



7050-01

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 (LSC or Corporation) regulation regarding fee-generating cases. This 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.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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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 the original 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.

To balance these considerations, LSC (1) defined “fee-generating case” to prohibit recipients from accepting cases that a private attorney would take, and (2) provided exceptions to the prohibition when adequate representation by the private bar is unavailable and contains 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.” *Id.* 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.* In § 1609.3, LSC established 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 LSC did not intend to change the

definition and sought to avoid confusion about its intent, the Board of Directors (“Board”) rejected the numerical changes proposed in the Notice of Proposed Rulemaking (“NPRM”). Id.

Nevertheless, the Board implemented 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.

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 fees to be remitted to the recipient. 41 FR 38505, Sept. 10, 1976. In 1984, LSC adopted a new section, § 1609.6, that requires 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 funds a case half with LSC funds and half with private funds, § 1609.6 requires the recipient to allocate any attorneys’ fees received to each fund in equal proportion. Section 1609.6 also requires 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 17, 2016, the Operations and Regulations Committee ("Committee") of the Board voted to recommend that the Board authorize rulemaking on part 1609. The Board voted to authorize rulemaking on July 18, 2016. On January 26, 2017, the Committee voted to recommend that the Board approve publication of an 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 the NPRM. LSC published the notice of proposed rulemaking in the Federal Register on February 13, 2017. 82 FR 10446, Feb. 13, 2017. The comment period remained open for thirty days and closed on March 15, 2017.

Materials regarding this rulemaking are available in the open rulemaking section of LSC’s website at <http://www.lsc.gov/about-lsc/laws-regulations-guidance/rulemaking>. After the effective date of the rule, those materials will appear in the closed rulemaking section at <http://www.lsc.gov/about-lsc/laws-regulations-guidance/rulemaking/closed-rulemaking>.

II. Section-by-Section Discussion of Comments and Regulatory Provisions

LSC received two comments during the public comment period. One comment was submitted by Northwest Justice Project (NJP), an LSC-funded recipient. The other comment was submitted by the National Legal Aid and Defender Association (NLADA) by its Civil Council, the elected representative body that establishes policy for the NLADA Civil Division, and its Regulations Committee. Both commenters were generally supportive of LSC’s proposed changes to part 1609.

III. Proposed Changes.

§ 1609.1 Purpose.

LSC proposed no changes to this section. LSC received no comments on this 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 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 proposed removing “from public funds or from the opposing party” from the definition.

Additionally, LSC proposed revising part 1609 to clarify that a recipient may provide brief services to an eligible client despite the possibility that the case ultimately 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 proposed incorporating this clarification into part 1609 by adding a separate paragraph to § 1609.2(b). The proposed paragraph explained 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, current § 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. LSC did not propose to change this language in the NPRM.

Comments: NJP “assume[d] that deletion of the source of the award to a client in proposed § 1609.2(a) is intended to denote the availability of an attorneys’ fee from funds that are paid to a lawyer from a monetary award to compensate the client for the injury or claim that is the subject to the litigation.” NJP continued, “As LSC notes, recipients may request, collect and retain an award of attorney fees as provided by law, so long as such a request is in the name of the recipient or the award is remitted to the recipient and accounted for pursuant to § 1609.4.” NJP provided no comment on proposed § 1609.2 besides its assumption.

NLADA “fully supports” clarifying that advice and counsel or limited services do not fall within the meaning of fee-generating case. In NLADA’s view, “[t]he provision is beneficial to LSC eligible clients by affording them the opportunity to receive brief advice or services regarding a fee generating case. The program can provide legal advice or take limited action that can be critical to preserving the client’s rights[.]”

Response: LSC is unsure what NJP’s assumption means. If NJP is assuming the proposed language means that a case in which a court awards fees directly to the attorney rather than awarding fees to the client is no longer a “fee-generating case” for purposes of part 1609, the assumption is incorrect.

LSC intends part 1609 to require recipients and their attorneys to consider whether cases that may result in fee awards are ones that can be handled by the private bar before accepting such cases. LSC does not intend to permit a recipient to accept a fee-generating case without first attempting to refer the case to the private bar simply because the court may award the attorneys’ fee portion of an award directly to the recipient or its attorney instead of the client. Nevertheless, this restriction does not prohibit a recipient from accepting cases where permitted by § 1609.2(b) or § 1609.3.

LSC believes the language in the proposed rule provides sufficient clarity regarding the intent of the rule and therefore adopts the proposed version in this final rule.

§ 1609.3 General requirements.

LSC proposed 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 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 proposed to rename § 1609.3 Authorized representation in a fee-generating case. LSC received no comments on this change and therefore adopts the proposed version in this final rule.

§ 1609.4 Accounting for and use of attorneys' fees.

LSC proposed to revise part 1609's requirement to account for receipt of attorneys' fees. Currently, § 1609.4 requires that attorneys' fees received in a case that the recipient used some amount of LSC funds to handle be allocated to the LSC grant account in proportion to which the LSC funds were used. 45 CFR 1609.4(a). This language requires the 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 proposed the following revisions to § 1609.4. First, LSC proposed 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's name, this change would help ensure that the court would award attorneys' fees to the organization and not to an individual staff attorney. LSC proposed placing this addition as § 1609.4(a), and redesignating paragraphs (a) and (b) of existing § 1609.4 as paragraphs (b) and (c), respectively.

Second, LSC proposed to state explicitly in § 1609.4(b) that, in the event a jurisdiction requires attorneys' fee petitions to 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 believed that these two changes 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 proposed changing the heading to Requesting and receiving attorneys' fees.

Comment: NJP had no concerns about requiring fee petitions to be made in the recipient's name to the extent permitted by law. NLADA generally supported the proposed revision clarifying that attorneys' fees are to be awarded to the recipient. NLADA, however, relayed a recipient's concern that state court rules may require licensed, individual attorneys to be designated on a petition for attorneys' fees instead of an organization. This contrasts with the proposed rule, which requires petitions for attorneys' fees to be filed in the name of the recipient "to the extent permitted by law." Recognizing there may be differences among statutes, court rules, and other rules,

NLADA recommended that the rule be revised to state “to the extent required by law or rules in the jurisdiction.”

Response: LSC will adopt the recommendation with one change. As NLADA noted, LSC does not intend for an attorney to violate any applicable law or any applicable rule in his or her petition for attorney fees. To clarify that the regulation requires compliance with both the law and rules, LSC will add the language recommended by NLADA, except that LSC will use the conjunction “and” between the phrases “to the extent permitted by law” and “rules in the jurisdiction.”

§ 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 proposed to change the heading to Receiving reimbursement from a client. LSC proposed no substantive changes to this section. LSC received no comments on this section. Consequently, LSC adopts the language proposed in the NPRM in this final rule

§ 1609.6 Recipient policies, procedures and recordkeeping.

LSC proposed no changes to this section. LSC received no comments on 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 amends 45 CFR part 1609 as follows:

PART 1609 – FEE-GENERATING CASES

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

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

2. In § 1609.2:

- a. Revise the section heading and paragraph (a);
- b. Remove “, or” at the end of paragraph (b)(1) and add a semicolon in its place;
- c. Remove the period at the end of paragraph (b)(2) and add “; or” in its place;

and

- d. Add paragraph (b)(3).

The revision and addition 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 and rules in the jurisdiction, 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.

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Dated: April 26, 2017.

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