




OFFICE OF LEGAL AFFAIRS

EXTERNAL OPINION

EX-2005-1003

TO: All LSC Program Directors

FROM: Victor M. Fortuno 
Vice President and General Counsel

DATE: December 16, 2005

SUBJ: **Clarification of OLA External Opinion EX-2002-1004**

Summary

The Office of Legal Affairs ("OLA") hereby withdraws footnote 2 in its External Opinion EX-2002-1004. We conclude that where a private attorney is providing legal assistance on a *pro bono* basis to an eligible client pursuant to an LSC grant recipient's Private Attorney Involvement ("PAI") program and where the recipient provides no compensation for that private attorney's time and service, the private attorney may claim, or collect and retain attorneys' fees and the recipient may allocate the costs expended in support of that *pro bono* case toward the recipient's PAI requirement. This opinion clarifies that payment by the recipient to the private attorney to reimburse costs or expenses or the extension of malpractice insurance coverage or other in-kind resources made available to the private attorney does not constitute compensation to the private attorney under these circumstances and, therefore, does not prohibit the private attorney from claiming, or collecting and retaining attorneys' fees in that case.

Background

On May 2, 2002, OLA issued External Opinion EX-2002-1004, providing guidance on the application of the attorneys' fees restriction in 45 CFR Part 1642 to an LSC grant recipient's PAI program. Footnote 2 of that opinion referenced a 1999 External Opinion which stated that a private attorney handling a *pro bono* case through a recipient's PAI program, for which the attorney is not being compensated by the recipient, may claim, or collect and retain attorneys' fees. The footnote went on to state that, "[t]his is true only for cases that a recipient does not treat as PAI cases for purposes of Part 1614" and that "recipients cannot count as PAI cases under Part 1614 any cases referred to private attorneys in which attorneys' fees are claimed."

After the issuance of EX-2002-1004, OLA received requests from the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants and the Center for

Law and Social Policy to reconsider footnote 2 of EX-2002-1004. Upon further consideration, OLA agrees that this statement was incorrect. Accordingly, OLA hereby withdraws footnote 2 in EX-2002-1004 and clarifies that a recipient may count towards its Part 1614 PAI requirement (that the recipient devote an amount equal to at least 12.5% of its LSC annualized basic field award) those expenses incurred by the recipient in support of cases handled by a private attorney on a *pro bono* basis under the recipient's PAI program - - even if the private attorney claims, or collects and retains attorneys' fees in the case - so long as the recipient has provided no compensation (irrespective of the source of the funds) to the private attorney.¹

Analysis

Application of the "Pro Bono Exception" to the Attorneys' Fees Restriction in PAI Cases

Part 1642 implements the statutory restriction prohibiting LSC grant recipients from claiming, or collecting and retaining, attorneys' fees. See §504(a)(13) of Pub. L. 104-134, 110 Stat. 1321 (1996); Pub. L. 108-447, 118 Stat. 2809 (2004). By regulation, the attorneys' fees restriction also applies to private attorneys who receive compensation from a recipient to provide legal assistance, but does not apply to private attorneys who do not receive compensation (referred to herein as the "*pro bono* exception"). 45 CFR §1642.4(b). The question addressed is whether the attorneys' fees restriction applies to cases referred to private attorneys and handled by them on a *pro bono* basis as PAI cases under Part 1614.

The text of 1642.4(b) states that the attorneys' fees restriction :

"...shall apply to any case undertaken by a private attorney on behalf of an eligible client when the attorney receives compensation from a recipient to provide legal assistance to such client under the recipient's private attorney involvement (PAI) program, judicare program, contract or other financial arrangement."

The "*pro bono* exception" is more fully addressed in the preamble to the final rule.

"Paragraph (b) . . . 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 arrangement, may not seek attorneys' fees in those cases. The prohibition does not include *pro bono* attorneys who receive no compensation from a recipient to handle cases, because they are not receiving financial assistance from the recipient to provide the services. Thus, attorneys who are handling cases on behalf of eligible clients on a *pro bono* bases [sic] may seek and collect attorneys' fees. It is the Corporation's

¹ Although the issue of counting cases for LSC Case Statistical Reports is not raised in footnote 2 of OLA External Opinion 2002-1004, LSC recipient programs may count the "*pro bono* exception" cases for CSR purposes.

judgment that the restrictions of this part would be a substantial impediment to the recruitment of *pro bono* lawyers.”

62 Fed. Reg. 25864-64 (May 12, 1997).

As the text of the PAI regulation and the preamble make clear, a private attorney who has been compensated for his time and services may not claim, or collect and retain attorneys’ fees and, by contrast, a private attorney who has not been compensated for his time and services may claim, or collect and retain attorneys’ fees. Thus, under the *pro bono* exception, private attorneys handling cases *pro bono* without compensation as part of a recipient’s PAI program may claim, collect and retain attorneys’ fees and recipient programs may allocate their expenses relating to those cases to their PAI requirement.

The *pro bono* attorney exception is justified as a way to remove a significant impediment to the recruitment and participation of the private bar in providing services to low income persons, which is the primary purpose of the Part 1614 PAI requirement. See 45 CFR §1614.1. In this context, it is reasonable to conclude that the language exempting cases handled on a *pro bono* basis by private attorneys from the attorneys’ fees prohibition was intended to include within the exception those cases handled on a *pro bono* basis by private attorneys pursuant to a recipient’s PAI program.

Whether Costs/Expenses Are “Compensation” Within the “Pro Bono Exception” to Part 1642

Questions have been raised concerning the scope and meaning of the term “compensation” and the permissibility of a recipient paying costs and expenses to a private attorney who is handling a case on a *pro bono* basis as part of a recipient’s PAI program and who is otherwise not being paid for his/her services when the PAI attorney claims, or collects and retains attorneys’ fees.

LSC Program Letter 97-1, which provides guidance on the application of the attorneys’ fees restriction, expressly states that “LSC does not define as compensation reimbursement for costs and expenses which an LSC recipient may make to a *pro bono* private attorney, either as co-counsel or sole counsel.” LSC determined that excluding from the *pro bono* exception to Part 1642 those cases in which a recipient provides payment for costs or expenses or otherwise provides in-kind resources to a private attorney would render the exception inapplicable in a significant number of cases and could present a substantial impediment to LSC recipient programs in their fulfilling LSC’s PAI policy objectives.

Part 1642 does not define the term “compensation,” nor does the regulation address whether the payment of costs and expenses or the provision of in-kind resources (such as malpractice insurance coverage or access to electronic legal research) constitute compensation for the purposes of the application of the attorneys’ fees restriction to private attorneys. Neither is this issue addressed in the preamble to the rule. Thus, there is nothing in the regulation nor its regulatory history to suggest that the policy set forth in the Program Letter is inconsistent with or goes beyond the intent of LSC when it adopted Part 1642.

The regulation does, however, draw an explicit distinction between payments intended as remuneration for an attorney's time and services and payments intended to cover or provide reimbursement for an attorney's costs and expenses. In fact, 45 CFR §1642.2(b)(4) specifically excludes costs and expenses. In this context, LSC intended to distinguish remuneration for an attorney's time and services from reimbursement of costs and expenses. LSC did not determine a recipient to be receiving attorneys' fees when it receives reimbursement of costs and expenses, and we do not now interpret it so. LSC intended that private attorneys providing *pro bono* service on referrals from recipients as part of the recipient's PAI program not be considered compensated when they receive only payment for costs and expenses.²

Conclusion

In light of the foregoing, OLA has concluded that where a private attorney is providing legal assistance on a *pro bono* basis to an eligible client pursuant to a recipient's PAI program and where the recipient provides no compensation for that private attorney's time and service, the private attorney may claim, or collect and retain attorneys' fees and the recipient may allocate the costs expended in support of that *pro bono* case toward the recipient's PAI requirements. Payment by the recipient to the private attorney to reimburse costs or expenses or providing malpractice insurance coverage or other in-kind resources to the private attorney does not constitute compensation to the private attorney under these circumstances and, therefore, does not prohibit the private attorney from claiming, or collecting and retaining attorneys' fees in that case.

² It has been suggested that a particular phrase in the preamble to the rule in the discussion of why reimbursement for costs and expenses are not within the definition of prohibited attorneys' fees in §1642.2 -- "costs and expenses are compensation for necessary outlays" -- indicates that the term "compensation" as used in §1642.4 includes costs and expenses. See 62 Fed. Reg. 25863 (May 12, 1997). We believe that such a suggestion focuses more than is warranted on the use of the word "compensation" and loses sight of the very distinction the LSC was drawing between remuneration for an attorney's time and services and the payment of expenses for necessary outlays in the course of litigation. This use of the word "compensation" in the preamble of §1642.2 is not dispositive of the intended meaning of the term in §1642.4.