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July 29, 1997

Jonathan A. Weiss  
Executive Director  
Legal Services for the Elderly  
130 W. 42nd Street, 17th Floor  
New York, N.Y. 10036

Dear Mr. Weiss:

This is a response to your letters of June 11, 1997 to Ahn Tu, Managing Program Counsel, Office of Program Operations ("OPO") and Victor M. Fortuno, General Counsel of the Legal Services Corporation ("Corporation") requesting a reconsideration of a response from OPO to your questions regarding the Corporation's restrictions on attorneys' fees, 45 CFR Part 1642.<sup>1</sup> Because of your need for a quick response, this letter responds to your question regarding whether recipient attorneys may claim or collect and retain attorneys' fees for cases they engage in on their own time outside of their work for the recipient. We anticipate that your other questions will be addressed in an upcoming program letter that will provide interpretive guidance on the Corporation's regulation on attorneys' fees.

A response to your inquiry requires the application of two Corporation regulations, 45 CFR Part 1604, the Corporation's regulation on the outside practice of law and 45 CFR Part 1642, the Corporation's regulation on attorneys' fees. The restriction on attorneys' fees provides that:

Except as permitted by §1642.4, 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.

<sup>1</sup> Pursuant to your suggestion, Ms. Tu has forwarded your June 11 letter to her to the Office of General Counsel for a response.

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45 CFR §1642.3.<sup>2</sup> Involvement in cases undertaken by recipient attorneys on their own time outside of their work for the recipient would not fall within this restriction because such cases do not involve a “case undertaken on behalf of a client of the recipient.”

However, Part 1604 prohibits recipient attorneys from engaging in the outside practice of law except for several limited circumstances.<sup>3</sup> The “outside practice of law” is defined as:

the provision of legal assistance to a client who is not entitled to receive legal assistance from the employer of the attorney rendering assistance, but does not include, among other activities, teaching, **consulting**, or performing evaluation.

45 CFR §1604.2(b)(emphasis added). Your letter stated that the involvement of your program attorneys in outside cases for which they wish to seek and retain attorneys’ fees constitutes consulting and thus are not prohibited by the rule. We disagree.

Part 1604 implements a very strict underlying statutory provision, Section 1007(a)(4) of the LSC Act, which reads:

The Corporation shall... (4) insure that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from (A) any compensated outside practice of law and (B) any uncompensated outside practice of law except as authorized in guidelines promulgated by the Corporation

42 U.S.C. §2996f(a)(4). The plain language of this provision prohibits any compensated outside practice of law, which would include cases where the attorney is compensated with attorneys’ fees.<sup>4</sup> Within the context of such a strict statutory prohibition, the type of consulting that would not violate the strict Congressional intent would be quite limited. Otherwise, an attorney could avoid the restriction by providing representation in a case and simply labeling the work in the case as consultation.

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<sup>2</sup> The restriction does not apply to cases filed prior to April 26, 1996, the commencement date of the Congressional restriction. See 45 CFR §1642.4(a); Pub. L. 104-134, §508(b)(3).

<sup>3</sup> This rule has been effective since 1976.

<sup>4</sup> Consistent with this strict Congressional prohibition, the Corporation’s regulation provides only two narrow exceptions for compensated outside practice, both of which respond to matters of professional responsibility. They include closing cases from a prior practice and court appointments. See §604.4(a) and (b).

In our view, any involvement in a case that qualifies a recipient attorney to claim attorneys' fees for time spent on the case falls outside of the meaning of consultation for the purposes of Part 1604. Generally, consultants or experts are paid a contractual fee for their services by the attorney or firm representing the client and they do not themselves provide representation to the client. Attorneys seeking attorneys' fees as defined in Part 1642, on the other hand, generally constitute attorneys providing representation to the client.<sup>5</sup> Although there may be exceptions to these general rules, the Corporation will interpret involvement in an outside case such that the attorney qualifies to claim attorneys' fees to be in violation of the Corporation's outside practice of law restriction unless, of course, the case falls within the two limited exceptions set out in §1604.4.<sup>6</sup> This interpretation is necessary to preserve the strict Congressional restriction and to prevent the exception from swallowing the rule.

Please note that the prohibition on outside practice of law applies only to a recipient's full-time attorneys.<sup>7</sup> Thus, a recipient's part-time attorneys may engage in the outside practice of law on their own time and seek and retain attorneys' fees from such outside cases.

Your description of your involvement in the Perez v. Manhattan Jeep Eagle case states that you personally provided consultation services to the attorneys in the case. You have asked whether you may claim attorneys' fees for your participation in the case. Since Perez was filed in 1992, it appears to qualify under §1642.4(a) which exempts cases filed before April 26, 1996, from the attorneys' fees restriction, although this exemption does not apply to any related claims for the clients made after April 25, 1996. However, based on the analysis above, if your involvement was such that it would qualify for a claim for attorneys' fees and you are a program attorney as defined in Part 1604, then the Corporation would interpret such involvement as a violation of the restriction on the outside practice of law. If your involvement, however, was within the limited type of consulting contemplated by Part 1604, you may, of course, receive a consultation fee and what you do with such funds is your personal decision.

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<sup>5</sup> This does not mean that a recipient attorney may not record his time spent on a case as a consultant so that the counsel of record may claim sufficient fees to cover the expenses of the litigation, including the costs of consultants. However, the recipient attorney may not claim attorneys' fees in the case or assist the outside attorneys to claim fees for him.

<sup>6</sup> See note 3.

<sup>7</sup> "Attorney" for the purposes of Part 1604 is defined as:

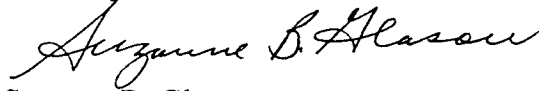
a person who is employed full time in legal assistance activities supported in major part by the Corporation, and who is authorized to practice law in the jurisdiction where assistance is rendered.

Section 1604.2(a).

Finally, I caution that the use of any recipient resources for any case involving the restriction on attorneys' fees, including any outside practice of law case, would raise questions about the appropriate use of recipient resources. At a minimum, a recipient's use of resources for any case involving the attorneys' fee restriction must be in compliance with Part 1604, Part 1642 and Part 1610, especially §§1610.7 (transfers of LSC funds) and 1610.8 (program integrity of recipient).

I hope this adequately responds to your inquiry. As stated above, a program letter that will provide additional interpretive guidance on the Corporation's attorneys' fee restriction will be forthcoming.

Sincerely,



Suzanne B. Glasow  
Senior Assistant General Counsel

cc: Anh Tu, Managing Program Counsel