



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
AO-2014-003

SUBJECT: Part 1610 Program Integrity Involving an Attorney Incubator Project

DATE: April 4, 2014

QUESTION PRESENTED

Whether Memphis Area Legal Services (MALS) may participate in a new incubator program involving newly admitted attorneys, the local bar association, and a local law school by renting some of its office space and providing limited support services to the participating attorneys, consistent with the program integrity requirements set forth in 45 C.F.R. § 1610.8.

BRIEF ANSWER

Based on MALS' description of its role in the incubator program, the arrangement proposed would comply with the program integrity requirements of section 1610.8. If the arrangement is implemented as proposed, it will be structured in a manner that prevents MALS' subsidization of the other entities involved and avoids the appearance that the participating attorneys are employed by MALS.

BACKGROUND

ESQ.BUILD is an incubator project to help newly admitted attorneys start law practices in their first three years. The Memphis Bar Association (MBA), the University of Memphis Law School (Law School), and the Service Corps of Retired Executives (SCORE) created and will

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managers) and offer seminars, CLE programs, and

described above. MALS would document that termination. The MBA's auditor noted in an August 2, 2013, email that the MBA will need to provide each attorney with a 1099-MISC stating the total fair market value of the rental space for the period occupied. Each attorney must also commit to providing a minimum of five pro bono hours per week to MALS. The pro bono work will most likely occur at MALS outreach locations, not at the MALS office. Each attorney will sign a lease with MALS on these terms.

ANALYSIS

I. LSC's Regulations

Part 1610 includes the requirement "that recipients maintain objective integrity and independence from organizations that engage in restricted activities." 45 C.F.R. § 1610.1. To that end, section 1610.8 provides:

§ 1610.8. Program integrity.

- (a) A recipient must have objective integrity and independence from any organization that engages in restricted activities.

A recipient will be found to have objective integrity and independence from such an organization if:

- (1) The other organization is a legally separate entity;
- (2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and
- (3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this

II. Analysis Under 45 C.F.R. § 1610.8

For purposes of this opinion it is presumed that every other entity involved in ESQ.BUILD intends to maintain the ability to engage in restricted activities. Thus, MALS intends to maintain program integrity regarding all of them.

The regulation establishes three separate requirements regarding program integrity: (1) legal separation; (2) the absence of transfers of or subsidies using LSC funds; and (3) physical and financial separation. The ESQ.BUILD proposal does not raise any concerns with the first two factors. MBA, the Law School, SCORE, and each of the ESQ.BUILD attorneys are all legally separate entities from MALS. MALS would not transfer any LSC funds as part of this project. MALS would determine and document that rental payments cover the fair market value of the furnished offices and support services to ensure that MALS is not subsidizing the attorneys or any other entity. MALS does not intend to provide any other support to the project that would raise subsidy questions.

The third requirement—physical and financial separation—requires a review of the totality of the circumstances to determine if entities actually operate with sufficient separation. The four factors listed in section 1610.8(a)(3) are not exhaustive, and none of them is determinative, but they provide a useful framework. Based on the information provided to LSC, MALS' participation in ESQ.BUILD would maintain physical and financial separation from all of the other entities. MALS' relationships with the other sponsoring organizations do not intertwine MALS' operations with any of them in a way that would require further analysis under the four identified factors or any other aspect of separation. MALS will not participate in any of the formal ESQ.BUILD mentoring and training and would not create any appearance that its staff is working for any of the other entities.

The location of the ESQ.BUILD attorneys within MALS' offices presents a concern about ensuring that they are not confused with MALS staff. The concern involves all four of the factors. The first and fourth factors are addressed through the separation of office space, signage, and protocols. These factors reinforce the separation of these attorneys from MALS personnel (factor one) and provide signage and other forms of identification to distinguish MALS from the legal practices of these attorneys (factor four).

The ESQ.BUILD attorneys would use offices located on a separate hallway from offices used by MALS staff. MALS would establish clear signage distinguishing its space from the space used by the ESQ.BUILD attorneys. MALS would limit the attorneys' use of MALS' resources and infrastructure. The attorneys would clearly identify themselves as unaffiliated with MALS and would be encouraged to meet with clients and others outside of the MALS space. Furthermore, the attorneys will be independently obligated to make clear to their clients and others that they are not affiliated with MALS with the other ESQ.BUILD attorneys in the same office space. MALS must ensure that these attorneys are aware of the separation issues and clearly identify their practices as unaffiliated with MALS. The pro bono work of the ESQ.BUILD attorneys will be performed through the same MALS programs that involve other

private attorneys and should not create any impression that the ESQ.BUILD attorneys have a closer relationship to MALS than other private attorneys.

The second factor involves “the existence of separate accounting and timekeeping records.” The proposed arrangement does not involve joint projects that raise accounting or timekeeping concerns. The ESQ.BUILD program is designed to support independent legal practices for each participating attorney, which would include maintaining their own accounting and timekeeping. The rental of space and administrative services will be covered by the rental agreements and paid for by the MBAs described, these agreements should clearly document and account for the arrangements separate from space and services provided to MALS staff.

The third factor involves “the degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities.” The ESQ.BUILD attorneys may represent restricted clients in restricted cases (e.g., ineligible aliens or prisoner litigation). This factor is addressed by the physical separation of their offices in a hallway different from the MALS offices and by the signs and protocols indicating the separation of their practices from the work of MALS. While these attorneys might occasionally use MALS conference space for meetings involving their cases, the expectation is that they will primarily use conference space outside of the MALS offices. Furthermore, the limited time of the arrangements (nine months), combined with the nature of private practice for newly admitted attorneys, minimizes the extent of restricted activities that might occur.

As the program proceeds, MALS should make sure that it maintains records that clearly document its separation from this program and practices of the participating attorneys. MALS should account for the actual use of space and infrastructure. In particular, MALS should periodically review the office rent payments to ensure that it reflects the fair market value of the lease and the services provided. MALS should regularly review the physical separation of the ESQ.BUILD attorneys’ offices and ensure that signage and procedures are consistently followed. MALS should review and update the layout, signage, and procedures to reflect any changes (such as changes to MALS’ use of adjoining spaces). MALS should ensure that the attorneys primarily use space outside of MALS meetings, or clearly designate a conference room for their use separate from the spaces used by MALS.

Lastly, MALS should include this arrangement in its annual program integrity review for section 1610.8k (shoub) ceuee

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