

7050-01-P-01-P

LEGAL SERVICES CORPORATION

45 CFR Part 1609

Fee-Generating Cases

AGENCY: Legal Services Corporation

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) proposes to amend the Legal Services Corporation's regulation on fee-generating cases to clarify that it applies only to LSC

In 1996 LSC revised Part 1609 in conjunction with the enactment of the Part 1642 entity prohibition on recipients claiming or collecting and retaining attorneys' fees. In the revision the language was changed from the prior "Corporation funds" prohibition to the more general "no recipient" entity prohibition. Notably though, there is no discussion in the preamble to the proposed or final regulation of any significant substantive change in scope. 61 Fed. Reg. 45765 (proposed rule August 29, 1996) and 62 Fed. Reg. 19398 (final rule April 21, 1997). Nor is there any such discussion in any of the relevant LSC Board transcripts. Rather, the only mention of the change in language is the following discussion of the revised §1609.3:

This section defines the limits within which recipients may undertake fee-generating cases. This new section reorganizes and replaces §§1609.3 and 1609.4 of the current rule *in order to make them easier to understand*.

Id. (appearing in the preambles to both the proposed and final rules) (emphasis added). The regulatory history contains extensive discussions of policy and regulatory nuances regarding the then-new attorneys' fees provisions and their relationship with the fee-generating case restriction in Part 1609. These discussions involved the LSC Board, LSC management, the LSC OIG and representatives of recipients. Considering the attention paid to this and the other regulations implemented in 1996 and 1997, it seems very unusual that LSC would adopt such a significant substantive change to Part 1609 without any discussion, any description of the change in the preamble to the rule, or any comments by the OIG or representatives of recipients.

Notwithstanding the 1997 regulatory change, LSC has not applied Part 1609 as an entity restriction, but has rather continued to apply it as a restriction applying only to a recipient's LSC and private non-LSC funds. For example, the LSC Compliance Supplement to the LSC Audit Guide, which provides guidance to auditors regarding recipient compliance with the

substantive LSC restrictions, states that Part 1609 means that “[r]ecipients may not use Corporation or private funds to provide legal assistance in a fee-generating case unless” one of the regulatory exceptions applies. It does not instruct auditors to read Part 1609 as applying to tribal or public non-LSC funds. The Compliance Supplement was last revised in December 1998 (after Part 1609 had been amended).

In addition, LSC’s regulation on the use of non-LSC funds at 45 CFR Part 1610 treats the fee-generating case restriction as an LSC funds restriction, rather than as an entity restriction, notwithstanding than express language of §1609.3. Generally Part 1610 works in tandem with the other regulations; each regulation (other than Part 1610) expressly specifies whether it applies to a recipient’s use of LSC funds (usually referred to as “Corporation funds”) or if it applies to the recipient entirely and Part 1610 categorizes each substantive LSC restriction as either an “LSC Act restriction” based on the provisions of the LSC Act¹ or an “entity restriction” (based on Section 504 of the LSC FY 1996 appropriations act) and then variously applies those other regulations to the use of non-LSC funds depending on whether the substantive restriction is an LSC Act (funds) restriction or a Section 504 (entity) restriction. 45 CFR §§1610.3 and 1610.4. The definitions section of Part 1610 includes the fee-generating case restriction found in section 1007(b)(1) of the LSC Act and Part 1609 of the Corporation’s regulations as an LSC Act restriction, not as an entity restriction. 45 CFR §1610.2(a)(3).

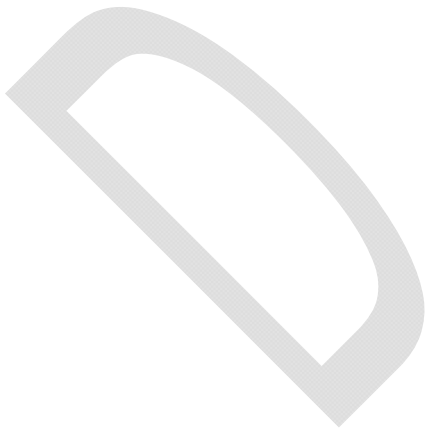
Section 1610.3 provides a general prohibition regarding the use of non-LSC funds:

¹ Part 1610 actually refers to the fee-generating case and other “LSC fund” restrictions as “LSC Act restrictions. Referring to these as “LSC Act” restrictions is somewhat of a misnomer in that s7 0 gaaf-3(- “Lt)7.4(in)-4erict3(”))6(res)-4stricti0.4(er

A recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with Section 504, unless such use is authorized by §§1610.4, 1610.6 or 1610.7 of this part.

Section 1610.4(b) provides a public non-LSC funds exception to the LSC Act restrictions but not

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subject to the priorities rule (45 CFR Part 1620) which requires recipients to provide legal assistance (regardless of the source of funds used for such legal assistance) only in accordance with adopted priorities and the types of cases that the fee-generating case restriction would prohibit are generally not within any recipient's priorities.

It has been suggested that the proposed amendment may result in a regulation that is more complex in administration, in that there if the restriction is applied only to LSC and private non-LSC funds, and a recipient takes fee-generating cases with available public non-LSC funds (without otherwise meeting the criteria and procedural requirements of the regulation) the recipient will have to keep sufficient records to demonstrate the segregated and proper use of the funds. However, this is true for all of the LSC Act-only restrictions and tracking and documentation of proper uses of various sources of funds has not, to date, proven to be an insurmountable barrier to effective administration or oversight. Moreover, the flexibility afforded to recipients may be argued to outweigh any complexity in recordkeeping occasioned by the application of the restriction to the source of funds rather than as an entity restriction. Finally, to the extent that current practice has been to enforce the regulation as an LSC funds, rather than an entity, restriction, LSC anticipates no more complex administration of the regulation than has been the case. If anything, having the plain language of the regulation accord with the Act and Part 1610, as well as reflect the current understanding of th.13 the A63.7(rp06 language owu

For reasons set forth above, and under the authority of 42 U.S.C. 2996g(e), LSC proposes

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