

LEGAL SERVICES CORPORATION**45 CFR Part 1609****Fee-Generating Cases****AGENCY:** Legal Services Corporation.**ACTION:** Proposed rule.

SUMMARY: This proposed regulation would completely revise the Legal Services Corporation's ("Corporation" or "LSC") regulation relating to fee-generating cases. A major revision is the removal of the current regulation's provisions on attorneys' fees. Attorneys' fees are addressed in part 1642 of the Corporation's regulations, which is also being published as an interim rule in this publication of the Federal Register. This proposed rule also makes substantive and clarifying revisions to several sections. In addition, some sections have been merged and unnecessary provisions have been eliminated.

DATES: Comments should be received on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St. NE., 11th Floor, Washington, DC 20002-4250.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, (202) 336-8910.

SUPPLEMENTARY INFORMATION: This rule has been under review by the Operations and Regulations Committee ("Committee") of the LSC Board of Directors ("Board") since September 1994. The Committee held public hearings on September 17 and October 28, 1994, and February 17, 1995, on proposed revisions. When it became apparent that Congress was considering substantially revised legislation related to this rule, the Committee suspended consideration until the new legislation became law. Public Law 104-134, 110 Stat. 1321 (1996), the Corporation's FY 1996 appropriations act became law on April 26, 1996. The new legislation did not contain any restrictions on taking of fee-generating cases, but it did prohibit recipients from claiming, or collecting and retaining, any attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees. See § 504(a)(13) of Pub. L. 104-134. On May 19, 1996, the Committee directed LSC staff to prepare an interim rule to implement a new legislative restriction on the taking of attorneys' fees by LSC recipients, an issue implicated in the current version of this rule.

LSC staff recommended and the Committee decided to promulgate a

separate rule, 45 CFR Part 1642, to address the attorneys' fees issue which is also published as an interim rule in this volume of the Federal Register. The Committee met on July 10 and 19, 1996, to consider a draft of a revised Part 1609 prepared by LSC staff and, after making some changes, made a recommendation to the Board and the Board voted to publish this proposed rule in the Federal Register for public notice and comment.

This proposed rule would revise the current rule entirely. It deletes the attorneys' fees provisions in order to address, in a separate part, provisions responsive to the Corporation's FY 1996 appropriations. The other changes made to the rule were under consideration by the Committee last year. Recipients should note that, upon publication of an interim rule on attorneys' fees, the attorneys' fees provisions in the current part 1609 will no longer have the force and effect of law, regardless of whether any revisions to this proposed rule are adopted and published as final by the LSC Board.

A section-by-section analysis of this proposed rule is provided below.

Section 1609.1 Purpose

This section is revised to state more clearly the purposes of this regulation, which are: (1) To ensure that recipients do not use scarce resources for cases where private attorneys are available to provide effective representation, and (2) to assist eligible clients to obtain appropriate and effective legal assistance.

Section 1609.2 Definition

This section defines "fee-generating case." A technical numerical change is made to clarify that the definition includes fees from three sources: an award (1) to a client, (2) from public funds, or (3) from the opposing party. The definition is also revised to explain what is not a "fee-generating case." The revision makes it clear that court appointments are not to be considered fee-generating cases, even where fees are paid, since such cases are a professional obligation of all attorneys. The definition also does not include situations where recipients undertake representation under a contract with a government agency or other entity. Acceptance of a payment under a contract arrangement in such a situation does not constitute a fee-generating case, because a contract payment does not constitute fees that come from an award to a client or attorneys' fees that come from public funds or the losing party in a case.

Section 1609.3 General Requirements

This section defines the limits within which recipients may undertake fee-generating cases. This new section reorganizes and replaces §§ 1609.3 and 1609.4 of the current rule in order to make them easier to understand. It is also retitled. The provision requiring recipients to establish procedures for the referral of fee-generating cases is deleted, and a new section on policies and procedures is added to the rule.

Paragraph (a) provides that, except as provided in paragraph (b) of this section, a recipient may undertake a fee-generating case only after the case has been rejected by the local lawyer referral service or by two private attorneys, or when neither the referral service nor two attorneys will take the case without a consultation fee. The current rule states that "neither the referral service nor any attorney will consider the case without payment of a consultation fee." [emphasis added] The current rule sets up an impossible burden for a recipient to meet, and the Committee has decided that the proposed new standard is reasonable and consistent with the purposes of this rule.

Paragraph (b) clarifies those circumstances under which a recipient may undertake a fee-generating case without first attempting to refer the case to the private bar. The first situation is delineated in § 1609.3(b)(1) and is based on § 1609.4(d) of the current regulation. This provision is revised to include any cases which, like Social Security cases, meet the terms of the underlying statutory provision. A 1977 amendment to § 1007(b)(1) of the Legal Services Corporation Act, 42 U.S.C. 2996, prohibits the Corporation from issuing guidelines on fee-generating cases that would preclude recipients from taking "cases in which a client seeks only statutory benefits and appropriate private representation is not available." 42 U.S.C. 2996f(b)(1). The legislative history of this amendment clearly indicates that Congress intended the provision to apply to the Social Security Act ("SSA") and Supplemental Security Income ("SSI") cases that are covered by both the current and the proposed rules, and to "such other cases as the Corporation deems appropriate because the only recovery sought by the eligible client is the amount of subsistence benefits to which he or she is statutorily entitled." S. Rep. No. 172, 95th Cong., 1st Sess. 15 (1977). The Committee has decided to add language to the rule that would include not only Social Security cases but also any other similar statutory benefits cases. The Committee is aware that, since the 1977

amendments to the LSC Act, the rules governing fees in veterans' benefits appeals, for example, have been changed and seeks comments on whether those cases or other similar cases should be treated in the same manner as Social Security cases.

Another circumstance under which a recipient may undertake a fee-generating case without first attempting to refer the case to the private bar is set out in § 1609.3(b)(2). This provision is based, in part, on a provision that appeared in the original LSC regulation adopted in 1976 that allowed a recipient to determine that the case was of the type that private attorneys did not accept or did not accept without a fee. LSC removed that provision as part of its 1984 revision, in part because of concern that it gave too much discretion to project directors. This proposal suggests a middle ground between the two positions. It restores to the discretion of the recipient the decision about what kinds of cases would qualify, but requires that the recipient consult with appropriate representatives of the private bar in making that determination. The recipient has the authority to determine the appropriate representatives, which could include representatives of the organized bar, the local referral service or private attorneys who handle plaintiffs' tort cases, depending on the make-up of the local bar and the kind of cases being considered. The provision does not specify whether the governing body or the director of the recipient is authorized to do the consultation and make the determination, leaving that judgment to the local decision-making process.

Numerous revisions are proposed to be made in the language and organization of § 1609.3(b)(3), which is based on the remaining provisions of § 1609.4 of the current regulation. The current regulation uses the term "free referral" instead of "referral to the private bar." The Committee decided that the term "free referral" was too vague and has substituted "referral of the case to the private bar" which is more descriptive. This provision makes it clear that the director of the recipient (or the director's designee) has the express authority, subject to policies adopted by the recipient, to make the determinations listed.

Section 1609.3(b)(3)(i) is a new proposal. It recognizes that, in certain cases, past experience in trying to refer out similar cases has shown that referral efforts would be futile. The Corporation does not wish scarce resources to be expended for efforts that the recipient knows will prove useless. This

provision, which is intended to address the specific circumstances in a particular case, differs from § 1609.3(b)(2), which deals with categories of case types.

Section 1609.3(b)(3)(ii) is essentially the same as the comparable provision in the current regulation. It allows a recipient to take a case if emergency circumstances require immediate action before referral procedures can be undertaken.

Section 1609.3(b)(3)(iii) is a revised version of the current 1609.4(b). It is included under the category of cases where the recipient's director or designee needs to make a case-by-case determination of the appropriate treatment of the case. The Committee also added the language on statutory fees to make it clear that if adequate statutory fees were available to attract private counsel, the recipient should try to refer the case out to the private bar, regardless of whether recovery of damages is a principal object of the client's case. This is not clear under the current regulation. Thus, for such cases, the Committee wished to clarify that if substantial fees might be available and the cases did not fall under any of the other categories authorizing representation, then the program was obligated to attempt referral in accordance with § 1609.3(a).

The language in the current rule relating to ancillary relief and counterclaims is proposed to be deleted because it is confusing and unnecessarily complicated, and the Committee wanted the commentary to include examples of the kinds of circumstances under which the recipient's director could determine that the recovery of damages was not the principal object of the case. For example, if the principal relief sought is equitable or a declaratory judgment, inclusion of a prayer for damages would not turn the matter into a fee-generating case. Similarly, if the recipient is representing the defendant in a case, the inclusion of a counterclaim for damages to protect the defendant's rights would not make the matter a fee-generating case.

Finally, because this proposed rule has deleted provisions on attorneys' fees, paragraph (c) directs recipients to refer to the Corporation's new rule on attorneys' fees, 45 CFR Part 1642.

Section 1609.4 Recipient Policies, Procedures and Recordkeeping

This new section requires that recipients establish written policies, procedures and recordkeeping requirements that will guide recipient

staff to ensure compliance with this rule.

Miscellaneous Changes

Sections 1609.5 through 1609.7 of the current regulation are proposed to be deleted and are superseded by a new interim regulation, 45 CFR Part 1642, also published in this publication of the Federal Register. Accordingly, §§ 1609.5 through 1609.7 no longer have the force of law.

List of Subjects in 45 CFR Part 1609

For reasons set forth in the preamble, 45 CFR Part 1609 is proposed to be revised to read as follows:

PART 1609—FEE-GENERATING CASES

Sec.

- 1609.1 Purpose.
- 1609.2 Definition.
- 1609.3 General requirements.
- 1609.4 Recipient policies, procedures and recordkeeping.

Authority: 42 U.S.C. 2996f(b)(1) and 2996e(c)(6).

§ 1609.1 Purpose.

This part is designed (1) to ensure that recipients do not use scarce legal services resources when private attorneys are available to provide effective representation and (2) to assist eligible clients to obtain appropriate and effective legal assistance.

§ 1609.2 Definition.

(a) As used in this part, "fee-generating case" means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award (1) to a client, (2) from public funds or (3) from the opposing party.

(b) "Fee-generating case" does not include a case where (1) a court appoints a recipient or an employee of a recipient to provide representation in a case pursuant to a statute or a court rule or practice equally applicable to all attorneys in the jurisdiction, or (2) a recipient undertakes representation under a contract with a government agency or other entity.

§ 1609.3 General Requirements.

(a) Except as provided in paragraph (b) of this section, a recipient may provide legal assistance in a fee-generating case only if:

- (1) The case has been rejected by the local lawyer referral service, or by two private attorneys; or
- (2) Neither the referral service nor two private attorneys will consider the case without payment of a consultation fee.

(b) A recipient may provide legal assistance in a fee-generating case without first attempting to refer the case pursuant to paragraph (a) of this section only when:

(1) An eligible client is seeking only statutory benefits, including but not limited to, subsistence benefits under Subchapter II of the Social Security Act, 42 U.S.C. 401 *et seq.*, as amended, Federal Old Age, Survivors, and Disability Insurance Benefits; or Subchapter XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.*, as amended, Supplemental Security Income for Aged, Blind, and Disabled;

(2) The recipient, after consultation with appropriate representatives of the private bar, has determined that the type

of case is one that private attorneys in the area served by the recipient ordinarily do not accept, or do not

accept without prepayment of a fee; or
(3) The director of the recipient, or the director's designee, has determined that referral of the case to the private bar is not possible because:

(i) Documented attempts to refer similar cases in the past generally have been futile;

(ii) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with professional responsibility, referral will be attempted at a later time; or

(iii) Recovery of damages is not the principal object of the recipient's client's case and substantial statutory

attorneys' fees are not likely to be available.

(c) Recipients should refer to 45 CFR Part 1642 for restrictions on claiming, or collecting and retaining attorneys' fees.

§ 1609.4 Recipient policies, procedures and recordkeeping.

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part.

Dated: August 20, 1996.
Suzanne B. Glasow,
Senior Counsel for Operations & Regulations.
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