

**LEGAL SERVICES CORPORATION****45 CFR Part 1609****Fee-Generating Cases**

**AGENCY:** Legal Services Corporation.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the Legal Services Corporation's ("Corporation" or "LSC") regulation relating to fee-generating cases. A major revision is the removal of the old regulation's provisions on attorneys' fees. Attorneys' fees now are addressed in 45 CFR part 1642 of the Corporation's regulations. In addition, other substantive and clarifying revisions are made, some sections have been merged, and unnecessary provisions have been eliminated.

**DATES:** Effective May 21, 1997.

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

**SUPPLEMENTARY INFORMATION:** This rule, which includes provisions on fee-generating cases and attorneys' fees 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 legislation that would significantly affect this rule, the Committee suspended consideration until the new legislation became law on April 26, 1996. See Public Law 104-134, 110 Stat. 1321 (1996), the Corporation's FY 1996 appropriations act.

The new legislation did not affect this part's provisions on fee-generating cases but it did change the law on attorneys' fees by prohibiting 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 the new legislative restriction on the taking of attorneys' fees by LSC recipients. The Corporation adopted a separate rule, 45 CFR part 1642, to address the attorneys' fees issue, which was published as an interim rule on August 29, 1996.

In order to delete the attorneys' fees provisions from part 1609 and make other revisions, the Committee met on July 10 and 19, 1996, to consider draft revisions to part 1609 and make a recommendation to the Board. The

Board authorized the publication of a proposed rule, which was published in the **Federal Register** for public notice and comment on August 29, 1996.

The Corporation received 37 timely comments. The Committee held public hearings on the rule on December 14, 1996, and January 5, 1997, and made revisions to the proposed rule, which they recommended to the Board. The Board adopted the Committee's recommended version on January 6, 1997, as a final rule.

This final rule deletes the attorneys' fees provisions in the old rule. The issue of attorneys' fees is now addressed in 45 CFR part 1642. This rule also retains the Corporation's longstanding definition of a "fee-generating case," but has added clarification of what is not considered to be a fee-generating case. In addition, the rule has been clarified and simplified by structural and minor substantive changes. Several changes have also been made to the requirements related to the referral of cases.

A section-by-section analysis of this final 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." The proposed rule made a technical change in numbering intended to clarify what is intended in the definition. However, the change raised comments on whether substantive changes to the definition were intended. To avoid such an interpretation, the Board rejected the changes in the proposed rule and retained the longstanding definition from the prior rule. The Board did adopt language in the proposed rule that was added to explain what is not a "fee-generating case." This 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. The definition also does not include situations where recipients undertake representation under a contract with a government agency or other entity in which the agency or entity pays the recipient for each case taken. Such cases are not considered fee-generating under the rule, because a contract payment does not constitute fees that come from an

award to a client or attorneys' fees that come from the losing party in a case, or from public funds.

It is important to clarify that, while this rule permits recipients to provide representation in certain fee-generating cases under the conditions set out in this rule, recipients are precluded from claiming or collecting and retaining any attorneys' fees as prohibited under part 1642.

**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 old 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 old rule stated that "neither the referral service nor any attorney will consider the case without payment of a consultation fee." [emphasis added] The old rule set up an impossible standard for a recipient to meet, and the Board has decided that the standard in this final rule is reasonable and consistent with the rule's purposes.

Paragraph (b) clarifies when 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). The proposed rule would have revised this section to include any cases which, like Social Security cases, meet the terms of the underlying statutory provision, § 1007(b)(1) of the Legal Services Corporation Act, under which the Corporation may not 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 Committee sought comments in the proposed rule on whether there are other similar cases that should be treated in the same manner as Social Security cases. No comments urging extension of the provision to other types of cases were provided to the Corporation, and the Board decided to continue to limit the provision to Social Security cases. The only other similar type of case identified

to the Board was Veterans' benefits cases, and oral comments indicated that there has not been much demand for LSC program assistance in such cases. If a particular case should arise, a program could decide to take the case after attempted referral or pursuant to § 1609.3(b)(2) or (3).

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 in 1984, in part because of concern that it gave too much discretion to project directors. The final rule adopts 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 individual private practitioners with knowledge about practices in the area, particularly related to fee-generating matters. The provision contemplates either the governing body or the director of the recipient undertaking the consultation based on local conditions.

Finally, recipients that have State-wide, multiple or exceptionally large service areas are encouraged to make separate determinations when appropriate for different sub-areas within their total service area. For example, a area that includes a large city may have attorneys that normally accept a particular type of case, while rural areas may not.

Numerous revisions are made in the language and organization of § 1609.3(b)(3), which is based on the remaining provisions of § 1609.4 of the old rule. The old rule used the term "free referral" instead of "referral to the private bar." The Board has decided that the term "free referral" was too vague and has substituted the more descriptive term, "referral of the case to the private bar." This provision specifically authorizes the director of the recipient (or the director's designee) to make the determinations listed, subject to policies adopted by the recipient.

Section 1609.3(b)(3)(i) is new. It recognizes that in certain cases prior experience 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 old rule. It allows a recipient to take a case if emergency circumstances require immediate action before referral procedures can be undertaken. The recipient must advise the client that, if appropriate, referral of the case will be attempted at a later time. However, any referral of the case must be done consistent with professional responsibility requirements.

Section 1609.3(b)(3)(iii) is a revised version of the old § 1609.4(b) and 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. Language on statutory fees has been added to make it clear that if adequate statutory fees are 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 was not clear under the old rule. The Board wants it to be clear that, if fees might be available sufficient to attract private counsel and the case does not fall under any of the other categories authorizing representation, the recipient is obligated to attempt referral in accordance with § 1609.3(a).

The language in the old rule relating to ancillary relief and counterclaims is deleted because it was confusing and unnecessarily complicated. Instead, this commentary includes 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 final rule has deleted provisions on attorneys' fees, paragraph (c) directs recipients 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 old rule are deleted and are superseded by 45 CFR part 1642.

#### **List of Subjects in 45 CFR Part 1609**

Grant programs, Legal services.

For reasons set forth in the preamble, 45 CFR part 1609 is 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:

- (a) To ensure that recipients do not use scarce legal services resources when private attorneys are available to provide effective representation and
- (b) To assist eligible clients to obtain appropriate and effective legal assistance.

##### **§ 1609.2 Definition.**

(a) *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 to a client, from public funds or 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 not provide legal assistance in a fee-generating case unless:

- (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 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: April 14, 1997.

**Victor M. Fortuno,**  
General Counsel.

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BILLING CODE 7050-01-P

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the Legal Services Corporation's ("Corporation" or "LSC") regulation on lobbying, rulemaking and other restricted activities. It is intended to implement provisions in the Corporation's FY 1996 appropriations act that are currently incorporated by reference in the Corporation's FY 1997 appropriations act, and which prohibit recipients from engaging in agency rulemaking, legislative lobbying activity or advocacy training. The final rule also implements statutory exceptions to the prohibitions, which permit recipients to use non-LSC funds to comment on public rulemaking, respond to requests from legislative and administrative bodies, and engage in efforts to encourage State and local governments to make funds available for recipient activities. Finally, the final rule continues the pre-existing prohibitions on participation in organizing activities, public demonstrations and certain illegal activities.

**DATES:** Effective May 21, 1997.

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

**SUPPLEMENTARY INFORMATION:** On May 19, 1996, the Operations and Regulations Committee ("Committee") of the LSC Board of Directors ("Board") requested LSC staff to prepare an interim rule with a request for comments to implement §§ 504(a)(2), (3), (4), (5), (6) and (12) and 504 (b) and (e) of the Corporation's FY 1996 appropriations act, 110 Stat. 1321 (1996), prohibiting recipients from engaging in most rulemaking, lobbying and advocacy training activities. The Committee held hearings on staff proposals on July 10 and 19, 1996, and the Board adopted an interim rule on July 20, 1996, for publication in the **Federal Register**. Although the interim rule was effective upon publication, see 61 FR 45741 (August 29, 1996), the Corporation also solicited comments on the rule for review and consideration by the Committee and Board.

Eight written timely comments were received by the Corporation. The comments generally approved the rule, but raised technical and clarifying issues as well as substantive policy concerns, particularly about the participation of recipient attorneys in bar association activities and in certain training programs. The Committee held public hearings on the rule on December 13, 1996, and January 5, 1997, and approved revisions to the interim rule to take into account the written comments

and LSC staff recommendations. The Board adopted the Committee's recommended version on January 6, 1997, as a final rule.

The Corporation's FY 1997 appropriations act became effective on October 1, 1996, see Pub. L. 104-208, 110 Stat. 3009. It incorporated by reference the § 504 conditions on LSC grants and other sections of the FY 1996 appropriations act implemented by this rule. Accordingly, the preamble and text of this rule continue to refer to the applicable section number of the FY 1996 appropriations act.

A section-by-section discussion of this final rule is provided below.

#### **Section 1612.1 Purpose**

The purpose of this rule is to ensure that LSC recipients and their employees do not engage in certain activities, including rulemaking, lobbying, grassroots lobbying, and advocacy training, banned by Section 504 in the Corporation's FY 1996 appropriations act, as incorporated by the Corporation's FY 1997 appropriations act. The rule continues existing provisions of the LSC Act that prohibit participation in public demonstrations, strikes, boycotts and organizing activities. It also provides guidance on when recipients may participate in public rulemaking, respond to requests from legislative and administrative bodies, and encourage State and local governments to make funds available to support recipient activities. In response to comments that the meaning of the term "fundraising" used in the interim rule was misleading, the final rule deletes the term "fundraising" in order to clarify that this part does not restrict efforts by recipients to engage in resource development activities. The activity that is restricted is what is commonly called "self-interest lobbying," which is any effort by recipients to encourage State or local governments to appropriate funds for the financial support of recipients. This final rule prohibits the use of LSC funds by recipients for self-interest lobbying, but permits recipients to use non-LSC funds for such efforts.

#### **Section 1612.2 Definitions**

The final rule significantly revises the definitions that were used in prior rules in order to reflect the new statutory restrictions and thus ensure that recipients do not engage in prohibited activity, and to provide greater clarity about the scope of the restrictions. In addition, definitions have been revised or eliminated because they are no longer necessary or the prior definition was inconsistent with the common sense usage of terms (such as the term

## **LEGAL SERVICES CORPORATION**

### **45 CFR Part 1612**

#### **Restrictions on Lobbying and Certain Other Activities**

**AGENCY:** Legal Services Corporation.