

LEGAL SERVICES CORPORATION

Attorney Involvement by Recipients of Funding

AGENCY: Legal Services Corporation.

ACTION: Instruction on Private Attorney Involvement 83-6.

EFFECTIVE DATE: This Instruction is Effective January 1, 1984.

FOR FURTHER INFORMATION CONTACT: Joshua Brooks, Deputy Director Office of Field Services, Legal Services Corporation, 733 15th Street, NW.; Washington, D.C. 20005 (202) 272-4060.

Instruction

I. Purpose

The purpose of this Instruction is to provide direction to recipients of Legal

Services Corporation funding on allocating a substantial amount of the recipient's financial support from the Legal Services Corporation to provide the opportunity for the involvement of private attorneys in the delivery of legal assistance to eligible clients. The term, "substantial amount" shall be defined as at least twelve and one-half percent of the recipient's LSC annualized basic field award. Funds received from the Corporation as one-time special grants and state support funds are not utilized in determining the private bar involvement requirement.

Recipients of Native American or migrant funding shall provide the opportunity for involvement in the delivery of services by the private bar in a manner which is generally open to board participation in those activities undertaken with those funds; or shall

demonstrate to the satisfaction of the Corporation that such involvement is not feasible.

II. General Policy

This Instruction implements and extends a policy and statement of principles on private attorney involvement that was adopted by the Board of Directors of the Corporation on October 2, 1981. That policy requires that a substantial amount of funds be made available to provide the opportunity for the involvement of private attorneys in the delivery of legal assistance to eligible clients. The Corporation encourages the implementation through both pro bono and compensated mechanisms.

The policy builds on local program experience as well as formal research and experimentation undertaken by the

Corporation, that has provided comprehensive information about the delivery of legal services to the poor. This information demonstrates that there are a variety of effective and economical mechanisms to involve private attorneys in either a voluntary or partially-compensated basis in the delivery of legal services to the poor; and there are many private attorneys willing and able to provide high quality legal assistance. There is substantial evidence that mixed delivery systems within each project will provide for the most economical and effective delivery service.

The Corporation's policies are designed to enhance the participation of private attorneys, through local programs. To achieve that goal the Corporation directed each recipient to develop and implement a plan to allocate a substantial amount of its LSC support to activities consistent with an Instruction published on December 14, 1981 and effective on January 14, 1982.

In the case of joint efforts involving two or more recipients, the minimum expenditure requirement shall be applied to the aggregate of the pertinent LSC support for each of the recipients. Each recipient in any such effort shall be a bona fide participant in the activities undertaken by the joint venture.

Recipients of national and state support grant awards, while not subject to the percentage requirement, shall investigate the feasibility, and as is appropriate, implement mechanisms of involving private attorneys pursuant to such grants.

Private attorney involvement shall be an integral part of a total local program undertaken within the established priorities of that program in a manner that furthers the statutory requirement of high quality, economical and effective client-centered legal assistance to the poor. Decisions about how to meet the substantial involvement requirement rest with the recipient through its governing body subject to review and evaluation by the Corporation. The Corporation requires, however, that the recipient develop and maintain its plan in consultation with its clients, staff, the organized bar, including minority and women's bar groups, and private attorneys in its service area. Experience has indicated that effective private attorney involvement occurs in those communities where the legal services program and relevant bar organizations have been able to work together in design and implementation of a plan to achieve that involvement. The funds required to be expended under this part should not be transferred, or sub-granted to other organizations.

III. Range of Activities

Private attorneys can be effectively involved in delivery of legal assistance to eligible clients in a variety of ways and in a response to a variety of priority legal needs of clients. At a minimum the following considerations will apply and define a range of activities permitted in meeting the requirements of this Instruction:

(1) The primary consideration in undertaking any such activities will be the provision of high quality civil legal services to eligible clients in an effective and economical manner; and

(2) Activities undertaken by the recipient to meet the requirements of this Instruction might include, but are not necessarily limited to:

(a) Direct delivery of legal assistance to eligible clients through organized pro bono or reduced fee plans utilizing volunteer attorneys, *judicare* panels, private attorney contracts, and/or organized referral systems; except that "revolving litigation funds" systems shall not be used nor funded under this part nor funded with any LSC support.

(b) Support provided by private attorneys to the recipient in its delivery of legal assistance to eligible clients on either a reduced fee or pro bono basis through the provision of community legal education; training; technical assistance; research; advice and counsel; co-counseling arrangements; or, the use of private law firm facilities, libraries, computer-assisted legal research systems or other resources; and,

(c) Support provided by the recipient in furtherance of activities undertaken pursuant to (a) above including the provision of training; technical assistance; research; advice and counsel; or the use of recipient facilities, libraries, computer assisted legal research systems or other resources.

(3) The specific methods to be undertaken by a recipient to involve private attorneys in the provision of legal assistance to eligible clients will be determined by the recipient taking into account the following factors:

(a) The priority legal needs of eligible clients in the service area;

(b) Effective and economical delivery or legal assistance to eligible clients;

(c) Linguistic and cultural barriers to effective advocacy;

(d) Actual or potential conflicts of interest between specific participating attorneys and individual eligible clients; and,

(e) The substantive and practice expertise, skills, and willingness to undertake new or unique areas of the law of participating attorneys.

(4) Systems designed to provide direct services to clients by private attorneys on either a pro bono or reduced fee basis, shall include at a minimum, the following components:

(a) Intake and case acceptance procedures which are consistent with the recipients established priorities in meeting the legal needs of eligible clients;

(b) Case assignment which insures the referral of cases according to the nature of the legal problem or problems involved and the skills, expertise, and substantive experience of the participating attorney;

(c) Case oversight and follow-up procedures which insure the timely disposition of cases in a manner and in a form calculated to achieve, in so far as possible, the result desired by the client and the efficient utilization of recipient resources; and,

(d) Support and technical assistance procedures which are appropriate and, to the extent feasible, provide access for participating attorneys to materials, training opportunities, and back-up on substantive law and practice considerations.

(5) The recipient shall utilize financial systems and procedures to account for costs allowable in meeting this Instruction which will:

(a) Meet the requirements of the Corporation's *Audit and Accounting Guide for Recipients and Auditors*;

(b) Accurately identify and account:

- For the recipient's administrative, overhead, staff, and support costs related to private attorney involvement activities;

- For payments to private attorneys for support or direct client services rendered;

- For contractual payments to individuals or organizations which will undertake administrative, supportive, and/or direct services to eligible clients on behalf of the recipient consistent with the provisions of this Instruction; and,

- For other such actual costs as may be incurred by the recipient in this regard.

(c) Income and expenses relating to the PAI effort must be reported separately in the year-end audit. This may be done by establishing a separate fund or by providing a separate supplemental schedule of income and expenses related to the PAI effort as a part of the audit.

(d) Auditors will be required to perform sufficient audit tests to enable them to render an opinion on the recipient's compliance with the requirements of this Instruction.

(e) Programs must maintain the internal records necessary to demonstrate that funds have been utilized for private attorney involvement consistent with this Instruction. Internal records should include contracts on file which set forth payment systems, hourly rates, maximum allowable fees, etc.; bills/invoices which are submitted before payments are made; job descriptions that reflect the assignment of specific responsibilities for PAI activities to specific program staff; and staff time records. Any direct or indirect staff time which is to be allocated as a cost to private attorney involvement must be documented by detailed timesheets in addition to regular attendance reports.

- Personnel costs must be documented by time records certified by the employee or a supervisor who is in a position to know what tasks the employee is performing 100 percent of the time.

- The time record is to be related to pay periods and prepared in intervals not longer than one month.

- 100 percent of an individual's time must be accounted for; it would be insufficient for an employer to record only time spent on PAI activities.

(f) Direct payments to private attorneys should be supported by invoices and internal procedures performed by the program to insure that the services billed have actually been delivered.

(g) Non-personnel costs should be allocated on the basis of reasonable operating data. All allocation methods should be clearly documented.

(h) Contracts with other organizations involving a transfer of funds for PAI activity should indicate that LSC funds will be accounted for in accordance with LSC guidelines. The organization receiving funds will be considered a sub-recipient or sub-grantee and will be bound by all accounting and audit requirements of the Audit Guide and 45 CFR Part 1627. These grants shall be accounted for on a cost-reimbursable basis so that the primary recipient will retain accountability for unspent funds. This part does not pertain to contracts with individual lawyers or law firms who provide legal services directly to eligible clients.

(i) Each recipient which utilizes a compensated private bar mechanism whether judicare, contract, or some other form, must develop a system which includes: a schedule for uniform assignment of encumbrances to similar types of cases, interim billing, a procedure to determine net encumbrances, a mechanism to relate specific encumbrances to specific cases,

and the ability to statistically determine the appropriateness of the encumbering system.

(j) Net encumbrances shall not be included in the calculation of whether a program has met the requirements of this Instruction. Nor should they be recorded as an expense for audit purposes. In other words, only actual expenditures or those amounts shown as accounts payable at the end of the fiscal period may be utilized to determine whether or not the program has met the requirements of this Instruction. Services must have been rendered and billed to satisfy expenditure requirements.

(k) In private attorney models, attorneys may be reimbursed for actual costs and expenses, but attorney fees may not be paid at a rate which exceeds 50 percent of the local prevailing market's rate for that type of service.

IV. Procedure

The recipient shall develop a plan and budget to meet the requirements of this Instruction which shall be a part of the refunding application or initial grant application. The budget shall be modified as necessary to fulfill this Instruction. That plan shall take into consideration the:

(1) Legal needs of eligible clients in the geographic area served by the recipient and the relative importance of those needs consistent with the priorities established pursuant to Section 1007(a)(2)(C) of the Legal Services Corporation Act (42 USC 2996 F(a)(2) and part 1620 of the Regulations (45 CFR 1620) adopted pursuant thereto; and

(2) Delivery mechanisms potentially available to provide the opportunity for private attorneys to meet the established priority legal needs of clients in an economical and effective manner.

(3) The results of the consultation as required.

The recipient shall consult with significant segments of the client community, private attorneys, and bar associations including minority and women's bar associations, in the recipient's service area in the development of its annual plan to provide for the involvement of private attorneys in the provision of legal assistance to eligible clients.

Annually, each recipient, pursuant to action taken by the governing body of the recipient, must certify to the Corporation that it is spending such sums as are necessary to comply with this Instruction.

Recipients who choose to spend a portion of the money required under this

Instruction to develop *pro bono* activities must assure that the value of the *pro bono* services substantially exceeds the direct and indirect costs being allocated to meet the requirements of this Instruction.

Note.—Prohibited Revolving Litigation Funds Systems—A revolving litigation fund is a mechanism which is created to advance funds to private attorneys for the costs, expenses, and/or attorney fees related to litigation in cases where there is an expectation of recovering attorneys fees. The principle and administration of such funds is simple. Monies are held in a fund and its availability is publicized within the legal community to encourage participation by private attorneys. Criteria established for reviewing funding requests and applications are reviewed by staff which administer the fund. When an application is approved, monies are advanced to the private attorney for specified purposes with the understanding that if the case is won, the loan will be repaid with interest or a percent of attorneys fees collected in the case which will be turned over to the fund in repayment of the loan. If the case is lost, the loan is forgiven.

This approach has been used for a number of years by public interest law firms and national legal organizations to encourage private bar involvement in public interest litigation. Previously (1982), the Legal Service Corporation funded a project of the Migrant Legal Action Program which makes such a fund available to private attorneys who handle cases on behalf of migrant farmworkers. In addition, TRLA has established such a fund in Texas.

The Office of Field Services will not endorse or approve such mechanisms. The potential for abuse is great. Such a mechanism is clearly counter to the restrictions in the Act which are meant to deter Legal Services Corporation funds and recipients involvement in fee-generating cases.

This prohibition does prevent reimbursement or payment of costs and expenses incurred by private attorneys in normal situations where litigation may result in attorney fees.

• Dated: November 23, 1983.

Gregg L. Hartley,

Director, Office of Field Services.

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