

adopting proposed paragraphs (b) and (c).

LSC is, instead, adopting language stating that except as provided in paragraph (b) of this section and section 1604.7(a) (relating to compensation provided to an attorney pursuant to court appointment and remitted to the recipient), a recipient's written policies shall not permit a full-time attorney to receive any compensation for the outside practice of law. The revised paragraph (b) would require that recipients' written policies which permit a full-time attorney who meets the criteria set forth in § 1604.4(c)(1) to engage in the outside practice of law shall permit full-time attorneys to seek and receive personal compensation for work performed pursuant to that section. Although the statute prohibits all compensated outside practice, the exception in proposed paragraph (a) for work on cases held over from a previous private practice is justified under the general principle that neither LSC nor the recipient can interfere with an attorney's professional responsibilities to a client. Since the representation was undertaken before the lawyer became a legal services attorney, fairness dictates that the attorney should be permitted to take fees for completion of the work. This exception is carried over from the current rule.

Section 1604.6 Use of Recipient Resources

LSC proposed to add a new section to the rule governing the use of recipient resources in the course of permitted outside practice activities. Specifically, LSC proposed to permit recipients' written policies to permit a recipient to allow its attorneys to use only a *de minimis* amount of program resources, including time, in cases when newly employed attorneys are closing old cases, and, for other permitted outside practice situations, to allow its attorneys to use a limited amount of program resources, including time. As with other aspects of this rule, LSC proposed to authorize recipients to adopt written policies more restrictive so as to permit the recipient to determine whether its attorneys could use recipient resources for a specific case to the extent allowed by this rule. These proposals were based on longstanding LSC policy and were intended to codify the accepted practice.

The NPRM solicited comments on the appropriateness of using recipient resources for any outside practice, and whether or not the distinction between "*de minimis*" and "*limited*" use of resources makes sense and is workable. In particular, LSC invited comment on

the impact of the 1996 restrictions, LSC's program integrity rules at 45 CFR part 1610 and LSC's timekeeping rules at 45 CFR part 1635 on the proposals set forth therein.

Four of the five comments LSC received address this issue. Two of the comments from the field supported the NPRM as proposed. These comments noted that the proposed language prohibiting the use of recipient resources (LSC and non-LSC) for activities for which the use of such funds is prohibited would ensure that no there were no violations of the program integrity standards and was consistent with the requirements of the timekeeping rules. One field commenter stated their opposition to any use of recipient resources for outside practice activities, given the scarcity of program resources available for program purposes. It was unclear from the comment, however, whether this commenter believed that LSC should prohibit the use of all program resources, or if it would be sufficient to permit programs the authority to prohibit the use of program resources. In contrast, the OIG argues that the rule should only permit recipients' written policies to permit the *de minimis* use of recipient in all circumstances. Any other use, the OIG contends risks running afoul not only of the appropriations act restrictions, but also the allowable costs requirements of part 1630. The OIG argues that outside practice activities should be subject to requirements of 1635 and other limitations applicable to any other personal activities.

LSC agrees that use of recipient resources to support restricted activities is prohibited by law. LSC also agrees, however, with the field recipients that the specific limitation on the use of resources for prohibited activities that was included in the proposed rule would prevent recipients from adopting written policies which would permit prohibited uses in connection with outside practice of law activities. LSC has amended the proposed language slightly to make this point even more explicit. With respect to non-restricted activities, LSC acknowledges that if a program permitted a significant enough amount of their LSC funded resources to be used in connection with outside practice activities, the program could run into a 1630 disallowed costs problem. However, LSC notes that the standards proposed reflect the longstanding practice and LSC has not, in fact, found this to present significant 1630 problems. Accordingly, LSC adopts section 1604.6 as proposed except as noted above.

Under the *de minimis* standard, an attorney could make a brief phone call or use the fax machine during working hours, but would have to take leave for court appearances. Under the "*limited*" standard, in addition to whatever an attorney could do under the *de minimis* standard, the attorney could, for example, make a brief court appearance during normal working hours without taking leave. An attorney could also be permitted to use a program computer or typewriter to prepare pleadings or other documents, within reason. However, if the attorney participated in a long trial or extended negotiation, he or she would normally be required to take leave to do so. If a recipient has a procedure to identify copying, postage and similar costs, and the attorney reimbursed the recipient, the use of those resources would also be permissible under either standard. This position is consistent with the longstanding LSC policy.

Section 1604.7 Court Appointments

This proposed section would treat court appointments and mandatory pro bono representation separately from outside practice, because there are substantially different considerations for court appointments and mandatory *pro bono* than there are for *pro bono* or other outside cases that an attorney undertakes on a strictly voluntary basis.

Proposed paragraph (a)(1) simply restated a general rule that applies to court appointments as well as to outside practice under the current part 1604 regarding the permissibility of a full-time attorney accepting a court appointment to provide representation. Two of the comments supported the language as proposed. The OIG, however, suggested that the language of this paragraph be revised to read "Such an appointment is consistent with the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters" to bring this provision into harmony with 45 CFR part 1613.4(a), relating to appointments in criminal proceedings. LSC considers the OIG's suggestion to be well taken and not inconsistent with the intent of the proposed language. Accordingly, LSC is revising paragraph (a)(1) in this final rule.

LSC received no objections to proposed paragraphs (a)(2) or (3) and adopts them as proposed. Paragraph (a)(2) is based on section 1006(d)(6) of the LSC Act. It is intended to protect recipients from efforts that have been made by some judges to appoint legal services attorneys to handle court appointments in lieu of private attorneys, and/or to refuse to provide