LEGAL SERVICES CORPORATION

45 CFR Part 1609

Fee-Generating Cases

AGENCY: Legal Services Corporation.

ACTION: Proposed rule.

SUMMARY: This proposed rule would provide a substantive and clarifying revision to the current fee-generating cases definition. The current definition is under review because the Committee, at its meeting on July 10 and 19, 1996, determined that the current definition provides insufficient guidance to recipients and attorneys as to what constitutes a fee-generating case and how it should be addressed.

This proposed rule would make the current definition clearer by defining what is and is not a fee-generating case. It would amend the definition to provide guidance to recipients and attorneys as to what constitutes a fee-generating case and how it should be addressed.

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. The Board voted to publish this proposed rule in the Federal Register for public notice and comment.

The 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 current rule does not contain any restrictions on taking of fee-generating cases. The proposed rule makes it clear that court appointments 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.

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

Section 1609.1 Purpose

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 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. 2996(f)(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 make the determination
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
determination of the appropriate
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.

§ 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
2996(e)(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 legal assistance and (2) to assist
good 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, which is 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.

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