

Committee, the Board of Directors adopted this Final Rule at its meeting of November 22, 2003.

### Section-by-Section Analysis

#### Section 1604.1 Purpose

The NPRM, as a whole, reflected a proposed change in approach from emphasizing the limitations on recipients' full-time attorneys regarding the outside practice of law to focusing on the situations in which outside practice may be approved and on recipients' rights and responsibilities in regulating the outside practice of law by their full-time attorneys. LSC proposed to revise the language of this section to reflect this proposed change in approach. Specifically, LSC proposed to amend the existing section 1604.1 to authorize a recipient to adopt written policies to permit its program attorneys to engage in pro bono legal assistance and to comply with their obligations as members of the Bar and officers of the court where those demands do not interfere with the attorneys' overriding responsibility to serve the program's clients. LSC further proposed to clarify that this part should not be construed to permit recipients to unduly restrict legal services attorneys from engaging in those activities. The use of the word "unduly" was intended to acknowledge that there may be some restrictions imposed by the LSC Act, LSC appropriations or other legislation and/or LSC regulations, or by recipients that are necessary to comply with applicable law or accomplish the overriding goals of the LSC Act.

Two of the comments LSC received supported the proposed changes as written. One commenter from the field appeared not to oppose the specific language proposed, but stated a firm belief that outside practice should generally not be permitted. The Office of Inspector General opposed the proposed changes, believing that the focus of the rule should remain on the statutory prohibition on the outside practice of law. In particular, the OIG argued that the last sentence of the proposed section implied that LSC's policy favors permitting the outside practice of law and should, therefore, be deleted as inconsistent with the Act.

Weighing the comments, LSC believes that the general change in approach reflected in the proposed language remains appropriate, but agrees with the OIG that the regulation should not imply that LSC favors the outside practice of law. While one comment from the field noted that encouraging their employees to engage in pro bono activities was helpful in attracting pro

bono practice among the private bar, another program was of the opinion that their program attorneys and program resources were already strained, and that encouraging program attorneys to engage in additional legal work outside the office was not in the program's or clients' best interest. LSC respects both of these approaches and believes that the regulation should set forth the parameters in which the outside practice of law is permissible under the LSC Act and leave it to the discretion of programs to determine how the outside practice of law by their full-time attorneys comports with their needs regarding providing service to their clients.

Accordingly, LSC is revising the purpose section to state that it is intended to provide guidance to recipients in adopting written policies relating to the outside practice of law by recipients' full-time attorneys and to make clear that 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.

#### Section 1604.2 Definitions

##### Section 1604.2(a) "Full-time Attorney"

LSC proposed to delete the definition of "attorney," because it is inconsistent with the definition of "attorney" in Part 1600 of the Corporation's regulations, Definitions. Instead, LSC proposed to substitute a definition which incorporates the definition of "attorney" in Part 1600, such that "full-time attorney" would be defined as an attorney who is a full-time employee of a recipient.

LSC received no objections to this definition, although the OIG stated that the preamble should make clear that LSC intends that the term "full-time" should be defined by the program for the purpose of the outside practice of law as the program defines "full-time" generally; that is as the term is used for other purposes, such as employee benefits. LSC agrees. LSC believes that the statement in the NPRM "LSC did not proposed a separate definition for the term 'full-time,' preferring to leave the decision as to what constitutes 'full-time' to the recipient's own personnel and outside practice policies and to any appropriate statutory definitions found elsewhere" was intended to convey that meaning. However, to avoid any

confusion, LSC believes it is appropriate to clarify that LSC does indeed intend that whatever definition of "full-time" the program applies for the purpose of its outside practice of law policies be the same as it uses for other purposes, such as employee benefits. LSC, accordingly, adopts the definition as proposed.

##### Section 1604.2(b) "Outside Practice of Law"

LSC proposed to amend this definition to explain what outside practice is, rather than what it is not. The regulation is intended, and currently applies only, to the outside practice of law by recipients' employees and not to other outside activities by recipients' employees that do not constitute the outside practice of law. LSC further proposed to substitute the words "receiving that" for "entitled to receive" to make clear that an attorney could represent a client in an outside practice case who is eligible for representation from the recipient even if the client is also receiving legal assistance from the recipient, as long as the recipient is representing the client on a different matter.

In the NPRM, LSC noted that the proposed definition was Judge Advocate General (JAG) Corps attorneys. Although LSC chose not to include language on this issue in the proposed rule, the NPRM noted LSC's intent to continue the policy established in prior General Counsel opinions, which have consistently found that an attorney is not engaged in the outside practice of law while serving as a JAG Corps reserve officer and solicited comments as to whether the rule should include language expressly stating this policy.

LSC received two comments supporting including a specific reference to JAG Corps attorneys in the rule and one comment which stated that the commenter had no objection to such a reference. None of the commenters had any other objections to the proposed changes. LSC believes that adding a reference to JAG Corps practice and the other proposed amendments will clarify the rule and aid in the comprehension and usability of the regulation. Accordingly, LSC is adopting the definition as proposed, except for the addition of language which specifies that the outside practice of law does not include the performance of duties as a JAG Corps attorney in the United States armed forces reserves.

##### Section 1604.2(c) "Court Appointment"

LSC proposed to add a definition for the term "court appointment." The proposed definition, "an appointment