied, LSC needs concrete information in order to determine if the regulation would, in fact, be satisfied. It may help to think of the indicia as different elements of a picture, the whole of

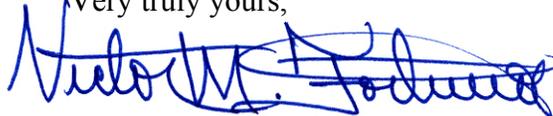
⁵ To the extent that the proposal provides that personnel *may* work part-time at either program, we would note that recipients’ attorneys who are full-time employees are generally barred by LSC regulations from the outside practice of law (45 CFR Part 1604).

⁶ LSC recipients and their employees are barred from engaging in certain activities supported with any of the recipient’s funds, not just the recipient’s LSC funds. *See* §1610.4. It may be that this is meant by the proposal language, but it is not clear.

which presents to clients and the public two separate organizations, not merely one organization with two nameplates on the door. Although there may be separate signs, business cards, and other means of identification, if the two organizations are so completely intertwined that identification of the recipient with the affiliate's restricted activities would be inevitable or that confusion would result, the separation requirement is not met. 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."

If the LSC grantees choose to establish affiliates pursuant to this proposal, we strongly recommend that they carefully consider the factors described herein as well as the other OLA External Opinions interpreting Part 1610, the attached LSC program letter, the OIG Program Integrity Audits of LSC grantees and any other materials discussing how other LSC grantees have been and are currently affiliating with other entities.⁷ Moreover, we remain available to re-evaluate this proposal upon the provision of greater factual detail, especially as to physical and financial separation and/or to evaluate alternate proposals for the establishment of or relationship with affiliate organizations.

Very truly yours,



Victor M. Fortuno
General Counsel

Attachments: April 25, 2003 Configuration Proposal
October 30, 1997 LSC Program Letter with attachments.
Certification of Program Integrity Form
Instructions for Certification of Program Integrity
Guidance in Applying the Program Integrity Standards

⁷ These materials are available from LSC upon request or via the web at <www.lsc.gov> or <www.oig.lsc.gov>. OLA External Opinions, such as this one, offer LSC's legal evaluation of the application and meaning of LSC statutes and regulations, often to situations presented by LSC grantees. OLA has a number of such opinions applying Part 1610 to situations presented by LSC grantees.

Configuration Proposal

Each grantee-plaintiff¹ 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

¹The 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:²

- 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).

² 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.



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MEMORANDUM

TO: All LSC Program Directors, Board Chairs
FROM: John A. Tull, Director
Office of Program Operations
DATE: October 30, 1997
RE: Certification of Program Integrity

Each LSC recipient's governing body is required under 45 CFR Part 1610 to certify by December 19, 1997, and annually thereafter, that the program is in compliance with the program integrity requirements of Section 1610.8. This section requires a recipient to have "objective integrity and independence" from any organization which engages in restricted activities as defined in 45 CFR Part 1610. This memorandum and the attached documents are intended to provide guidance on the certification process and the requirements of 45 CFR Part 1610.

Part 1610 was adopted to implement Congressional restrictions on the use of non-LSC funds and to assure that no LSC-funded entity shall engage in restricted activity. A list of restricted activities can be found at 45 CFR Sections 1610.2(a)¹ and (b). They include, among other things, lobbying, participation in class actions, representation of prisoners, and claiming, or collecting and retaining attorneys' fees. Under this regulation, an LSC recipient cannot itself engage in such activities, transfer LSC funds to another organization which engages in restricted activity,² or use recipient resources to subsidize the restricted activity of another organization.

¹ The restrictions in §1610.2(a) are not "entity" restrictions and only apply to LSC and private funds. Thus, recipients may use public funds to engage in §1610.2(a) activities without compromising the program integrity standards discussed in this memo and attached documents.

² An LSC recipient may transfer LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities *for the sole purpose* of funding the recipient's private attorney involvement activities (PAI) pursuant to 45 CFR Part 1614, regardless of

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Memorandum

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October 30, 1997

Recipients may transfer *non*-LSC funds to another organization which engages in restricted activity if, and only if, the other organization is a legally separate entity³ and the LSC recipient maintains objective integrity and independence from it. Even where there is no transfer of funds, the LSC recipient must maintain objective integrity and independence from any organization which engages in restricted activity.

To meet the objective integrity and independence test, a recipient must be organized so it is *physically and financially separate* from the other organization. Mere bookkeeping separation is insufficient.

To determine whether there is sufficient physical and financial separation, a range of factors, including the following, must be considered:

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

The presence or absence of any one or more factors will not be determinative. Each situation will be viewed on a case-by-case, totality of the circumstances basis.

Recipient governing bodies must consider the same factors when preparing the enclosed Certification of Program Integrity. To assist recipients and their governing bodies, additional guidance is contained in the instructions to the Certification form and the attached Guidance in Applying the Program Integrity Standards.

If you have any questions, please contact Anh Tu at (202) 336-8946 or Bob Gross at (202) 336-8856.

whether such associations, programs, attorneys, law firms or other entities otherwise engage in restricted activity using their other funds. Of course, the PAI activities supported by the recipient's funds and counted towards the recipient's PAI activity must not include any restricted activity.

³ An LSC recipient may have an overlapping board with a legally separate organization which engages in restricted activity as long as the recipient maintains objective independence and integrity from the other organization.

CERTIFICATION OF PROGRAM INTEGRITY

Recipient Name: _____

Recipient Number: _____

I certify that the governing body has received and reviewed a written report from the executive director pertaining to the recipient's compliance with the program integrity requirements of 45 CFR 1610 and authorized me, based on the governing body's review and discussion of the director's report, to certify that:

1. The recipient is a legally separate entity from any organization which engages in restricted activity; *and*
2. Except for funds provided to a bar association, *pro bono* program, private attorney or law firm, or other entity for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614, since January 1, 1997, the recipient has not transferred LSC funds to any organization which engages in restricted activity; *and*
3. Since January 1, 1997, the recipient has not utilized recipient funds or resources to subsidize the restricted activity of any organization; *and*
4. The recipient meets the requirements of 45 C.F.R. 1610.8(a) in that the recipient is physically and financially separate from any organization which engages in restricted activity. Factors relevant to the Board's determination of program independence and integrity include:
 - a. The existence of separate personnel;
 - b. The existence of separate accounting and timekeeping records;
 - c. The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities;
 - d. The extent to which signs and other forms of identification which distinguish the recipient from the other organization are present.

On behalf of the governing body, I acknowledge that compliance with the integrity and independence requirements of 45 C.F.R. 1610.8(a) is a prerequisite to the recipient receiving continued funding from the Legal Services Corporation.

_____ (Chair or President of the Board)

_____ (Date)

INSTRUCTIONS FOR CERTIFICATION OF PROGRAM INTEGRITY

Introduction. Section 1610.8(b) of 45 CFR Part 1610 requires each recipient's governing body to certify by December 19, 1997 that the recipient is in compliance with the program integrity requirements of Section 1610.8. This regulation requires a recipient to have objective integrity and independence from any organization which engages in restricted activities as defined in 45 CFR Part 1610.¹

To comply with Part 1610, the president or chair of the recipient's governing body must sign and date the attached certification and mail it by *December 19, 1997* to:

Office of Program Operations
Legal Services Corporation
750 First Street, NE, 10th Floor
Washington, D.C. 20002-4250

Written Report to Governing Body. To enable each recipient's governing body to undertake the review required by the regulation, the program director must provide its governing body with a written report which either:

(a) states that the recipient has not transferred recipient funds to nor subsidizes, employs, shares or utilizes any of the same personnel, office space, facilities or equipment with an organization which engages in restricted activity; or

(b) addresses the following:

- A. **Legally separate entity.** A recipient may not engage in restricted activity and must be a legally separate entity from any organization which engages in restricted activity. If the recipient has any relationship with an organization which engages in restricted activity which involves a transfer of recipient funds, overlapping board membership between the two organizations, joint employment or utilization of any of the same personnel, office space, facilities or equipment, the director must provide the governing body with information demonstrating that the other organization is a legally separate entity, such as a separately incorporated non-profit organization or a legally separate partnership.

¹ "Restricted Activity" means those activities defined in 45 CFR Section 1610.2 (a) "Purpose prohibited by the LSC Act" and (b) "Activity prohibited by or inconsistent with Section 504." Note that restrictions in §1610.2(a) are not "entity" restrictions and only apply to LSC and private funds. Thus, recipients may use public funds to engage in §1610.2(a) activities without compromising the program integrity standards.

- B. Transfers of program funds.** Except to support its private attorney involvement activity under 45 CFR Part 1614,² an LSC recipient may not transfer LSC funds to an organization which engages in restricted activity. Recipients may transfer non-LSC funds to organizations which engage in restricted activity only if the recipient maintains objective integrity and independence from the transferee organization.³

If, since January 1, 1997, the recipient has transferred funds to another organization, the director's report must demonstrate that the transfers were permissible because they involved either:

- (1) LSC funds to support the recipient's private attorney involvement activity under 45 CFR Part 1614; or
- (2) LSC funds pursuant to a previously approved subgrant under 45 CFR Part 1627; or
- (3) non-LSC funds.

If LSC funds have been transferred for any other purpose, the recipient may not be able to complete the certification form and should contact LSC for guidance.

- C. Subsidies.** LSC recipients may not use recipient resources to subsidize restricted activity.⁴

² An LSC recipient may transfer LSC funds to bar associations, *pro bono* programs, private attorneys, law firms, or other entities *for the sole purpose* of funding the recipient's private attorney involvement activities (PAI) pursuant to 45 CFR Part 1614, regardless of whether such associations, programs, attorneys, law firms or other entities otherwise engage in restricted activity using their other funds. Of course, the PAI activities supported by the recipient's funds and counted towards the recipient's PAI activity must not include any restricted activity.

³ For the purpose of this Certification, "transfer" means a payment of funds by a recipient to a person or entity for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients, or that provide direct support to the recipient's legal assistance activities. The term "transfer" does not include payment of recipient funds to vendors, accountants or other providers of goods and services made by the recipient in the normal course of business.

⁴ "Subsidize" means to use recipient resources to support, in whole or in part, restricted activity conducted by another entity, or payment by the recipient to cover another entity's

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If the recipient employs any of the same personnel, donates to, or shares or utilizes office space or equipment, with an organization which engages in restricted activity, the director must provide the governing body with information establishing that the recipient is not subsidizing restricted activity.

Such information might include, for example, evidence that the recipient receives fair value for a sublease of space or use of recipient equipment; or that the donated space is not used for restricted activity. In the case of shared personnel, the director must establish that compensation by the recipient of staff who are jointly employed by the other organization is consistent with compensation policies established in recipient personnel policies or union contracts. Such information may be a part of the description provided in paragraphs D (1) or (2) below.

D. Physical and Financial Separation. Whether a recipient maintains sufficient physical and financial separation from an organization which engages in restricted activity is determined by the totality of the circumstances. If the recipient employs, shares or utilizes any of the same personnel, office space or equipment with an organization which engages in restricted activity, the director must describe the joint utilization in the report to the governing body.

(1) Physical Separation. If the recipient shares or utilizes any of the same office space or equipment with an organization which engages in restricted activity, and the office space or equipment is under the control of the recipient or the other organization, the director's report must include the following information:

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overhead for restricted activity. A "subsidy" does not include a transfer of a recipient's non-LSC funds to another organization regardless of the use the other entity makes of those funds. However, a recipient will be considered to be subsidizing the activities of another organization if it provides the use of its resources (e.g., donates space or telephone services) for restricted activity without receiving fair value for such use. A recipient will also be considered to be subsidizing the activities of another organization if it pays a third party to cover the overhead expenses for the restricted activities of the other entity (e.g., pays the rent for space that the other organization uses to conduct restricted activity without reimbursement from the other entity). Note, however, that the fact that the recipient receives a fair payment does not necessarily mean the arrangement is permissible. A recipient must also maintain physical and financial separation from an entity which engages in restricted activity.

- a. **the name of the organization with whom the recipient jointly utilizes facilities or equipment,**
 - b. **what facilities and equipment are jointly utilized,**
 - c. **the frequency of use of such facilities or equipment by the recipient and the other organization,**
 - d. **the financial arrangement for such joint utilization,**
 - e. **whether there are separate entrances, signs and other forms of identification distinguishing the recipient from the other organization.**
- (2) **Separate Personnel.** If the recipient employs any staff who are also employed by an organization which engages in restricted activity, where
- a. there is an arrangement between the recipient and the other organization regarding the terms and conditions of employment of such staff; or
 - b. the recipient and the other organization are using any of the same facilities or equipment; or
 - c. although there is no arrangement or sharing of facilities or equipment, a substantial proportion⁵ of the recipient's attorney and/or paralegal staff work part-time for an organization which engages in restricted activity;
- the director's report must include the following information:
- a. **the name of the organization employing such recipient staff,**
 - b. **the positions occupied and duties performed by such recipient staff for the recipient,**
 - c. **the terms and conditions of employment between the recipient and such staff.**
- (3) **Separate Accounting and Timekeeping Records.** If there is any joint utilization of facilities, equipment, or staff required to be reported above, the director's report must include information describing how the recipient maintains separate accounting and timekeeping records.

⁵ For larger organizations, 10% of the recipients' attorney/paralegal staff should serve as a guide. However, for recipients with smaller staffs, the program director should use his or her best judgement to determine whether part-time staff constitute a substantial proportion of the recipient's legal workforce.

- E. Recordkeeping.** Recipients must maintain copies of the report and any accompanying documentation provided the governing body under these instructions.

GUIDANCE IN APPLYING THE PROGRAM INTEGRITY STANDARDS

The following information is provided to help recipient governing bodies assure their programs comply with 45 CFR Part 1610 which requires LSC recipients to have “objective integrity and independence” from any organization which engages in “restricted activity.” Programs are encouraged to contact LSC if they have any questions about compliance with the program integrity standards.

Objective integrity and independence: To meet the program integrity standard of 45 CFR Part 1610, if the recipient has any relationship with another organization which engages in restricted activities:

- the other organization must be a legally separate entity;
- the other organization must not receive any transfer of LSC funds;
- the recipient must not subsidize any restricted activities engaged in by the other organization; and
- the recipient must be physically and financially separate from the other organization.

A. Legally separate entity. A recipient may not engage in restricted activity and must be a legally separate entity from any organization which engages in restricted activity.

Overlapping boards: A recipient may have the same or overlapping Board of Directors as another organization which engages in restricted activity. However, the other organization must be a legally separate entity and the recipient’s Board must ensure that the relationship between the recipient and the other organization meets the program integrity standards.

The fact that the recipient and another organization which engages in restricted activities have no common board members does not automatically mean there is no relevant relationship that should be reviewed to see if it meets the program integrity standards. For example, even though they share no board members, if the recipient subleases space to an organization which engages in restricted activity, or employs some of the same staff, the relationship should be reviewed for program integrity.

B. Transfers of recipient funds. Recipients may transfer LSC funds pursuant to the subgrant provisions of 45 CFR Part 1627 to an organization which does *not* engage in restricted activity.¹ Recipients may transfer LSC funds to an organization which engages in restricted

¹ For the purpose of the Program Integrity Certification required by 45 CFR Section 1610.8(b), “transfer” means a payment of funds by a recipient to a person or entity for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients, or that provide direct support to the recipient’s legal assistance activities. The term “transfer” does not include payment of recipient funds to vendors,

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activity *only if* the transfer is to support the recipient's private attorney involvement activity under 45 CFR Part 1614. Recipients may transfer *non-LSC* funds to an organization which engages in restricted activity only if the recipient maintains objective integrity and independence from the transferee organization.

Private attorney involvement. A recipient may transfer LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities *for the sole purpose of* funding private attorney involvement activities (PAI) pursuant to 45 CFR Part 1614, regardless of whether such associations, programs, attorneys, law firms or other entities otherwise engage in restricted activity using their other funds. Of course, the PAI activities supported by the recipient's funds and counted towards the recipient's PAI activity must not include any restricted activity.

C. Subsidizing restricted activity. A recipient may not use recipient resources to subsidize restricted activity.

"Subsidize" means to use recipient resources to support, in whole or in part, restricted activity conducted by another entity, or payment by the recipient to cover another entity's overhead for restricted activity. A "subsidy" does not include a transfer of a recipient's non-LSC funds to another organization regardless of the use the other entity makes of those funds. However, a recipient will be considered to be subsidizing the activities of another organization if it provides the use of its resources (e.g., donates space or telephone services) for restricted activity without receiving fair value for such use. A recipient will also be considered to be subsidizing the activities of another organization if it pays a third party to cover the overhead expenses for the restricted activities of the other entity (e.g., pays the rent for space that the other organization uses to conduct restricted activity without reimbursement from the other entity). Note, however, that the fact that the recipient receives a fair payment does not necessarily mean the arrangement is permissible. A recipient must also maintain physical and financial separation from an entity which engages in restricted activity.

D. Physical and financial separation: The determination of whether a recipient is physically and financially separate from another organization which engages in restricted activities will be determined on the totality of the factors in each particular case. Thus, this guidance on particular factors should not be considered as providing a bright-line response that would be true in all circumstances. Nor should it suggest that some involvement of each factor is necessarily permissible. With this caveat, the following is provided to assist recipients in reviewing their relationships with other organizations that engage in restricted activities.

¹(...continued)

accountants or other providers of goods and services made by the recipient in the normal course of business.

1. **Separate facilities:** Recipients should be cautious about sharing space, equipment and facilities with another organization which engages in restricted activity since doing so may give the impression that the recipient is engaged in such activity. This is particularly so if the two organizations employ any of the same personnel or use any of the same facilities that are accessible to clients or the public. On the other hand, standing alone, being housed in the same building, sharing a library or other common space that is not accessible to clients or the public may be permissible so long as there is appropriate signage, separate entrances and other forms of identification distinguishing the two organizations, and no recipient funds subsidize restricted activity.

The governing body should review whether the recipient utilizes any of the same office space or equipment as an organization which engages in restricted activity. If so, the governing body should review what facilities and equipment are jointly utilized, the degree and frequency of use of such facilities or equipment for restricted activities, and whether the recipient receives fair value for the use of any of its space or equipment.

2. **Separate personnel.** 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 or proportion of recipient staff calls the recipient’s separateness into question.

- a. **Arrangements to share personnel.** The governing body should review whether the recipient has any arrangements to employ any of the same personnel with other organizations which engage in restricted activity. If such arrangements exist, the governing body should review the number and positions of recipient staff who are “shared,” and the duties they perform as recipient employees.
- b. **Joint utilization of personnel and facilities.** Even where there is no agreement to jointly employ the same staff, if the recipient and an organization which engages in restricted activity are using any of the same facilities or equipment, the governing body should review the number, positions and duties of part-time staff who are also working part-time with the other organization.
- c. **Substantial proportion of attorney or paralegal staff.** The governing body should be similarly informed if a substantial proportion² of the recipient’s attorney

² For larger organizations, 10% of the recipients’ attorney/paralegal staff should serve as
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and/or paralegal staff work part-time for an organization which engages in restricted activity regardless of whether or not there is an agreement to share staff or the two organizations share facilities or equipment.

- d. **No restricted work while on duty.** The governing body should also ensure that the recipient has systems in place to assure that no staff perform any restricted work while on duty for the recipient nor identify the recipient with restricted activity. Attorneys or paralegals must maintain time records pursuant to the timekeeping requirements of 45 CFR Part 1635. Accurate timekeeping of activity undertaken for the recipient will be especially important for any recipient attorneys or paralegals who work part-time for an organization which engages in restricted activity.

3. **Separate accounting and timekeeping records.** If the recipient employs any of the same personnel, or shares or utilizes office space or equipment, with an organization which engages in restricted activity, the governing body should review and ensure that the recipient maintains its own accounting and timekeeping records separate from those of any other organization. A recipient may send its financial records to an outside accountant or service bureau. A recipient may also perform accounting services for, or purchase them from, any other organization, provided the recipient maintains its records separately and fair value is exchanged for the services.

4. **Signs and other forms of identification.** Organizational names, building signs, business cards, telephone and fax numbers, e-mail addresses and other forms of identification should clearly distinguish the recipient from any organization which engages in restricted activity. Recipient governing bodies should review whether any such forms of identification could mislead the public about the recipient's separation and independence from organizations which engage in restricted activity.

E. **Involvement of more than one factor.** The program integrity test is a case-by-case determination based upon the totality of the circumstances. The more factors involved in a particular relationship between the recipient and another organization which engages in restricted activities, the more likely the recipient will fail the program integrity test. Once the governing body has sufficient information about each of the above factors, it must determine whether, taken as a whole, the recipient is physically and financially separate and independent from any organization which engages in restricted activity. If the answer is no, the governing body should

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a guide. However, for recipients with smaller staffs, the program director should use his or her best judgement to determine whether part-time staff constitute a substantial proportion of the recipient's legal workforce.

take such action as is necessary to alter or disengage the recipient from the relationship before signing the certification.

F. Questions? Recipients are encouraged to contact LSC if they have any questions about the program integrity standards. Call either Anh Tu at (202) 336-8946 or Bob Gross at (202) 336-8856.