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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. [Emphasis added.]

With respect to compensated outside practice of law, § 1604.4 provides that "[a] recipient may permit an attorney to engage in [such practice] . . . if Section 1604.3 is satisfied, and (a) [t]he attorney is newly employed and has a professional responsibility to close cases from a previous law practice, and does so as expeditiously as possible; or (b) [t]he attorney is acting pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction. . . ." [Emphasis added.]

With respect to uncompensated outside practice of law, § 1604.5 provides that "[a] recipient may permit an attorney to engage in [such practice] if Section 1604.3 is satisfied, and the attorney is acting: (a) [p]ursuant to an appointment made under a rule or practice of equal applicability to all attorneys in the jurisdiction[3]; or on behalf of; (b) a close friend or family member; or (c) a religious, community, or charitable group." [Emphasis added.]

Before addressing the primary issues presented, I will address two preliminary matters invoked by the current situation. First, the legislative history of the LSC Act is clear that Congress did not intend for LSC funds to relieve states or localities of lawful obligations to provide counsel to indigents.[4] LSC funds are intended to supplement, and not substitute for, the resources available in a community for representation of the poor. My understanding, based on my conversations with you and the correspondence I have reviewed on this subject, is that 18-B appointments are assignments made pursuant to the county program for representing the poor. As such, 18-B appointments to your program that are determined inconsistent with attorneys' full-time responsibilities would violate Congressional intent.

As a second preliminary matter, LSC's Office of Legal Affairs has previously determined that when grantees receive judicial appointments, they are still required to evaluate those assignments for financial eligibility and limit representation to matters falling within program priorities.[5] Based on my understanding of the 18-B cases that your program will likely be assigned (i.e. custody cases), the appointments will fall outside of your program's established priorities.

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[3] The letter written by Judge Lawliss to Thomas Murnane, Esq., dated January 28, 2002, makes clear that Judge Lawliss' appointments

The legislative history of the LSC Act, and of 42 U.S.C. § 2996f(a)(4) in particular, makes clear that 1) the guiding principle in permitting any outside practice of law is that such work must not be inconsistent with an attorney's full-time responsibilities to represent eligible clients of the program, and 2) LSC has the authority to establish the parameters of permissible outside practice of law.[6] Pursuant

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[6] The House and Senate Committee Reports, as well as the Conference Report, all reflect these principles. The relevant text of said reports is as follows, and copies are attached hereto for your information.

S. REP. NO. 93-495, at 15 (1973):

Outside Practice Restricted (Section 1007(a)(4))

This section provides that the Corporation shall insure that attorneys employed full-time in legal assistance work that is funded in major part by the Corporation, shall not accept outside compensation from any client for the practice of law. Legal services attorneys, however, like all attorneys, may offer their services in aid of their communities and may be required to perform duties as officers of the court. ***The bill provides for guidelines to be promulgated by the Corporation***, under which such duties as well as outside legal work for clients who do not pay fees, such as family members, friends, religious groups, community charities, or other parties, would be authorized. ***The guidelines should be designed to assure that such outside work does not interfere with their responsibilities to provide high quality legal assistance to the poor in accordance with the new title.*** [Emphasis added.]

S. REP. NO. 93-495, at 26 (1973) :

Subsection (a)(4) provides that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from any outside practice of law for compensation and, ***except as deemed appropriate in guidelines promulgated by the Corporation***, any uncompensated outside practice of law. [Emphasis added.]

H.R. REP. NO. 93-247, at 8-9 (1973):

Sec. 7 provides that with respect to grants and contracts to provide legal assistance to eligible clients the corporation in accordance with the Canons of Ethics and Code of Professional Responsibility shall: . . . (4) insure that full-time attorneys represent only eligible clients and refrain from the outside practice of law. . . . It is expected that such attorneys, however, will be permitted to handle uncompensated legal work for their families, church groups, community organizations, and other parties ***so long as their uncompensated work does not interfere with their responsibilities to provide first-rate legal assistance to the poor in accordance with this bill.*** [Emphasis added.]

H.R. REP. NO. 93-247, at 3889-90 (1974)

Sec. 7. Grants and Contracts

(a) This section sets forth conditions and guidelines under which the corporation shall contract or issue grants to provide legal assistance to eligible clients in accordance with the Canons of Ethics and Code of Professional Responsibility of the American Bar Association, including: (4) the insurance that attorneys employed full-time by the legal assistance program refrain from any outside practice of law for compensation; and also that attorneys employed full time in legal assistance activities refrain from

to the authority given to LSC by federal law, LSC has delegated to Executive Directors of grantees, via federal regulation, the authority to determine whether the outside practice of law, in any given circumstance, is inconsistent with an attorney's full-time responsibilities. The delegation of this authority is logical given that an Executive Director of a program is in a better position than LSC to determine whether a case constituting the outside practice of law is inconsistent with an attorney's full-time responsibilities. Because an Executive Director's authority to determine whether the outside practice of law is inconsistent with an attorney's full-time responsibilities derives from federal law, it is the opinion of this office that it would be a violation of the Supremacy Clause, Article VI, Section 2, of the United States Constitution, for a state or local court judge to overrule such a determination by an Executive Director.

The few recorded cases addressing this issue support the opinion of this office.

In Central Florida Legal Services Inc. v. Eastmoore, 517 F. Supp. 497 (1981), an LSC grantee challenged the appointment of program attorneys by state circuit court judges to represent state criminal defendants.[7] As in the present situation, the judges in this case sought to distribute the obligation of representing the needy among the membership of the entire local bar association. Id. at 498. The program had previously determined that because of insufficient resources, representation in criminal proceedings was inconsistent with its primary responsibility to provide legal assistance to eligible clients in civil matters. Id. at 500. Notwithstanding this determination, however, the judges refused to excuse program attorneys from the appointments, and the program sought a preliminary injunction in United States District Court for the Middle District of Florida in Jacksonville. Id. at 497. The Court granted the injunction, noting in its opinion that federal statutes are superior to practices or rules of state or local bar associations. Id. at 499. In making its decision,

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uncompensated outside practice of law ***except that deemed appropriate in guidelines promulgated by the corporation.*** [Emphasis added.]

H.R. REP. NO. 93-1039, at 24 (1974)

The House bill contained an absolute prohibition on the outside practice of law for attorneys employed full time in activities supported by the Corporation, and required that they represent only eligible clients. The Senate amendment prohibited attorneys employed full time in legal assistance activities supported in major part by the Corporation from any compensated outside practice of law and any uncompensated outside practice of law ***except as authorized in guidelines promulgated by the Corporation***. [Emphasis added.]

[7] Although this case deals with appointments in criminal cases rather than civil cases, it is still instructive because the critical issue is whether the state court judge has the authority to negate the Executive Director's determination that a case constituting outside practice of law is inconsistent with an attorney's full-time responsibilities.

the Court agreed with the finding of a lower court judge in the case of Central Florida Legal Services v. Blount, Case No. 78-561-Orl-Civ.Y, that the authority of an Executive Director to make the relevant determination derives from federal law, and program attorneys cannot be compelled to violate federal law by state court judges. Id. at 500.

The Supreme Court of West Virginia reached a similar conclusion in the case of Rehmann v. Maynard, 376 S.E.2d 169 (1988). In Rehmann, a circuit judge appointed an attorney from Appalachian Research and Defense Fund, Inc., an LSC grantee, to represent a defendant in a criminal case.[8] Id. at 171. As in the case at hand, the judge in this case also made the appointment in order to distribute the burden of representing indigent defendants among the majority of attorneys in the local bar association. Id. at 170-71. Notwithstanding a previous determination that criminal representation was inconsistent with the program's primary responsibilities to provide legal assistance to eligible clients in civil matters, the judge refused to exempt the attorney from the case and the program sought a writ of prohibition from the state's highest court. Id. at 171, 173. Acknowledging in its opinion that "courts of [the] State must yield to [federal] law", the Court held that a circuit judge is prohibited by the LSC Act from appointing an attorney of an LSC-funded program to represent an indigent criminal where the program has determined that such representation is inconsistent with its primary responsibility to provide legal assistance to eligible clients in civil matters. Id. at 172-173.

The defendant judges in the Central Florida Legal Services case argued that they could circumvent the prohibitions of the LSC Act and Regulations by appointing a program attorney in his individual capacity as a member of the state and county bar associations, rather than as a member of the LSC-funded program. 517 F. Sup. at 500. The Court noted that the attorney would nonetheless be prohibited from accepting the appointment because he was prohibited by the LSC Act and Regulations from engaging in the outside practice of law. Id. The Court rejected the defendant judges' argument that the attorney should undertake the case without using program funds ("i.e. without secretarial or support staff, without office supplies, and presumably during non-working hours although both the pretrial and trial are [were] scheduled during regular working hours"), finding that position untenable.

It is the position of this office that a state court judge cannot circumvent the LSC Act and Regulations governing the outside practice of law by appointing an attorney in her/his individual capacity as a member of a state or local bar, rather than as a member of an LSC-funded program. If a judge makes such an appointment in an individual capacity, the attorney's employment with an LSC-funded program still invokes an analysis of the permissibility of the representation under the LSC Act and

[8] Once again, although this case involved a criminal appointment, it is still instructive in that it addresses the ability of a state court judge to overrule the determination by an Executive Director that the outside practice of law is inconsistent with an attorney's full-time responsibilities.

Regulations. If the Executive Director of the program determines the representation to be inconsistent with the attorney's full-time responsibilities, the representation is still prohibited, notwithstanding that the appointment was made in an individual capacity. As stated above, it is the opinion of this office that it would be a violation of the Supremacy Clause of the United States Constitution, for a state or local judge to overrule such a determination by an Executive Director.

While we recognize that Judge Lawliss has good intentions in implementing the above-referenced policy, forcing your program to accept appointments that constitute impermissible outside practice of law (e.g. because they fall outside of established priorities or because the are inconsistent with an attorney's primary responsibilities) could jeopardize your program's funding. It seems clear that the potential loss of federal funding for your program would be more detrimental to the indigent of Clinton County than the inability of program attorneys to represent 18-B clients in Family Court.

If you have further questions regarding this matter or if you would like to discuss the conclusions herein, please feel free to contact me at (202) 336-8871.

Sincerely,

Dawn M. Browning
Assistant General Counsel

Victor M. Fortuno
General Counsel