

both to the recipient and to themselves as individuals.

§ 1640.4 Violation of agreement.

(a) A violation of the agreement under § 1640.2(b)(1) shall result in the recipient's LSC grant or contract being terminated by the Corporation without need for a termination hearing. During the pendency of any appeal of a conviction or judgment, the Corporation may take such steps as it determines necessary to safeguard its funds.

(b) A violation of the agreement under § 1640.2(b)(2) shall result in the recipient's LSC grant or contract being terminated by the Corporation. Prior to such termination, the Corporation shall provide notice and an opportunity to be heard for the sole purpose of determining whether the recipient knowingly or through gross negligence allowed the employee or board member to engage in the activities which led to the conviction or judgment. During the pendency of any appeal of a conviction or judgment or during the pendency of a termination hearing, the Corporation may take such steps as it determines necessary to safeguard its funds.

§ 1640.5 Reporting requirement.

(a) The recipient shall give telephonic or other actual notice to the Corporation within two (2) working days of the date that:

(1) The recipient or any of the recipient's employees has been charged with a violation of any of the Federal laws listed in § 1640.2(a) with respect to its LSC funds; or

(2) It has reason to believe that any of its employees or board members have misused the recipient's LSC funds in violation of any of the Federal laws listed in § 1640.2(a).

(b) The notice required in paragraph (a) of this section shall be followed by written notice within ten (10) calendar days.

(c) A recipient or an employee or board member of the recipient has been "charged with a violation" when a governmental entity having authority to initiate such a proceeding has instituted action against the recipient or the recipient's employee and the proceeding is pending.

Dated: August 20, 1996.

Suzanne B. Glasow,

Senior Counsel for Operations & Regulations.
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45 CFR Part 1642

Attorneys' Fees

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule is intended to implement a provision in the Legal Services Corporation's ("Corporation" or "LSC") FY 1996 appropriations act that prohibits LSC recipients from seeking attorneys' fees in cases filed after the date of enactment of the appropriation. Although this interim rule is effective upon publication, the Corporation also solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: This interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

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

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

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee ("Committee") of the Legal Services Corporation ("LSC" or "the Corporation") Board of Directors ("Board") requested the LSC staff to prepare interim rules to implement § 504(a)(13) of the Corporation's FY 1996 appropriations act, Public Law 104-134, 110 Stat. 1321 (1996), prohibiting LSC recipients and their employees from claiming, or collecting and retaining attorneys' fees. The Committee held hearings on July 10 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation that is already in effect and which carries severe penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. 5 U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comments on the rule for review

and consideration by the Committee. After receipt of written public comment, the Committee intends to hold public hearings to consider the written comments and to hear oral comments. The Committee anticipates that a final rule will be issued which will supersede this interim rule.

This rule is based, in part, on provisions in 45 CFR Part 1609, the Corporation's regulation dealing with attorneys' fees in relation to fee-generating cases. The Corporation has determined that, although related, the issues of fee-generating cases and attorneys' fees are sufficiently separate to warrant separate rules. Accordingly, the provisions on attorneys' fees and acceptance of reimbursement for costs and expenses in this part supersedes the comparable provisions in Part 1609. A revised version of part 1609 is also published in this publication of the Federal Register as a proposed rule.

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

Section 1642.1 Purpose

The purpose of this rule is to ensure that LSC recipients and their employees do not seek or retain attorneys' fees awarded pursuant to Federal or State law, including common law, permitting or requiring such fees.

Section 1642.2 Definitions

This section defines "attorneys' fees" as an award that is intended to compensate an attorney of the prevailing party as permitted or required by Federal or State law. An "award" is defined as an order of a court or administrative agency that an unsuccessful party pay the attorneys' fees of the prevailing party. The definition makes clear that the term includes attorneys' fees that are awarded as part of a court or agency approved settlement agreement. The Corporation has received a number of comments arguing that the restriction was not intended to apply to attorneys' fees in Social Security cases, because such fees are paid pursuant to an agreement by the client to pay the fees out of the client's back benefits. The court or administrative agency merely approves the agreement, but does not "award" the fees. The definition of "award" reflects this interpretation.

Programs which seek fees out of favorable awards to clients should be aware that the Corporation's interpretation of the statute reflected in this interim rule may change following receipt of public comment and any such change could affect a recipient's practices.

Section 1642.3 Prohibition

This section states the restriction on attorneys' fees contained in § 504(a)(13) of the Corporation's FY 1996 appropriations act, which prohibits LSC recipients from claiming, or collecting and retaining attorneys' fees in any cases. This rule uses the term "cases" and does not refer to "matters," as does the underlying statute, because attorneys' fees may only be derived from cases. Paragraph (a) prohibits recipients or their employees from claiming, or collecting and retaining attorneys' fees in any case, unless allowed under paragraph (c). Paragraph (b) provides that private attorneys who are paid by LSC recipients to handle cases for eligible clients as part of a recipient's PAI program, under a contract or judicare program, may not seek fees in those cases unless allowed under paragraph (c). The prohibition applies to those private attorneys who receive funds from a recipient, because they are persons receiving financial assistance under the appropriations bill and are thus subject to the prohibition on attorneys' fees. This would not include pro bono attorneys who receive no compensation from a recipient to handle cases, because they are not receiving financial assistance to provide the services.

Paragraph (c) clarifies that the prohibitions in paragraphs (a) and (b) do not apply to four situations. First, the statute expressly allows programs to seek and retain attorneys' fees for cases filed prior to April 26, 1996, but this exception does not extend to any additional claims for the client filed after April 26, 1996, in any pending case.

Second, the prohibitions in paragraphs (a) and (b) do not apply to activity allowed pursuant to 42 U.S.C. 2996e(d)(6) of the LSC Act, which permits recipient attorneys to accept compensation for legal services that they provide as officers of the court, i.e., court appointments.

Third, paragraph (c) clarifies that sanctions imposed by courts on parties in litigation for behavior that violates court rules may be accepted by recipients because they are considered to be sanctions rather than attorneys' fees. Such sanctions often include compensation for the time spent by the opposing lawyer in litigating against the sanctioned behavior.

Finally, the restrictions do not apply to the reimbursement of costs and expenses made by an opposing party.

Section 1642.4 Accounting for and use of Attorneys' Fees

This section is a revised version of § 1609.6, which is superseded by this interim rule. It includes an accounting requirement for attorneys' fees that are permitted under § 1642.3(c) of this part that are received by a recipient. Recipients are required to allocate such fees that are received 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. Thus, if a particular case was funded 60% by LSC funds and 40% from non-LSC funds, a recipient would be required to allocate 60% of the fees received to the LSC account. There is no requirement that the program allocate the remaining 40% to any particular account. This is a change from current law that required allocation to the same fund to which expenses had been charged. The change is based on a policy that, if a non-LSC funder does not require that its fund be reimbursed from attorneys' fees awarded in litigation supported with its funds, LSC should not dictate how those funds are to be allocated.

Section 1642.5 Acceptance of Reimbursement From a Client

This section allows recipients to accept reimbursement from clients for out-of-pocket costs and expenses incurred in connection with cases where the client recovers damages or statutory benefits, provided that the client has agreed in writing to reimburse the recipient for such costs and expenses out of any recovery. This section also authorizes recipients to require clients who do not qualify for *in forma pauperis* to pay court costs.

Section 1642.6 Recipient Policies, Procedures and Recordkeeping

This section requires the recipient to establish written policies and procedures to guide the recipient's staff to ensure compliance with this rule. Recipients are also required to maintain sufficient documentation to demonstrate compliance with this part.

List of Subjects in 45 CFR Part 1642

Attorneys' fees; Grant programs—law; Legal services.

For reasons set forth in the preamble, 45 CFR Chapter XVI is amended by adding part 1642 as follows:

PART 1642—ATTORNEYS' FEES

Sec.

- 1642.1 Purpose.
- 1642.2 Definitions.
- 1642.3 Prohibition.

1642.4 Accounting for and use of attorneys' fees.

1642.5 Acceptance of reimbursement from a client.

1642.6 Recipient policies, procedures and recordkeeping.

Authority: Sec. 504(a)(13), Pub. L. 104-134, 110 Stat 1321; 42 U.S.C. 2996e(d)(6).

§ 1642.1 Purpose.

This part is designed to insure that recipients or employees of recipients do not claim, or collect and retain attorneys' fees available under any Federal or State law permitting or requiring the awarding of attorneys' fees.

§ 1642.2 Definitions.

(a) *Attorneys' fees* means an award to compensate an attorney of the prevailing party made pursuant to common law or Federal or State law permitting or requiring the awarding of such fees.

(b) An *award* is an order by a court or an administrative agency that the unsuccessful party pay the attorneys' fees of the prevailing party or an order by a court or administrative agency approving a settlement agreement of the parties which provides for payment of attorneys' fees by an adversarial party.

§ 1642.3 Prohibition.

(a) Except as permitted by paragraph (c) of this section, no recipient or employee of a recipient may claim, or collect and retain attorneys' fees in any case undertaken on behalf of a client of the recipient.

(b) Except as permitted by paragraph (c) of this section, no recipient and no private attorney who receives compensation from a recipient to provide legal assistance to eligible clients under the recipient's private attorney involvement (PAI) program, judicare program, contract or other arrangement, may claim, or collect and retain attorneys' fees for such legal assistance.

(c) The prohibitions contained in paragraphs (a) and (b) of this section shall not apply to:

(1) Cases filed prior to April 26, 1996, except that the prohibition shall apply to any additional claim for the client made in a case pending on April 26, 1996;

(2) Cases to which 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, and in which the recipient or employee receives compensation under the same terms and conditions as are applied generally to attorneys practicing in the

court in which the appointment is made;

(3) Sanctions imposed by a court for violations of court rules, including Rule 11 or discovery rules of the Federal Rules of Civil Procedure, or similar State court rules; or

(4) Reimbursement of costs and expenses from an opposing party.

§ 1642.4 Accounting for and use of attorneys' fees.

(a) Attorneys' fees received by a recipient pursuant to § 1642.3(c) for work supported in whole or in part with funds provided by the Corporation shall be allocated to the fund in which the recipient's LSC grant is recorded in the same proportion that the amount of Corporation funds expended bears to

the total amount expended by the recipient to support the work.

(b) Attorneys' fees 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.

§ 1642.5 Acceptance of reimbursement from a client.

(a) When a case results in a recovery of damages or statutory benefits, a recipient may accept reimbursement from the client for out-of-pocket costs and expenses incurred in connection with the case, if the client has agreed in writing to reimburse the recipient for

such costs and expenses out of any such recovery.

(b) A recipient may require a client to pay court costs when the client does not qualify to proceed *in forma pauperis* under the rules of the jurisdiction.

§ 1642.6 Recipient policies, procedures and recordkeeping.

The 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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