

NOTE: The form illustrated in § 101-26.4902-1424 is filed as part of the original document and does not appear in the FEDERAL REGISTER.

(Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).)

Effective date: This regulation is effective September 10, 1976.

It is hereby certified that the impact does not meet the inflation impact criteria for major rules or regulations.

Dated: September 2, 1976.

JACK ECKERD,  
Administrator of General Services.  
[FR Doc. 76-26533 Filed 9-9-76; 8:45 am]

Title 45—Public Welfare  
CHAPTER XVI—LEGAL SERVICES CORPORATION  
PART 1609—FEE-GENERATING CASES

The Legal Services Corporation was established pursuant to the Legal Services Corporation Act of 1974, Pub. L. 93-355, 88 Stat. 378, 42 U.S.C. 2996-2996f ("the Act"). Section 1007(b)(1) of the Act, 42 U.S.C. 2996f(b)(1), prohibits the use of Corporation funds to provide legal assistance with respect to any fee-generating case, except in accordance with guidelines promulgated by the Corporation.

On May 5, 1976, (41 FR 18528) a proposed regulation on fee-generating cases was published. Interested persons were given until June 3, 1976 to submit comments on the proposed regulation. All comments received were given full consideration. The following issues were among those considered before adoption of the final regulation.

PURPOSE

Generally the private Bar is 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 specific statutory authorization. However, 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 too small, or for some other reason. The Act requires the Corporation to issue guidelines to insure that eligible clients will be able to obtain legal assistance in such cases, with appropriate safeguards to prevent legal services lawyers from competing with the private bar when private representation is in fact available.

The definition of "fee-generating case" in § 1609.2(a) includes every situation in which an attorney reasonably may expect to receive a fee for services from any source except the client.

SAFEGUARDS

Section 1609.3 prohibits representation in a fee-generating case unless other adequate representation is unavailable. Section 1609.4 sets forth the circumstances in which a fee-generating case may be accepted. The principal safeguard is in the requirement that either the client or the recipient attempt to find private representation through the local lawyer

referral service, or by request made to two private lawyers. Referral need not be attempted, however, if the recipient knows from past experience that it would be futile because the case is of a type that private lawyers ordinarily do not accept; and referral may be postponed if emergency circumstances require immediate action. Referral is not required when a client is obliged to pay a fee before a case will be considered. The provision should encourage local referral services and members of the private Bar to waive their customary fees for initial consultation when a recipient refers an eligible client with a fee-generating case. When recovery of damages is not the principal object of a case, a request for damages sometimes may be necessary, for tactical reasons; or because a latent counterclaim is discovered in the course of representation. Referral in such cases is rarely feasible, and requiring that it be attempted is an unnecessary administrative burden the Committee decided not to impose.

AWARDS OF FEES OR COSTS

In recent years statutes have begun to include provisions for the award of attorneys' fees to successful plaintiffs, and § 1609.5 encourages legal services programs to take advantage of this trend. Such cases are subject to the safeguards in § 1609.4 applicable to all fee-generating cases, but if referral is not possible, a recipient may take the case and may accept an award of attorneys' fees. The proceeds must be remitted to the recipient, used solely for purposes authorized by the Act, and reported to the Corporation.

Recipients are encouraged to take advantage of statutory provisions for attorneys' fees. Many courts have held that the fact that an attorney did not charge a fee to the client does not disqualify the attorney from receiving a fee under such statutes. See generally: *Tafte v. Department of Social and Health Services*, 85 Wash. 2d 161 (1975) and cases cited therein; *Hoitt v. Vitek*, 495 F.2d 219 (1st Cir. 1974); *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970); Comment, "Award of Attorney's Fees to Legal Aid Officers," 87 Harv. L.R. 411 (1973). Awards to recipients will increase their resources, and may encourage private attorneys to undertake similar cases on behalf of eligible clients. A recipient's tax status will not be affected by its acceptance, and use for program purposes, of fees awarded in cases undertaken for eligible clients.

The disclaimers in § 1609.6 (a) and (b) clarify the intention of the original draft. Section 1609.6(c) is new. It was added in response to suggestions that

<sup>1</sup> To the extent that the basis for the award in federal cases is the "private attorney general" theory they have been rendered obsolete by the decision in *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240 (1975); but *Alyeska* did not undermine the principle that legal services programs are entitled to equal treatment with private attorneys when there is statutory authorization for an award of fees.

such a provision would encourage desirable cooperation between recipients and the private Bar. A private lawyer may be reluctant to undertake a low-fee case in a possibly novel area of the law without the assurance of assistance from a recipient. By permitting a recipient to share its expertise with the private Bar, the Corporation can, without expending its own resources, increase the number of lawyers available to serve the poor. In such cases it seems appropriate to allow the recipient to share in any award of attorneys' fees that may be made.

- Sec.  
1609.1 Purpose.  
1609.2 Definitions.  
1609.3 Prohibition.  
1609.4 Authorized representation in a fee-generating case.  
1609.5 Acceptance of fees.  
1609.6 Acceptance of reimbursement.  
1609.7 Application.

AUTHORITY: Sec. 1007(b)(1), (42 U.S.C. 2996f(b)(1)).

§ 1609.1 Purpose.

This part is designed to insure that recipients do not compete with private attorneys and, at the same time, to guarantee that eligible clients are able to obtain appropriate and effective legal assistance.

§ 1609.2 Definition.

"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.

§ 1609.3 Prohibition.

No recipient shall use funds received from the Corporation to provide legal assistance in a fee-generating case unless other adequate representation is unavailable. All recipients shall establish procedures for the referral of fee-generating cases.

§ 1609.4 Authorized representation in a fee-generating case.

Other adequate representation is deemed to be unavailable when (a) The recipient has determined that free referral is not possible because:

- (1) The case has been rejected by the local lawyer referral service, or by two private attorneys; or
- (2) Neither the referral service nor any lawyer will consider the case without payment of a consultation fee; or
- (3) The case is of the type that private attorneys in the area ordinarily do not accept, or do not accept without prepayment of a fee; or

(4) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate, and consistent with professional responsibility, referral will be attempted at a later time; or

(b) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other non-pecuniary relief; or inclusion of a coun-

terclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims; or

(c) A court appoints a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

#### § 1609.5 Acceptance of fees.

(a) A recipient may seek and accept a fee awarded or approved by a court or administrative body, or included in a settlement, if

(1) The requirements of § 1609.4 are met, and

(2) Funds received are not used for purposes prohibited by the Act, and are accounted for in the manner directed by the Corporation.

(b) If a legal fee is awarded or approved by a court or administrative body, it shall be remitted promptly to the recipient.

#### § 1609.6 Acceptance of reimbursement.

When a case or matter subject to this Part results in a recovery of damages, other than statutory benefits, a recipient may accept reimbursement from the client for out-of-pocket costs and expenses incurred in connection with the case or matter, if

(a) The requirements of § 1609.4 are met, and

(b) The client has agreed in writing to reimburse the recipient for such costs and expenses.

#### § 1609.7 Application.

Nothing in this part shall prevent a recipient from

(a) Requiring a client to pay court fees when the client does not qualify to proceed in forma pauperis under the rules of the jurisdiction; or

(b) Accepting a fee in a case that was initiated prior to adoption of this part; or

(c) Acting as co-counsel with a private attorney when appropriate, and accepting part of any fee that may result from a shared case.

Effective date: This part becomes effective on October 12, 1976.

THOMAS EHRLICH,  
President,

Legal Services Corporation.

[FR Doc. 76-3926 Filed 9-9-76; 8:45 am]

### PART 1613—RESTRICTIONS ON LEGAL ASSISTANCE WITH RESPECT TO CRIMINAL PROCEEDINGS

The Legal Services Corporation ("the Corporation") was established pursuant to the Legal Services Corporation Act of 1974, Pub. L. 93-355, 88 Stat. 378, 42 U.S.C. 2996-2996f ("the Act"), for the purpose of providing financial support for legal assistance in non-criminal proceedings or matters to persons financially unable to afford legal assistance. Section 1007(b)(1) of the Act restricts the use of Corporation funds in criminal proceedings.

A proposed regulation was published on June 11, 1976 (41 FR 23728-9), and interested persons were given until July 12, 1976 to submit comments. All comments received were given full consideration before adoption of a final regulation. The following issues were among those considered.

#### DEFINITION

An initial policy question was whether to leave the scope of the prohibition against criminal representation to the varying definition of "criminal" in state and federal law, or to adopt a uniform definition. Consistent with the Corporation's policy seeking uniformity in application of the Act and its regulations, a uniform definition has been adopted.

Many minor infractions, such as housing, sanitation and traffic law violations, that are punishable by no more than a fine, are basically civil in nature. They are treated as civil in some states and in the Model Penal Code, and the ABA recommends their removal from criminal codes. "ABA Report, New Perspectives on Crime" iv (1972). Because the Corporation believes such offenses are basically civil in nature, and because the imposition of a fine may be extremely burdensome for the clients of legal services programs, the regulation permits representation of defendants in such cases.

The definition in the original draft has been amended to exclude cases prosecuted by private citizens to vindicate claims that are civil in nature, even though criminal sanctions or procedures may be provided by some states. Examples are child support and alimony cases. The change is consistent with the Conference Report, which states that the conferees understood "criminal proceedings" to refer to actions brought by governmental units.

The definition may leave a gap between cases where legal services lawyers can provide representation, and those where the Sixth Amendment right to counsel in criminal prosecution applies, because the Supreme Court has suggested that the Sixth Amendment is inapplicable when imprisonment is unlikely, although authorized. "Argersinger v. Hamlin," 407 U.S. 25 (1975). Recognizing that gap, the Corporation still believes that legal services lawyers should not participate in cases where an alternative jail sentence is authorized, even though they are arguably civil in nature. The Corporation's resources are too limited to accept the substantially expanded quasi-criminal caseload that might result if such representation were permitted.

If no more than a fine can result from conviction, the Part does not prohibit representation. But whether representation actually should occur is a question for a recipient to decide on the basis of its own priorities and resources, and the availability of other legal assistance in the community.

The prohibition of this part does not apply until adversary judicial criminal proceedings have been initiated by for-

mal complaint, indictment, or information. Choice of this point was suggested by the Supreme Court's decision in "Kirby v. Illinois," 406 U.S. 682 (1972), where the Court explained that "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified \* \* \*. It is this point, therefore, that marks the commencement of [a] 'criminal prosecution' \* \* \*." 406 U.S. 689.

#### AUTHORIZED REPRESENTATION

The legislative history makes it clear that certain limited exceptions to the general prohibition against criminal representation were intended.

In geographic areas where there is no Public Defender, and there are relatively few lawyers available, a legal services lawyer may be required by a court to accept appointment to represent an indigent defendant. If appointment is made pursuant to a statute or a court rule or practice of general applicability to all attorneys in the jurisdiction, § 1613.4(a) permits a legal services lawyer to fulfill an attorney's responsibility as an officer of the court, as long as criminal representation is not inconsistent with the primary responsibility of the legal services program to provide assistance to eligible clients in civil matters.

Occasionally a noncriminal matter undertaken on behalf of a juvenile evolves into a criminal proceeding (as for example, when a juvenile court waives jurisdiction). Section 1613.4(b) permits continued representation of the juvenile in the criminal proceeding, if required by professional responsibility.

Section 1613.4(c) was added to permit representation, if required by professional responsibility, in a case in which a criminal charge directly arises out of a civil matter in which a client has received or is receiving legal assistance from a recipient.

This Part does not prohibit legal assistance with respect to any matters that are not part of a criminal prosecution, such as probation revocation after sentence has been imposed, "Mempa v. Rhay," 389 U.S. 128 (1967), parole revocation, "Morrissey v. Brewer," 408 U.S. 471 (1972), or relief from illegal conditions of confinement.

#### Sec.

1613.1 Purpose.

1613.2 Definition.

1613.3 Prohibition.

1613.4 Authorized Representation.

AUTHORITY: Sec. 1007(b)(1); (42 U.S.C. 2996f(b)(1)).

#### § 1613.1 Purpose.

This part is designed to insure that Corporation funds will not be used to provide legal assistance with respect to criminal proceedings unless such assistance is required as part of an attorney's responsibilities as a member of the Bar.