



OFFICE OF LEGAL AFFAIRS

EXTERNAL OPINION

External Opinion # EX-2003-1003

To: Jean Turner Carter
Executive Director
Center for Arkansas Legal Services
303 West Capitol Avenue, Suite 200
Little Rock, Arkansas 72201

Date: February 10, 2003

Subject: Request for Opinion on Outside Practice of Law, External Opinion

Dear Ms. Carter:

I am writing in response to your recent request for an opinion on the outside practice of law. You indicated that a full-time staff attorney with the Center for Arkansas Legal Services (CALS) has requested approval to work part-time for the Arkansas Access & Visitation Mediation Program (AAVMP), a program established by the Arkansas Alternative Dispute Resolution Commission. The staff attorney is primarily interested in mediating family law cases, and she has assured you that she would only engage in mediations held outside of regular office hours and away from your program's offices. The mediations undertaken by the attorney would be those referred to her by Arkansas courts, or cases in which she is hired by attorneys or private parties through the AAVMP program. She would be paid at a fixed rate per hour up to a maximum of 10 hours per mediation.

The Legal Services Corporation's (LSC) regulation on the outside practice of law provides that "no attorney shall engage in any outside practice of law if the director of the recipient has determined that such practice is inconsistent with the attorney's full time responsibilities." 45 C.F.R. § 1604.3. "Attorney" is defined in this regulation as "a person who is employed full time in legal assistance activities supported in major part by the Corporation, and who is authorized to practice law in the jurisdiction where assistance is rendered." 45 C.F.R. § 1604.2(a). "Outside practice of law" is defined as "the provision of legal assistance to a client who is not entitled to receive legal assistance from the employer of the attorney rendering assistance, but does not include, among other activities, teaching, consulting, or performing evaluation." 45 C.F.R. § 1604.2(b).

The determination of whether an activity constitutes the "outside practice of law" is fact-specific and must be made on a case-by-case basis. (*See LSC Op. Ltr., 6/18/99*, appended hereto as Attachment 1.) In making such determinations, LSC considers multiple factors including, but not limited to: the definition of the "practice of law" in the relevant jurisdiction; whether a non-lawyer could perform the work in question; whether the attorney, in performing the given

activity, is holding herself out as a lawyer or by another title; how the attorney is paid (e.g. at an hourly attorney's rate or by a flat fee per service); and whether that attorney is working directly with clients or whether she is hired by a firm or company. *Id.*

Among the factors used to assess whether a given activity amounts to the "outside practice of law," the definition of "practice of law" in a given jurisdiction is perhaps the most important. The State of Arkansas defines the "practice of law" as follows:

. . . any service rendered, regardless of whether compensation is received therefore, involving legal knowledge or legal advice. It shall include representation, provision of counsel, advocacy, whether in or out of court, rendered with respect to the rights, duties, regulations, liabilities, or business relations of one requiring the legal services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document or law. Inactive attorneys may not, at any time, or in any manner, hold themselves out as lawyers to the general public. Nonetheless, it shall not be considered the practice of law for attorneys to represent themselves or family members to the third degree of consanguinity. ARK. CODE ANN., ARK. ST. CLE REGS, RULE 2.02(2) (2002).

Although the definition of the "practice of law" in Arkansas does not specifically include mediation or alternative dispute resolution services, it is necessary to review the specific job duties performed in the AAVMP program to ascertain whether work done in this context would amount to the "practice of law" as defined by the State of Arkansas.

In submitting your request for an opinion, you provided supplemental materials about the AAVMP program. These materials include a pamphlet from the AAVMP program providing information to participants about the purpose of mediation, the role of the mediator, how the mediation program works, etc., as well as the Arkansas Alternative Dispute Resolution Commission's Guidelines for Mediator Skills and Qualifications. In discussing the role of the mediator, the pamphlet does not list any activities that fall within the range of services encompassed in the State of Arkansas' definition of the "practice of law." In quoting the *Academy of Family Mediators – Standards of Practice for Family and Divorce Mediation*, for example, the pamphlet notes that "[m]ediation is a family-centered conflict resolution process in which an impartial third party assists participants to negotiate a consensual and informed settlement. . . . The role of the mediator includes reducing the obstacles to communication, maximizing the exploration of alternatives, and addressing the needs of those it is agreed are involved or affected." The pamphlet goes on to state that in the context of custody cases, "[t]he mediator is a trained professional who facilitates a difficult, confidential discussion between the parents, helping the parents listen to one another and be open with one another." It also lists the following roles of the mediator in the mediation process: facilitate a discussion; focus on the future; and to be a neutral party. Based on these materials, the relevant mediation program does not contemplate mediators engaging in traditional lawyer functions within the context of mediations. In particular, the program materials do not envision mediators rendering services that specifically involve legal knowledge or legal advice, that amount to representation,

provision of counsel or advocacy rendered with respect to the rights, duties, regulations, liabilities or business relations of the participants in the mediation process, or that require the mediator to examine the law or pass upon the legal effect of any act, document or law.

The conclusion that the work of mediators in the AAVMP program is not intended to involve the “practice of law” is supported by the Arkansas Alternative Dispute Resolution Commission’s Guidelines for Mediator Skills and Qualifications. This document enumerates three guidelines dealing with mediator skills and qualifications. The first is a general guideline to advise the public on what it should expect of a mediator in terms of basic skills necessary for competent performance as a neutral mediator.¹ The second guideline sets out the requirements that must be met before a mediator can be placed on the roster of mediators maintained by the Arkansas Alternative Dispute Resolution Commission.² The third guideline is a set of standards that may be used by courts in establishing court-annexed mediation systems or selecting court-referred mediators, and it includes standards for family mediations among others.³ None of the three guidelines requires that a mediator be an attorney, which indicates that the program does not contemplate mediators engaging in the “practice of law.”⁴

At its core, the definition of “outside practice of law” contained in LSC’s regulations is the provision of legal assistance to a client, except for teaching, consulting or performing an

¹ This guideline advises the public of the Commission’s opinion that a competent, neutral mediator should possess the following skills and attributes: good moral character; ability to listen actively; ability to understand and analyze complex factual materials; ability to use clear, concise language; ability to recognize and respect gender, ethnic, and cultural differences of disputants; ability to analyze problems, identify and separate the issues involved, and frame these issues for resolution or decision making; ability to screen out non-mediable issues; ability to suggest creative options for resolution of mediable issues; ability to discuss with the parties the process that will be used to resolve the dispute if no agreement is reached; ability to reduce the agreement of the parties to writing; persistence; patience; ability to maintain control of a diverse group of disputants; and adherence to the *Arkansas Alternative Dispute Resolution Commission’s Requirements for the Conduct of Mediation and Mediators*.

² In addition to stating the procedural steps that a mediator must take in order to become listed on the roster (e.g. filing an application for inclusion on the Commission’s roster along with the payment of an administrative handling fee), this guideline also enumerates the following substantive qualifications that a candidate must possess: the mediator must have a bachelor’s degree from an accredited college or university; must submit evidence of successful completion of at least 40 hours of training in basic mediation skills offered by a training program approved by the Commission; must submit evidence of observation, co-mediation or mediation of at least two complete mediations; be of good moral character; and accept and follow the *Arkansas Alternative Dispute Resolution Commission’s Requirements for the Conduct of Mediation and Mediators*.

³ The guidelines for Family Mediators include the following requirements: the mediator must have completed a minimum of 40 hours in a family mediation training program approved by the Commission or have completed 40 hours of basic mediation training with an additional 20 hours of family mediation training in a program devoted entirely to family or parenting mediation and which is approved by the Commission; have a bachelor’s level degree with at least two years work experience in family and marriage issues or have a master’s degree or higher in social work, mental health, behavioral social science, or communications, or be an attorney; have observed, mediated, or co-mediated two family mediations; be of good moral character; and accept and follow the *Arkansas Alternative Dispute Resolution Commission’s Requirements for the Conduct of Mediation and Mediators*.

⁴ Although the third guideline indicates that being an attorney qualifies one to mediate family cases, status as an attorney is not required to perform these mediations.

evaluation (*See* LSC Op. Ltr., 4/14/98, appended hereto as Attachment 2).⁵ The services performed in the AAVMP program do not seem to contemplate representing a client or clients, but rather facilitating communication between two parties involved in a lawsuit or potential lawsuit.

Based on the facts that 1) the State of Arkansas' definition of the "practice of law" does not include mediation or alternative dispute resolution services, 2) the materials distributed by the AAVMP program do not contemplate mediators engaging in any activities that fall within the range of services encompassed in the State of Arkansas' definition of the "practice of law," 3) none of the three guidelines for mediator skills and qualifications issued by the Arkansas Alternative Dispute Resolution Commission requires a mediator to be an attorney, and 4) the work performed in the relevant program would not involve the actual representation of clients, it is the opinion of the Office of Legal Affairs that participating as a mediator in the AAVMP program -- as described in the program's published materials -- does not involve the "practice of law" as defined by the State of Arkansas, and it accordingly does not violate LSC's prohibition on the "outside practice of law."

Notwithstanding the aforementioned conclusion, however, it would be possible for the attorney to participate in the AAVMP program and still engage in the practice of law, thereby potentially violating LSC's prohibition on the "outside practice of law." She could do this by engaging in the range of services encompassed in the State of Arkansas' definition of the "practice of law" in the course of her mediations (e.g. rendering legal advice within the context of mediation services; advising mediation participants on their rights, duties or liabilities under the law outside of the scope of information normally provided through the AAVMP program; or rendering an opinion on the legal effect of any act, document or law within the context of mediation services). If the attorney wishes to participate as a mediator in the AAVMP program, she should be very mindful of not engaging in the practice of law in the context of mediating family disputes, and she should also refrain from holding herself out as an attorney in advertising her mediation services or otherwise soliciting mediation clients. It is also important to note that our conclusion in this matter is based primarily on Arkansas' definition of the "practice of law," so if the state's definition changes or if the state bar issues an opinion concluding that mediation constitutes the "practice of law," this opinion would have to be revisited.

I hope that this information is helpful. If you would like to discuss this issue or if you have any additional questions, please feel free to contact me directly at (202)336-8871.

Sincerely,

Dawn M. Browning
Assistant General Counsel

⁵ As noted in the opinion cited, the rest of the definition focuses on what is meant by "outside," i.e. the practice of law outside of the attorney's employment with the recipient.

Victor M. Fortuno
General Counsel