



7050-01

LEGAL SERVICES CORPORATION

45 CFR Part 1609

Fee-Generating Cases

AGENCY: Legal Services Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule revises the Legal Services Corporation (LSC or Corporation) regulation regarding fee-generating cases. This proposed rule clarifies the definition of “fee-generating case,” clarifies that brief advice is permitted by the regulation, and revises how a recipient accounts for attorneys’ fees awards.

DATE: Comments must be submitted by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: lscrulemaking@lsc.gov. Include “Comments on Revisions to Part 1609” in the subject line of the message.
- Fax: (202) 337-6519.
- Mail: Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Part 1609 Rulemaking.
- Hand Delivery/Courier: Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Part 1609 Rulemaking.

Instructions: Electronic submissions are preferred via email with attachments in Acrobat PDF format. LSC will not consider written comments sent to any other address or received after the end of the comment period.

FOR FURTHER INFORMATION CONTACT: Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007; (202) 295-1563 (phone), (202) 337-6519 (fax), or sdavis@lsc.gov.

SUPPLEMENTARY INFORMATION:

I. Background.

Section 1007(b)(1) of the Legal Services Corporation Act of 1974 prohibits recipients from using LSC funds “to provide legal assistance (except in accordance with guidelines promulgated by the Corporation) with respect to any fee-generating case[.]” 42 U.S.C. 2996f(b)(1). LSC implemented this provision through 45 CFR part 1609. In the preamble to part 1609, LSC explained that the private bar is generally “eager to accept contingent fee cases and cases in which there may be an award of attorneys’ fees to be paid by the opposing party pursuant to [statute].” 41 FR 38505, Sept. 10, 1976. LSC therefore drafted part 1609 to “insure that recipients do not use scarce legal services resources when private attorneys are available to provide effective representation and . . . assist eligible clients to obtain appropriate and effective legal assistance.” 45 CFR 1609.1(a), (b). Nevertheless, LSC recognized that “there may be instances when no private attorney is willing to represent an individual, because the recovery of a fee is unlikely, the potential fee is too small, or some other reason.” 41 FR 38505, Sept. 10, 1976.

To balance these considerations, part 1609 (1) defines “fee-generating case” to prohibit recipients from accepting cases that a private attorney would take, and (2) provides exceptions to

the prohibition for when adequate representation by the private bar is unavailable and implements safeguards to prevent recipients from taking cases the private bar would accept. Id. The definition of “fee-generating case” includes “every situation in which an attorney reasonably may expect to receive a fee for services from any source except the client.” 41 FR 38505. Specifically, LSC defined “fee-generating case” as “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.” Id. Section 1609.3 then clarified circumstances in which a recipient may use LSC funds to provide legal assistance in a fee-generating case, such as after the case has been rejected by the local lawyer referral service or by two private attorneys. 45 CFR 1609.3(a)(1).

In 1996, LSC proposed two changes to clarify the meaning of “fee-generating case.” First, LSC proposed “[a] technical numerical change” to the definition of “fee-generating case” which was intended “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.” 61 FR 45765, Aug. 29, 1996. This proposed change resulted in comments about whether LSC intended to make substantive changes to the definition. 62 FR 19398, Apr. 21, 1997. Because the Board did not intend to change the definition and sought to avoid confusion about its intent, the Board rejected the numerical changes to the proposed rule. Id.

Nevertheless, the Board adopted a second proposed change by adopting language that explained what is not a “fee-generating case.” Id. The revision excluded court appointments from the definition because such cases, even where fees are paid, are considered a professional obligation. Id. Additionally, the revision excluded situations where recipients undertake representation under a contract with a government agency or other entity and the agency or entity

pays the recipient “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.” Id.; see 45 CFR 1609.2(b). LSC has not made substantive changes to the definition of “fee-generating case” since this revision. See 76 FR 23502, Apr. 27, 2011.

When a recipient may take a fee-generating case, Part 1609 also prescribes how recipients account for attorneys’ fees received in the case. Part 1609 requires the proceeds be remitted to the recipient. 41 FR 38505. In 1984, LSC adopted a new section, § 1609.6, that required attorneys’ fees received by the recipient to be returned to the fund from which the resources to litigate the case came. 49 FR 19657, May 9, 1984. In other words, if the recipient funded a particular case half with LSC funds and half with private funds, § 1609.6 required the recipient to allocate any attorneys’ fees received to each fund in equal proportion. The new section also required that fees be recorded during the accounting period in which the program receives the award. Id.

In 1996, LSC’s appropriation legislation provided that no LSC funds could be used to provide financial assistance to a recipient that receives attorneys’ fees pursuant to any federal or state law. Sec. 504(a)(13), Pub. L. 104-134, 110 Stat. 1321, 1321-55; 75 FR 21507, Apr. 26, 2010. To implement this legislation, LSC created a separate rule, 45 CFR part 1642. 62 FR 25862, May 12, 1997 (final rule); 61 FR 45762, Aug. 29, 1996 (interim final rule). LSC moved § 1609.6 to part 1642 and revised the provision to require recipients to allocate fees from cases or matters supported in whole or in part with LSC funds to the LSC fund in the same proportion that the case or matter was funded with LSC funds. Id. In a departure from then-existing § 1609.6, LSC did not propose to dictate how recipients allocated remaining fees to their non-LSC accounts. Id.

In 2010, Congress repealed the prohibition on accepting and retaining attorneys' fees. Sec. 533, Pub. L. 111-117, 123 Stat. 3034, 3157. LSC subsequently repealed part 1642 but retained two provisions relevant to accounting for attorneys' fee awards and accepting reimbursement of costs from a client. 75 FR 6816, Feb. 11, 2010 (interim final rule); 75 FR 21506, Apr. 26, 2010 (final rule). LSC placed these two provisions in part 1609 at §§ 1609.4 and 1609.6, respectively. 75 FR 21508. LSC has made no changes to either section since then.

LSC added rulemaking on part 1609 to its annual rulemaking agenda in June, 2015. On July 18, 2016, the Committee voted to recommend that the Board authorize rulemaking on part 1609. On January 26, 2017, the Committee voted to recommend that the Board approve publication of this NPRM in the Federal Register for notice and comment. On January 28, 2017, the Board accepted the Committee's recommendation and voted to approve publication of this NPRM.

II. Proposed Changes.

Section 1609.1 Purpose.

LSC proposes to make no changes to this section.

Section 1609.2 Definition.

Recipients have repeatedly requested guidance regarding what constitutes a "fee-generating case" as defined in § 1609.2(a). Questions have included whether paid court appointments are "fee-generating cases" and whether "advice and counsel" or "brief services" are prohibited if the case may, during the course of subsequent extended representation, develop into a "fee-generating case." Recipients have also sought guidance regarding permissible sources of fees.

Section 1609.2 currently provides, “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.” 45 CFR 1609.2(a). A reader could interpret “award” as modifying only “to a client” and not to include an “award . . . from public funds or [an award] from the opposing party.” Thus, under the current definition, a recipient might accept a case that may result in an award from public funds, a result not intended by LSC. Therefore, LSC proposes removing “from public funds or from the opposing party” from the definition.

Additionally, LSC proposes to revise part 1609 to clarify that a recipient may provide brief services to an eligible client despite the possibility that the case may result in fees otherwise restricted by part 1609. In AO-2015-002, LSC considered whether a recipient may provide “advice and counsel” or “limited services” (as defined in 45 CFR 1611.2(a) and (e)) to an eligible client where the matter might constitute a fee-generating case if extended services were provided. Based on the language of § 1609.3, which prohibits recipients from using LSC funds to provide assistance in “every situation in which an attorney reasonably may expect to receive a fee[,]” LSC concluded an “attorney’s reasonable expectation of such fees would not typically arise until after . . . initial advice or brief services was under way or had been completed.” AO-2015-002, June 17, 2015. LSC proposes incorporating this clarification into part 1609 by adding a separate paragraph to § 1609.2(b). The new paragraph would explain that “advice and counsel” or “limited services” in matters that may later constitute fee-generating cases are not prohibited by part 1609.

Finally, in response to questions regarding court appointments, revised § 1609.2(b) states that a court appointment pursuant to a statute or court rule or practice that is equally applicable to all attorneys in the jurisdiction is not a fee-generating case. 45 CFR 1609.2.

Section 1609.3 General requirements.

LSC proposes a technical change to the heading of § 1609.3 to more accurately reflect the topic it addresses. Section 1609.3 briefly sets forth the general prohibition on a recipient's using LSC funds to provide legal assistance in a fee-generating case. The bulk of § 1609.3, however, prescribes the circumstances and procedures under which recipients may accept fee-generating cases. To more aptly reflect the substance of § 1609.3, LSC proposes to rename § 1609.3 "Authorized representation in a fee-generating case."

Section 1609.4 Accounting for and use of attorneys' fees.

LSC proposes to revise part 1609's accounting requirement for receipt of attorneys' fees. Currently § 1609.4 requires that attorneys' fees received by a recipient supported at least in part by LSC funds be allocated to the LSC grant account in the proportion to which the LSC funds were used. § 1609.4(a). This language requires this accounting only for attorneys' fees received by the recipient, which could be interpreted to mean that attorneys' fees awarded to a staff attorney in his or her own name need not be remitted to the recipient or be subject to the accounting requirement.

To clarify that attorneys' fee awards received by either the recipient or a recipient's staff attorney are subject to the accounting requirement, LSC proposes the following revisions to § 1609.4. First, LSC proposes to require recipients to file any petitions for attorneys' fees in the name of the recipient and not in the name of any staff

attorney. To the extent a jurisdiction may allow an attorneys' fee petition in the recipient's name rather than a staff attorney, this change would help ensure that the court would award attorneys' fees to the organization and not to an individual staff attorney. LSC proposes placing this addition as § 1609.4(a), and redesignating the current paragraphs (a) and (b) of this section as paragraphs (b) and (c), respectively.

Second, LSC proposes to state explicitly that, in the event a jurisdiction requires that attorneys' fee petitions be made in a staff attorney's name, the staff attorney must remit the award to the recipient, which must then allocate an award of attorneys' fees to its LSC grant account in proportion to the amount of LSC funds used to obtain the award. LSC believes that these two changes will accommodate variations in state and local rules governing the award of attorneys' fees and help ensure that any attorneys' fee awards supported by LSC funds are adequately credited to LSC funds.

Finally, to more aptly describe the substance of § 1609.4, LSC proposes changing the heading to "Requesting and receiving attorneys' fees."

Section 1609.5 Acceptance of reimbursement from a client.

To create consistency in the verbs used in the headings for § 1609.4 and § 1609.5 and more aptly describe the substance of the latter section, LSC proposes to change the heading to "Receiving reimbursement from a client." LSC proposes no substantive changes to this section.

Section 1609.6 Recipient policies, procedures and recordkeeping.

LSC proposes to make no changes to this section.

List of Subjects in 45 CFR Part 1609

Administrative practice and procedure, Grant programs – law, Legal services.

For the reasons set forth in the preamble, the Legal Services Corporation proposes to amend 45 CFR part 1609 as follows:

PART 1609 – FEE-GENERATING CASES

1. The authority citation for part 1609 continues to read as follows:

AUTHORITY: 42 U.S.C. 2996g(e).

2. Revise paragraph (a) and add paragraph (b)(3) to § 1609.2 to read as follows:

§ 1609.2 Definitions.

- (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.

- (b) * * *

(3) A recipient provides only advice and counsel or limited services, as those terms are defined in 45 CFR 1611.1(a) and (e), to an eligible client.

3. Revise the heading of § 1609.3 to read as follows:

§ 1609.3 Authorized representation in a fee-generating case.

* * * * *

4. Revise § 1609.4 to read as follows:

§ 1609.4 Requesting and receiving attorneys' fees.

- (a) Any petition seeking attorneys' fees for representation supported in whole or in part with funds provided by LSC, shall, to the extent permitted by law, be filed in the name of the recipient.

- (b) Attorneys' fees received by a recipient or an employee of a recipient for representation supported in whole or in part with funds provided by LSC shall be allocated to the fund

in which the recipient's LSC grant is recorded in the same proportion that the amount of LSC funds expended bears to the total amount expended by the recipient to support the representation.

(c) Attorneys' fees received shall be recorded during the accounting period in which the money from the fee award is actually received by the recipient and may be expended for any purpose permitted by the LSC Act, regulations and other law applicable at the time the money is received.

5. Revise the heading of § 1609.5 to read as follows:

§ 1609.5 Receiving reimbursement from a client.

* * * * *

Dated: February 6, 2017.

Stefanie K. Davis,

Assistant General Counsel.

[FR Doc. 2017-02717 Filed: 2/10/2017 8:45 am; Publication Date: 2/13/2017]