



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
Advisory Opinion # AO-2015-002

Date: June 17, 2015

Subject: Applicability of Restrictions on Fee-Generating Cases to Advice and Counsel or Brief Services

QUESTION PRESENTED

Can a recipient provide “advice and counsel” or “limited services” (as defined in 45 C.F.R. § 1611.2(a) and (e)) to an eligible client consistent with the restrictions on fee-generating cases set forth in Section 1007(b)(1) of the Legal Services Corporation Act (42 U.S.C. § 2996f(b)(1)) and 45 C.F.R. Part 1609, where the matter might constitute a fee-generating case if extended services were provided?

BRIEF ANSWER

Yes. The restrictions on fee-generating cases set forth in Section 1007(b)(1) of the Act and 45 C.F.R. Part 1609 do not preclude a recipient from providing advice and counsel or most brief services to an eligible client. The statute and regulation do not prohibit these types of legal assistance because they are not the types of services for which a private attorney would expect to receive a fee for legal assistance from any source other than the client.

AUTHORITY

Section 1007(b)(1) of the Legal Services Corporation Act restricts a recipient’s ability to provide legal assistance with respect to a fee-generating case “except in accordance with guidelines promulgated by the Corporation.” 42 U.S.C. § 2996f(b)(1). LSC implemented guidelines through regulation at 45 C.F.R. Part 1609. The purpose of Part 1609 is “[t]o ensure that recipients do not use scarce legal services resources when private attorneys are available to provide effective representation” 45 C.F.R. § 1609.1(a). Subject to certain exceptions not applicable here, a recipient cannot use LSC “funds to provide legal assistance in a fee-generating case” *Id.* at § 1609.3(a). The regulation defines “fee-generating case” as “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.” *Id.* at § 1609.2(a).

LSC defines “advice and counsel” as legal assistance that is “limited to the review of information relevant to the client’s legal problem,” counseling on the relevant law, and, possibly, suggesting a course of action. *Id.* at § 1611.2(a). “Advice and counsel” does not include drafting any documents or contacting third parties on behalf of the client. *Id.* “Brief services” is

legal assistance that is “discrete and time-limited service” beyond advice and consultation. *Id.* at § 1611.2(e). “Brief services” can include drafting documents or contacting third-parties on behalf of the client. *Id.*

ANALYSIS

Whether a recipient can provide advice and counsel or brief services to an eligible client depends on if the case is “fee-generating” as defined by Part 1609. The regulation explicitly limits the definition of “fee-generating case” to “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.*” *Id.* at 1609.2(a) (emphasis added). When Part 1609 was first promulgated in 1976, LSC stated that the term “fee-generating case” included “every situation in which an attorney reasonably may expect to receive a fee for services *from any source except the client.*” 41 Fed. Reg. 38505 (Sep. 10, 1976) (emphasis added). The reasonable expectation referenced in the regulation must necessarily be determined at the outset of the advice and counsel or brief services being rendered.

Generally, a private attorney first encounters a potential client during an initial consultation. The purpose of the initial consultation is to get to know the client and determine the facts of a potential case. During the initial consultation, a private attorney may explain the law, tell the client his or her rights, and explain the different options available. At the end of the consultation, the attorney may decide whether he or she will take the case and on what terms for payment. The private attorney may offer to provide advice and counsel or brief services for free or for a fee from the client. The private attorney may also charge the client a fee for the consultation. Generally, at the outset of such a consultation, a private attorney would not reasonably expect to receive a fee *from any source except the client* for providing these brief types of legal assistance. Although a later fee award following a litigation judgment or settlement could include the consultation time, or the time for initial advice or counseling or brief services, the attorney’s reasonable expectation of such fees would not typically arise until *after* the consultation or initial advice or brief service was under way or had been completed.

Accordingly, it follows that a recipient may provide advice and counsel or brief services, such as writing a letter on behalf of a client, even if the underlying matter could be fee-generating if extended services were provided. If the recipient determines during intake or initial consultation that the eligible client has a Part 1609 fee-generating case, the recipient would be obligated to tell the eligible client that they are restricted from providing extended services in such cases.

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