



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
AO-2013-009

SUBJECT: Applicability of LSC's Rules of Eligibility to Court Appointments

DATE: November 26, 2013

QUESTIONS PRESENTED

(1) Whether a recipient's written policy drafted pursuant to 45 C.F.R. § 1604.7(a), permitting full-time attorneys to accept a court appointment under certain circumstances, may permit appointments to represent a client who does not meet other LSC client-eligibility requirements.

(2)

C.F.R. § 1613.4(a) permits attorneys to accept court appointments in criminal cases. As with § 1604.7(a), there is no provision requiring that those clients be otherwise eligible for LSC-funded services. The absence of the “not otherwise prohibited” proviso in § 1613 means that such a requirement does not apply to court appointments for criminal proceedings under § 1613.4(a).

BACKGROUND

Attorneys employed by recipients are sometimes appointed by courts to represent

45 C.F.R. Part 1604 implements the statutory provision on the outside practice of law by full-time attorneys. Part 1604 “is intended to provide guidance to recipients in adopting written policies relating to the outside practice of law by recipients’ full-time attorneys.” *Id.* § 1604.1. “Under the standards set forth in [Part 1604], recipients are authorized, but not required, to permit attorneys, to the extent that such activities do not hinder fulfillment of their overriding responsibility to serve those eligible for assistance under the Act, to engage in pro bono legal assistance and comply with the reasonable demands made upon them as members of the Bar and as officers of the Court.” *Id.* Section 1604.7 addresses court appointments:

§ 1604.7 Court appointments.

- (a) A recipient’s written policies may permit a full-time attorney to accept a court appointment if the director of the recipient or the director’s designee determines that:
 - (1) Such an appointment is consistent with the recipient’s primary responsibility to provide legal assistance to eligible clients in civil matters;
 - (2) The appointment is made and the attorney will receive compensation for the court appointment under the same terms and conditions as are applied generally to attorneys practicing in the court where the appointment is made; and
 - (3) Subject to the applicable law and rules of professional responsibility, the attorney agrees to remit to the recipient any compensation received.¹
- (b) A recipient’s written policies may permit a full-time attorney to use program resources to undertake representation pursuant to a court appointment.
- (c) A recipient’s written policies may permit a full-time attorney to identify the recipient as his or her employer when engaged in representation pursuant to a court appointment.
- (d) If, under the applicable state or local court rules or practices or rules of professional responsibility, legal services attorneys are mandated to provide pro bono legal assistance in addition to the attorneys’ work on behalf of the recipients’ clients, the recipients’ written policies shall treat such legal assistance in the same manner as court appointments under paragraphs (a)(1), (a)(3), (b) and (c) of this section, *provided that*

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attorney's responsibilities as a member of the bar." *Id.* § 1613.1. Section 1613.4 authorizes legal assistance in criminal cases in two circumstances:

§ 1613.4 Authorized representation.

Legal assistance may be provided with respect to a criminal proceeding:

- (a) Pursuant to a court appointment made under a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction, if authorized by the recipient after a determination that it is consistent with the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters; or
- (b) When professional responsibility requires representation in a criminal proceeding arising out of a transaction with respect to which the client is being, or has been, represented by a recipient.

Part 1610 of the LSC regulations implements the statutory restrictions on recipients' use of *non-LSC funds*. Section 1610.6(b) provides that certain specified prohibitions, including those governing legal assistance in criminal proceedings (45 C.F.R. §§ 1610.2(a)(4) & 1613) and legal assistance to aliens (45 C.F.R. §§ 1610.2(b)(7) & 1626) "will not apply to...criminal or related cases accepted by a recipient or subrecipient *pursuant to a court appointment.*" 45 C.F.R. § 1610.6(b) (emphasis added).

II. Analysis Under 45 C.F.R. § 1604.7

Under Section 1604.7(a), a recipient's written policies may permit a full-time attorney to accept a court appointment, if the executive director makes several determinations, including that the appointment is consistent with the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters a

See, e.g. Marx v. General Revenue Corp., 133 S.Ct. 1166, 1175 (2013); *United States v. Okoye*, 2013 WL 5394287 (1st Cir. 2013). Where, as here, a proviso is present in one section but not in another, the canon holds that the proviso is meant to only apply to the section in which it is found.

The conclusion that LSC's rules of client eligibility do not apply to court appointments under certain circumstances finds further support in section 1006(b)(3) of the LSC Act. This

