



OFFICE OF LEGAL AFFAIRS

## ADVISORY OPINION

Advisory Opinion # AO – 2009-1007

**SUBJ:** “Incubator Program” Attorneys Status as Staff Attorneys

**DATE:** November 25, 2009

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### *Questions Presented*

Whether a person who worked on the staff of a recipient in connection with an “incubator program” intended to provide training and introduction to legal practice in the low income community would be a “staff attorney” for the recipient?

Whether a recipient would be prohibited from providing compensation to an attorney after that person was no longer serving on the staff of that recipient and/or charging that payment against the recipient’s private attorney involvement spending requirement under 45 CFR Part 1614?

### *Brief Answers*

Any attorney participating in the “incubator program” who earns more than one half of his or her professional income from a recipient qualifies as a staff attorney.

A recipient could not make a payment to any attorney who qualified as a staff attorney for two years after the attorney was a staff attorney and charge that payment against the recipient’s private attorney involvement spending requirement under 45 CFR Part 1614.

### *Factual Background*

A recipient would like to collaborate with a nearby law school to create an “incubator” program to provide training and assistance to law school graduates to establish independent law practice geared toward serving the low income community. As envisioned, the participants who would serve three to four internships at the recipient. Some of the participants, it is anticipated, would already be licensed attorneys. These persons would be hired and paid as program attorneys on a temporary employment basis. Others, however, would be persons who had just graduated from law school. For these participants, it is presumed that they would have taken the July bar exam, but would not be likely to have their results or (for those who passed) have been admitted to the bar during the majority of the period of internship with the recipient. Instead these persons would be hired and paid on a temporary basis as paralegals and would be permitted to perform some legal services under the supervision of recipient staff under state practice rules applicable to law students and recent graduates.

Following the period of employment with the recipient, the participants could then have several additional months of internship gaining legal practice experience in a structured community service setting organized under the auspices of the law school. Following the period of internship through the incubator program, the attorneys would be expected to establish independent private practices providing legal services to low income persons in the community. During the second internship period, and later on an ongoing basis in the lawyer's independent private practice, the recipient would like to be able to refer eligible clients to those lawyers and to pay those attorneys in accordance with its private attorney involvement (PAI) plan (and count the funds expended towards its PAI spending requirement under 45 CFR Part 1614.<sup>1</sup>

This advisory opinion addresses the question as to whether the recipient would be permitted under LSC's private attorney involvement (PAI) regulation at 45 CFR Part 1614 to provide compensation to attorneys who had served in the incubator program and count those funds towards its PAI spending requirement.

### *Analysis*

Under the terms of the PAI regulation, "no PAI funds shall be committed for direct payments to any attorney who for any portion of the previous two years has been a staff attorney as defined in §1600.1 of these regulations . . ." 45 CFR §1614.1(e). Staff attorney is defined in Part 1600 as "an attorney more than one half of whose professional income is derived from the proceeds of a grant from the Legal Services Corporation or its received from a recipient, subrecipients, grantee, or contractor that limits its activities to providing legal assistance to clients eligible for assistance under the Act." 45 CFR §1600.1. LSC considers its basic field programs to be "recipient[s] organized solely for the provision of legal assistance to eligible clients under [the LSC Act]." LSC Office of Legal Affairs External Opinion EX-2003-1004. Accordingly, any attorney employed by such a program who receives more than one-half of his income from the program's funds – whether they are LSC funds or non-LSC funds – is considered to be a "staff attorney." *Id.*

The key to the analysis as to whether any or all of the participants in the incubator program would be "staff attorneys" is whether they would be receiving more than one half of their professional income from the recipient. This is a determination the recipient will have to make on an individualized basis for each attorney. As we understand the incubator program as

months, and then receive additional income from

It is important to keep in mind, however, that once the graduate passes the bar and is admitted to practice in the state, the gtiyid is

A heavily distorted and colorful signature or stamp, possibly representing a name like 'Vicki'. The image is a horizontal strip with a complex, multi-colored background (including shades of blue, green, yellow, and red) and a blue, scribbled signature overlaid on it.