

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) Whether a recipient may accept a court appointment in a criminal case pursuant to 45 C.F.R. § 1613.4(a), where the potential client would not meet other LSC client-eligibility requirements.

BRIEF ANSWERS

(1) LSC's restrictions on client eligibility do not apply to court appointments meeting the requirements of 45 C.F.R. § 1604.7(a). Section 1604.7(a) authorizes recipients to issue written policies permitting full-time attorneys to accept court appointments if the director of the recipient makes certain specified determinations, including that (1) the "appointment is consistent with the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters" and (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." There is no provision in § 1604.7(a) requiring that clients represented by appointment be otherwise eligible for LSC-funded services or that such appointments not be otherwise prohibited by LSC's regulations. By contrast, 45 C.F.R. § 1604.7(d), which authorizes recipients to issue policies permitting pro bono work in jurisdictions which *mandate* that members of the bar provide pro bono legal assistance, explicitly requires that any such policy "may only permit mandatory pro bono activities that are not otherwise prohibited by the LSC Act, applicable appropriations laws, or LSC regulation." Under well-accepted principles of statutory and regulatory construction, the omission of such language in § 1604.7(a) supports the conclusion that the "not otherwise prohibited" limitation does not apply to policies permitting court appointments under § 1604.7(a).

(2) The same answer applies to court appointments under Part 1613, which implements the statutory prohibition against using LSC funds to provide legal assistance in criminal proceedings. If the director of the recipient makes certain specified determinations, 45

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 indigent defendants. LSC has three principal sets of regulations that bear on court appointments. 45 C.F.R. § 1604.7 addresses court appointments generally; 45 C.F.R. § 1613 addresses appointments in criminal proceedings using LSC funds; and 45 C.F.R. § 1610.6 addresses appointment in criminal proceeding using non-LSC funds. The question under Parts 1604 and 1613 is whether they permit appointment of attorneys employed by recipients to represent clients who do not meet other LSC client-eligibility requirements, such as financial eligibility (Part 1611) and citizenship (Part 1626). The question does not arise with respect to appointments under Part 1610, because 45 C.F.R. § 1610.6 on its face specifies the prohibitions not applicable to such appointments.

ANALYSIS

I. The LSC Act and LSC’s Regulations

The LSC Act requires that “the corporation shall ... insure that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from (A) any compensated outside practice of law, and (B) any uncompensated outside practice of law except as authorized in guidelines promulgated by the Corporation.” 42 U.S.C. § 2996f(a)(4).

Also pertinent to the issues under consideration here is Section 1006(b)(3) of the LSC Act, which prohibits LSC and its grantees from interfering with the professional responsibilities of attorneys:

§ 1006(b)(3) Interference with professional responsibilities of attorneys.

The Corporation shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association (referred to collectively in this subchapter as “professional responsibilities”) or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys’ professional responsibilities.

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 the policies may only permit mandatory pro bono activities that are not otherwise prohibited by the LSC Act, applicable appropriations laws, or LSC regulation.*

45 C.F.R. § 1604.7 (emphasis added).

Part 1613 of the LSC regulations implements the statutory prohibition (42 U.S.C. § 2996f(b)(1)) against using *LSC funds* to provide legal assistance in criminal proceedings. Section 1613.1 states that the prohibition applies “unless such assistance is required as part of an

¹ 45 C.F.R. § 1604.7(c) addresses the LSC Act prohibition on “any compensated outside practice of law.” 42 U.S.C. § 2996f(a)(4).

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 and that the appointment is made "under the same terms and conditions as are *applied generally to attorneys* practicing in the court where the appointment is made" (emphasis added).

Section 1604.7(d) provides that, in jurisdictions where pro bono legal assistance is required by court rules or practices or by the rules of professional responsibility, the recipient's "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 the policies may only permit mandatory pro bono activities that are not otherwise prohibited by the LSC Act, applicable appropriations laws, or LSC regulation.*" 45 C.F.R. § 1604.7(d) (emphasis added). Section 1604.7(a), by contrast, does not include a "not otherwise prohibited" proviso. The plain language of section 1604.7 therefore supports the conclusion that recipients' policies may permit court appointments for representation that would otherwise be prohibited by statutes or LSC regulation.

This conclusion is supported by the standard canon of statutory and regulatory construction, *expressio unius est exclusio alterius* (the expression of one is the exclusion of the other). The canon provides that, if the legislating body (here the LSC Board of Directors) had intended to include a given provision in a statute or regulation, it would have done so expressly.

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 section provides that LSC “shall not . . . interfere with any attorney in carrying out his professional responsibilities to his client,” and that LSC shall not “abrogate . . . the authority of a State . . . to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction.” 42 U.S.C. § 2996e(b)(3). When read in light of these statutory requirements, we read 45 C.F.R. § 1604.7(a)(2) – which authorizes recipient policies permitting court appointments “made . . . under the same terms and conditions as are applied generally to attorneys” within a court’s jurisdiction – to refer to court appointments required as part of an attorney’s responsibility as a member of the bar. Where a court appointment is made under such circumstances, it is thereby tied to “standards of professional responsibility generally applicable to attorneys in such jurisdiction” that, pursuant to the LSC Act, may not be abrogated.

The distinction between the treatment of court appointments and mandatory pro bono matters reflects the differences in a lawyer’s ability to choose who his or her client is. Where a court appoints an attorney to represent a party, the appointed attorney generally has no choice as to the identity or personal circumstances of that party. By contrast, even in jurisdictions that require mandatory pro bono work, attorneys have some ability to choose what clients they wish to represent in fulfilling that obligation.

We emphasize that our conclusion that LSC’s restrictions on client eligibility do not apply to court appointments meeting the requirements of 45 C.F.R. § 1604.7(a), only applies to court appointments meeting *all* of those requirements. Thus, for example, where a court appoints a recipient or attorney employed by a recipient *not* as an obligation applicable to all members of the bar or under terms and conditions that are *not* generally applicable to other attorneys practicing before the court, but because, for example, the recipient or attorney has accepted similar appointments in the past, LSC’s restrictions would continue to apply.

III. Analysis Under 45 C.F.R. Parts 1613 and 1610

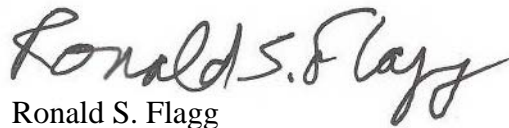
Part 1613 of the LSC regulations implements the statutory prohibition against using *LSC funds* to provide legal assistance in criminal proceedings. 45 C.F.R. § 1613.1 states that the prohibition applies “unless such assistance is required as part of an attorney’s responsibilities as a member of the bar.” Consistent with this requirement, 45 C.F.R. § 1613.4(a) provides that a recipient’s full-time attorney may provide legal assistance in a criminal proceeding “[p]ursuant to a court appointment made under a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction...” (The section also requires, like Part 1604, that the director of the recipient make certain specified determinations before the attorney can accept a court appointment. *Id.*) The “not otherwise prohibited” proviso in § 1604.7(d), requiring the application of LSC’s client-eligibility rules, does not appear in Part 1613. This again supports the

conclusion that the “not otherwise prohibited” proviso does not apply to § 1613, and that a client in a criminal proceeding need not be otherwise eligible for LSC services, *if* (1) the attorney is appointed by a court “under a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction,” *i.e.*, it is “required as part of an attorney’s responsibilities as a member of the bar,” and (2) the recipient determines that the appointment would be consistent with the recipient’s primary obligation to provide legal assistance to eligible clients in civil matters. Again, where a court appoints a recipient or attorney employed by a recipient *not* as an obligation applicable to all members of the bar or under terms and conditions that are *not* generally applicable to other attorneys practicing before the court, but, for example, because the appointee has accepted similar appointments in the past, LSC’s restrictions would continue to apply.

Part 1610 of the LSC regulations implements the statutory restrictions on recipients’ use of *non-LSC funds* and makes clear that certain otherwise applicable restrictions do *not* apply to the use of such funds for legal assistance pursuant to a court appointment in a criminal case. Specifically, section 1610.6(b) provides that 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).

CONCLUSION

LSC’s rules for client eligibility do not apply to court appointments under § 1604.7(a) or § 1613.4, so long as the court appointments are made under a statute or a court rule or practice of general applicability to all attorneys in the jurisdiction, and if authorized by the recipient’s director after a determination that it is consistent with the recipient’s primary responsibility to provide legal assistance to eligible clients in civil matters.



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