



February 23, 2000

Robert Hickerson
Executive Director
Alaska Legal Services Corporation
1016 West Sixth Avenue, Suite 200
Anchorage, AK 99501-1963

Dear Mr. Hickerson:

This letter is in response to your letter of December 16, 1999 (copied to Linda Perle at CLASP). You requested clarification on 42 C.F.R. § 1604, Outside Practice of Law. According to your letter one of the full time ALSC staff attorneys currently prepares Miller income trusts for eligible clients. He has requested permission to volunteer his services to the Disability Law Center preparing these trusts for DLC clients ineligible for ALSC representation. You have asked if you have the discretion to allow him to engage in this type of uncompensated outside practice of law.

Issue Presented

Can a full time recipient attorney engage in uncompensated legal work preparing Miller income trusts for clients of a separate disability rights program?

Summary

The Legal Services Corporation's ("Corporation") Outside Practice Of Law regulation, 45 U.S.C. § 1604, permits full time recipient attorneys to represent individual clients on behalf of a separate charitable organization such as a disability rights program, subject to the approval of the recipient program's director.

Analysis of Law and Regulations

The LSC Act provides at 42 U.S.C. § 2996f (a)(4) that the Corporation shall "insure that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from (A) any compensated outside practice of law, and (B) any uncompensated outside practice of law except as authorized in guidelines promulgated by the Corporation." The Corporation's Outside Practice of Law regulation, 45 C.F.R. § 1604 provides in subsection 1604.5 that "[a] recipient may permit an attorney to engage in uncompensated outside practice of law" under limited circumstances subject to the recipient director's approval. One of those circumstances is when "the attorney is acting . . . on behalf of . . . [a] religious, community, or charitable group." For purposes

of § 1604, an ‘attorney’ is defined as “a person who is employed full time in legal assistance activities supported in major part by the Corporation” § 1604.2(a).¹

Neither the regulation nor the supplemental information to the regulation provide guidance on what activities constitute ‘acting on behalf of’ a charitable group. See Outside Practice of Law, 41 Fed. Reg. 10,629 (1976) (Proposed Rule); Outside Practice of Law, 41 Fed. Reg. 18,512 (1976) (Final Rule). The original proposed rule phrased this exception differently as permitting uncompensated outside practice of law if “legal assistance is rendered to religious, civic, community or charitable groups.” § 1604.4(c), 41 Fed. Reg. 10,629. This language was changed in the final rule without explanation. The supplemental information for the final rule states that uncompensated outside law practice is permitted when it “is undertaken on behalf of a close friend or family member, or for a civic or charitable group” 41 Fed. Reg. 18,512 (emphasis added).

The substitution of the phrase ‘on behalf of’ for the preposition ‘to’ indicates an intent to avoid a narrow application of the regulation. Legal assistance ‘to’ a charitable group might mean that the group must receive the direct benefit of the legal work. Legal assistance ‘on behalf of’ such a group more clearly means that the work may be done either for the direct benefit of the group or as a means of furthering the group’s goals (such as providing legal representation for clients of the group).

This interpretation is supported by the comment language that uses the preposition ‘for’ as synonymous with ‘on behalf of.’ Providing legal assistance for a client can mean working at the direction of the client to directly benefit someone else as well as directly representing the client. Thus an attorney employed by a recipient is said to work for the recipient even though she provides her legal work to the low-income clients of the recipient rather than to the recipient itself. That attorney could properly describe her situation as working on behalf of the recipient representing the client.²

Furthermore, in 1995 a proposed revision to this section was designed “to revise paragraph (c)(4) to make it clear that in addition to representing a religious, community, or charitable group, an attorney may represent a client who has been referred to him or her by such a group” through a regular referral program. Outside Practice of Law, 60 Fed. Reg. 3368 (Jan. 17, 1995) (Proposed Rule) (emphasis added). Had this been a change in the regulation, the supplemental information would have stated that it was expanding the rule rather than merely clearing up any doubts about this application of it. The comments submitted in response to this proposed rule raised no objections to this clarification nor did any commentator object to the description of it as a clarification

¹ Under § 1604 a recipient attorney may engage in the outside practice of law regardless of compensation if the attorney works only part time for the recipient or the attorney’s work for the recipient is not supported in major part by funds from the Corporation.

² The parallel subsection, § 1604.5(b), allows for uncompensated outside practice of law when the attorney is acting on behalf of a close friend or family member. Under this section a recipient full time attorney representing a friend’s child in a lawsuit might be acting for and on behalf of both the parents and the child through providing legal assistance directly to the child.

Robert Hickerson
December 8, 2005
Page 3

rather than a change. This revised § 1604 was tabled when priority was given to promulgating regulations implementing the new restrictions on LSC funding.

Conclusion

According to your letter the DLC is a charitable organization. Under § 1604.5 you have the discretion to allow ALSC full time staff attorneys to engage in uncompensated outside practice of law on behalf of DLC. This includes service as a volunteer attorney preparing Miller income trusts for DLC clients. Please contact me if you need any further information.

Very truly yours,

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cc: Linda Perle