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referred 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 that might be necessary, for tactical reasons, or because a latent counterclaim is discovered in the course of representation. Referral in such cases is rarely acceptable, 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 that § 1609.4 applicable to all fee-generating cases, but if referral is not possible, a recipient may accept the case and may accept an award of attorneys' fees. The recipient must be referred by 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 the attorney is paid a fee to the client does not disqualify the attorney from receiving a fee under such statutes. See generally: Taffe v. Department of Social and Health Services, 85 Wash. 2d 161 (1976) and cases cited therein; Holtt v. Vtech, 495 F.2d 219 (1st Cir. 1974); Miller v. Amusement Enter- tainment, Inc., 473 F.2d 213 (3rd Cir. 1973); Comment, “Award of Attorney's Fees to Legal Aid Officers,” 87 Harv. L.R. 411 (1978). Awards to recipients will encourage private attorneys to undertake similar cases on behalf of eligible clients. A recipient's tax status will not be affected by the service, and 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 such a provision would encourage desirable cooperation between recipients and the private Bar. A private lawyer may be permitted 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.

Section 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. 2990(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 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 payment of a consultation 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 nonpecuniary relief; or inclusion of a coun-

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A proposed regulation was published on June 11, 1978 (41 FR 23728-9), and interested persons were given until July 12, 1978 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. Minor minor infraction, 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 such in the states and in the Model Penal Code, and the ABA recommends their removal from criminal codes. "ABA Report, New Perspectives on Criminal Defendant Representation." Because the Corporation believes such offenses are basically civil in nature, and because the imposition of heavy criminal sanctions on extreme, bad faith by governments or 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 conference 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 to 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 (1972). Recognizing that gap, the Corporation recognizes that legal services lawyers should not participate in cases where an alternative jail sentence is authorized, even though they are actively involved in the civil matter in which the defendant has received or is receiving legal assistance from a recipient.

This Part does not prohibit legal assistance with respect to civil matters that are not part of a criminal prosecution, such as probation revocation when sentence has been imposed, "Empson v. Ray," 359 U.S. 128 (1959), purveying, "Morrissey v. Brewer," 400 U.S. 471 (1973), or relief from illegal conditions of confinement.

**PART 1612—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. 88-354, as 98 Stat. 978, 42 U.S.C. 2996c ("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.

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