

Opinion letter
on 1610 from OPC
in Velayquey case.



LEGAL SERVICES CORPORATION

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September 10, 1997

H. Richard Schumacher, Esq.
Chairperson, Board of Directors
Legal Services for New York City
350 Broadway, 6th Floor
New York, NY 10013-9998

Re: Recipient No. 233100

Dear Mr. Schumacher:

I am writing in response to your letter of August 12, 1997, presenting a proposed plan of operation for an affiliate corporation of your subgrantee Queens Legal Services Corporation. I appreciate your interest in determining whether such an arrangement would be permissible under 45 C.F.R. 1610. For the reasons that follow, we conclude that the plan does not meet the requirements of the regulation.

As you know, 45 C.F.R. 1610 was adopted to implement Congressional restrictions on the use of non-LSC funds and to assure that no LSC-funded entity shall engage in restricted activity. Under this regulation, an LSC recipient cannot itself engage in such activities, transfer LSC funds to another organization which engages in restricted activity, or use LSC funds to subsidize the restricted activity of another organization.

Recipients may transfer *non*-LSC funds to another organization which engages in restricted activity if, and only if, the other organization is a legally separate entity and the LSC recipient maintains objective integrity and independence from it.

*A list of the restricted activities can be found at 45 C.F.R. 1610.2(a) and (b). They include, among other things, lobbying, participation in class actions, representation of prisoners, and claiming, or collecting and retaining attorneys' fees.

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To meet the objective integrity and independence test, a recipient must be organized so it is *physically and financially separate* from the other organization. Mere bookkeeping separation is insufficient. To determine whether there is sufficient physical and financial separation, the following factors, among others, will be considered:

- existence of separate personnel;
- existence of separate accounting and timekeeping records;
- degree of separation from facilities in which restricted activities occur, and the extent of such activities; and
- the extent to which signs and other forms of identification which distinguish the recipient from the other organization are present.

The presence or absence of any one or more factors is not determinative. Each situation is viewed on a case-by-case, totality of the circumstances basis.

The Queens proposal clearly fails this test. Although Queens Legal Services Corporation II ("QLSC-II") is a legally separate entity from Queens Legal Services Corporation ("QLSC"), that is practically all that is separate. As the proposal states, not only will the corporations share what is essentially the same name, but QLSC and QLSC-II also

will operate out of shared office space, and will share library facilities, office equipment, and office support services. QLSC and QLSC-II may share personnel, including but not limited to, Project Directors, litigation directors, supervising attorneys, attorneys, paralegals, secretaries and other support staff, while some personnel may work for only one corporation or the other.

The corporations will share a common reception area, and it appears that clients will be directed to common offices for appointments with attorneys who work for both corporations. The method of apportioning expenses retrospectively (monthly in some instances, at the end of the fiscal year in others) indicates common financial and timekeeping systems as well.

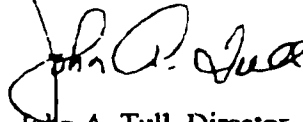
The fact that there may be separate signs, business cards, letterhead, litigation backup and other means of identification does not satisfy the separateness requirement. As proposed, the two corporations are so completely intertwined that identification of QLSC with QLSC-II's restricted activities would be inevitable, as would confusion and misunderstanding about QLSC's involvement with restricted activities. What amounts to little more than bookkeeping separation between the organizations is insufficient to avoid the public perception that restricted activities are being conducted by QLSC staff out of QLSC offices. Under such circumstances, QLSC does not have the requisite

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objective integrity and independence required by 45 C.F.R. 1610.8 from organizations that engage in restricted activities.

I hope this letter provides you with the guidance you need. If you have further questions, feel free to contact Anh Tu at (202) 336-8946.

Sincerely,



John A. Tull, Director
Office of Program Operations

cc: Dale Steven Johnson, Esq.
Joseph Farber, Esq.
Arnold S. Cohen, Esq.

07-11-1997
3-11-1997
3-11-1997

REQUEST FOR APPROVAL OF
NON-LSC AFFILIATE RELATIONSHIP

I. Background

Queens Legal Services Corporation ("QLSC"), a not-for-profit corporation organized under the laws of the State of New York, and a provider of legal services for the poor in the County of Queens, New York, hereby applies to Legal Services Corporation ("LSC") for approval of the affiliation of QLSC with a second corporation, Queens Legal Services Corporation II ("QLSC-II"), a not-for-profit corporation organized under the laws of the State of New York, which will use non-LSC funds to provide legal services restricted by Pub. L. 104-208.

In order to represent clients to the fullest extent permitted under the Constitution and in accordance with LSC regulations, QLSC has established a separate affiliated corporation for the purpose of engaging in restricted activities without the use of LSC funds. On May 7, 1997 the Board of Directors of QLSC adopted a resolution creating QLSC-II to engage in such activity. QLSC-II has been incorporated, has sources of non-LSC funding and is ready to commence operations immediately. Therefore, pursuant to LSC's policy of reviewing contemplated relationships upon request, as stated in 62 Fed. Reg. 27695, 27698 (May 21, 1997), QLSC hereby seeks confirmation from LSC that this proposed affiliate structure, as set forth below, complies with the regulations set forth in 45 C.F.R. Part 1610 and any other applicable LSC regulations.

II. Operations

QLSC proposes the following operating arrangements with QLSC-II, so as to permit QLSC to continue to receive LSC funding and to permit QLSC-II to engage in legal

services activities otherwise restricted under Pub. L. 104-208, without reducing QLSC's eligibility for LSC funding. QLSC will continue to receive LSC funds (either directly or through Legal Services for New York City, Inc.) and will not use those funds for legal services activities restricted by Pub. L. 104-208. QLSC-II will receive funds only from sources other than LSC; these sources may include, among others, IOLA, state and local governments, foundations and private donors. QLSC-II also may receive such non-LSC funds through QLSC. QLSC will not engage in any activity restricted by Pub. L. 104-208, while QLSC-II will engage in such activities, and may also engage in non-restricted activities. QLSC and QLSC-II will operate out of shared office space, and will share library facilities, office equipment, and office support services. QLSC and QLSC-II may share personnel, including, but not limited to, Project Directors, litigation directors, supervising attorneys, attorneys, paralegals, secretaries and other support staff, while some personnel may work for only one corporation or the other.

- A. The proposed relationship complies with 45 C.F.R. § 1610.8(a)(1) because the two organizations are legally separate entities.**

The proposed relationship complies with the requirements of § 1610.8(a)(1)

because, as indicated above, QLSC-II is a legally separate entity from QLSC.

- B. The proposed relationship complies with 45 C.F.R. § 1610.8(a)(2) because QLSC-II will receive no transfer of LSC funds, and LSC funds will not subsidize restricted activities.**

As indicated above, QLSC-II will not receive any LSC funds through any source.

In addition, careful accounting and apportionment of expenses will ensure that the non-subsidization requirement of § 1610.8(a)(2) is met. In the case of shared attorneys and paralegals, each entity will pay the proportion of salaries and benefits that are allocable to that entity, which will be calculated retrospectively on a monthly basis, based on time spent by the

employee working for that entity. All other common or shared financial expenditures, including salaries of non-legal personnel, rent, library expenses, phone bills, utilities, supplies and office equipment expenses will be divided between QLSC and QLSC-II on a pro-rata basis (the “pro-rata figure”). The “pro-rata figure” will be calculated, retrospectively, on a monthly basis, as a ratio between attorney and paralegal time spent on QLSC matters and QLSC-II matters.

Each attorney and paralegal at QLSC and QLSC-II will maintain complete and accurate time records of the work they perform for each corporation. At the end of each fiscal year, beginning upon the date of approval of this application, the pro-rata figure will be calculated from these time records and all common or shared expenses and costs for QLSC and QLSC-II will be divided in accordance with that figure. This will ensure that for each fiscal year, LSC funds do not subsidize activities restricted by Pub. L. 104-208.

C. The proposed relationship complies with 45 C.F.R. § 1610.8(a)(3) because QLSC will be physically and financially separate from QLSC-II.

In compliance with § 1610.8(a)(3), QLSC and QLSC-II will maintain sufficient physical and financial separation to ensure that QLSC is not identified with restricted activities. Although QLSC and QLSC-II may share a common reception area, the separate corporations will be distinguishable through signage stating: “Queens Legal Services Corporation” and “Queens Legal Services Corporation II.” Once an attorney meeting with a potential client foresees the reasonable likelihood that an activity restricted by Pub. L. 104-208 may be undertaken, the attorney shall advise the potential client that their matter will be handled by the non-LSC funded QLSC-II. If the attorney is only employed by QLSC, the attorney shall direct the client to a QLSC-II attorney.

In addition, there will be clear identification of the entity that is acting in any given case, through the use of separate and distinct business cards, letterhead, litigation backs and other means of identification. For example, any court filing will be made with a litigation back indicating which entity is filing the document. Similarly, at all court appearances, depositions or meetings with opposing counsel or other parties, similar identification will be presented. Finally, if any attorney wishes to engage in lobbying efforts or administrative or legislative activity restricted by Pub. L. 104-208, the attorney shall identify himself or herself as an employee of "Queens Legal Services Corporation II" and present a business card or other identification to that effect.

These procedures provide for physical and financial separation as required by 45 C.F.R. § 1610.8(a)(3). The activities restricted by Pub. L 104-208 essentially involve representation of clients in judicial or administrative proceedings or appearances before legislative bodies. Thus, the proposed procedures -- which require that every paper filed and every appearance by an attorney involving a restricted activity will identify that the client is being represented by QLSC-II, not QLSC -- are entirely sufficient in themselves to ensure that QLSC is not identified with the restricted activity. It will be apparent to the courts and agencies before which QLSC-II practices, the legislative bodies before which it appears, its clients and the public that QLSC is not engaging in, financing or endorsing the activities of QLSC-II.