

None of the funds appropriated in this act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of . . . Section 504 of Public Law 104-134 (110 Stat 1321-53 et seq. and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section²

Pub. L. 105-119, 111 Stat. 2440 (November 27, 1997). Subsequently, each appropriation law since FY 1998 has included a provision incorporating section 502 of the FY 1998 by reference. Thus, since FY 1999, each appropriation has incorporated by reference the provision in the FY 1998 law (Section 502) which incorporated by reference the attorneys' fees restriction found in paragraph (a)(13) of section 504 of the FY 1996 law.

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Regulatory Restriction

LSC adopted regulations found in 1996 and 1997 which implemented the statutory attorneys' fees restriction. 45 CFR Part 1642; 61 Fed. Reg. 45762 (August 29, 1996); 62 Fed. Reg. 25862 (May 12, 1997). The attorneys' fees regulation restates the basic prohibition on claiming or collecting and retaining attorneys' fees:

Except as permitted by §1642.4, no recipient or employee of a recipient may claim, or collect and retain attorneys' fees in any case undertaken on behalf of a client of the recipient.

46 CFR §1642.3. The regulation provides further guidance to recipients by, among other things, providing a regulatory definition of attorneys' fees; setting forth rules for the applicability of the restriction to private attorneys providing legal assistance to a recipient's private attorney involvement program; and providing express authority to recipients to accept reimbursements of costs from a client. The regulation also sets forth rules for the accounting for and use of those attorneys' fees which recipients are not prohibited from claiming, collecting or retaining.

The regulation remains in place notwithstanding the lifting of the statutory restriction. LSC has inherent rulemaking authority to adopt requirements by regulation not specifically required by statute, provided that they are not prohibited by statute and otherwise are within the scope of LSC's statutory authority. *TRLA v. LSC* (940 F.2d 685 (D.C. Cir. 1991)); *see also*, 45 CFR §1610.7(a)(extending the statutory restrictions on a recipient's non-LSC funds to the non-LSC funds of a subgrantee of LSC funds) discussed at 62 Fed. Reg. 27695 at 27696-96 (May 21, 1997).⁴ The adoption of the attorneys' fees restriction is within LSC's inherent statutory authority. The current law merely lifts the statutory restriction, but does not affirmatively provide recipients the right to claim or collect and retain attorneys' fees, nor does it prohibit LSC from

⁴ *Cf.* Department of Health and Human Services (HHS) final rule amending an HHS regulation classifying HIV infection as a communicable disease of public health significance (which resulted in a ban on travel into the United States by HIV-positive aliens). 74 Fed. Reg. 56547 (November 2, 2009). In this situation, HIV infection had been included in the definition of "communicable disease of public health significance" by statute, but Congress amended the statute in 2008 to delete HIV infection from the definition. HHS, however, retained HIV in the list of communicable diseases of public health significance by regulation. The statutory change had no legal impact on the validity of the regulation or the authority of HHS to retain or amend the regulation. As noted in the preamble to the final rule:

In summer 2008 Congress amended the [Immigration and Naturalization Act] by striking "which shall include infection with the etiologic agent for acquired immune deficiency syndrome," *thereby leaving to the Secretary of HHS the discretion* for determining whether HIV infection

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Assuming that the Board is going to consider the substantive merits of reviewing the

monetary value of the underlying claim itself is not relatively small. Restricting a recipient's ability to avail itself of this strategic tool puts clients at a disadvantage and undermines clients' ability to obtain equal access to justice. The attorneys' fees restriction can also be said to undermine one of the primary purposes of fee-shifting statutes; namely to punish those who have violated the rights of persons protected under such statutes. Second, in a time of extremely tight funding, the inability of a recipient to obtain otherwise legally available attorneys' fees places an unnecessary financial strain on the recipient. If a recipient could collect and retain attorneys' fees, it would free up other funding of the recipient to provide services to additional clients and help close the justice gap.⁹

If LSC does not choose to lift its regulatory restriction, recipients will continue to function at a strategic disadvantage, to the detriment of clients. Similarly, if LSC does not choose to lift its regulatory restriction, recipients will continue to be denied an avenue for additional funding otherwise legally available to other litigants under Federal and State statutes and the common-law of the jurisdictions in which they practice.¹⁰ Moreover, given the legislative history, a choice by LSC to retain the restriction such that recipients will be unable to realize the benefits from the statutory change Congress clearly appears to have intended may not be a wise political choice for LSC to make.

Option 2 – Repealing and /or Amending and/or Part 1642

If the Board chooses to consider the substantive merits of reviewing the regulation at this time, the Board could substantively determine that it wishes as a policy matter to lift the regulatory restriction on the claiming, collecting and retention of attorneys' fees. In this regard, it should be noted at the outset that when the LSC Board adopted the regulatory prohibition on claiming, and collecting and retaining attorneys' fees, it was done to implement the statutory restriction. The regulatory history of the regulation does not suggest that the Board shared the policy position of the Congress on this matter.¹¹ More importantly, as noted above, there are strong arguments favoring the adoption of a change in policy regarding the attorneys' fees restriction. Namely, as discussed under Option 1, above, the restriction imposes several significant burdens on recipients and the services they provide to their clients that can be alleviated by lifting the restriction; and there is likely an expectation in Congress that LSC will

⁹ It should be noted that the LSC Act's restriction on recipients taking fee-generating cases (and the implementing regulatory restriction on fee-generating cases) are not affected by the lifting of the statutory ban on the claiming and collecting and retention of attorneys' fees and would not be affected by any regulatory amendment to Part 1642.

lift the regulatory restriction. If the Board selects Option 2 and wishes to lift the attorneys' fees restriction, there are important implementation issues for the Board's consideration.

Application with Respect to Prior Performed Work

As noted above, the new appropriation law merely no longer contains any restriction on the claiming, or collection and retention of attorneys' fees. As such there is no statutory limitation on LSC's authority to implement the lifting of its regulatory restriction. That is, LSC is legally within its authority to permit recipients to currently seek attorneys' fees for any otherwise permissible work done even while the attorneys' fees restriction was in place. It is also within its authority to decide that recipients will only be permitted to seek fees for work done after the lifting of the restriction.

New Work Only

One policy option would be to a

Under this option, a recipient would end up in the position of being able to claim attorneys' fees for some, but not all work done after the date selected.

Advance Notice of Proposed Rulemaking (ANPRM). An ANPRM often does not set forth

Option 3 – Initiate a Rulemaking and Direct the Development and Publication of an Interim Final Rule with Request for Comments

Under this option, the Board could initiate a rulemaking and direct Staff to develop a Interim Final Rule and Request for Comments, consistent with policy guidance provided by the Board in consideration of the various policy concerns and options set forth herein, management's recommendations and comments from the field and other interested members of the public. OLA believes that this is a legally permissible option because LSC would be removing and not imposing any additional prohibitions or requirements on recipients and doing so in response to a specific statutory change removing a similar prohibition. An Interim Final Rule could be developed within a few weeks and the Committee and the Board could meet prior to the regularly scheduled meeting to approve the Interim Final Rule for publication. The Interim Final Rule would go into effect 30 days from the date of publication, and be the quickest way to afford recipients the benefit of the lifting of the prohibition. However, to ensure that recipients and the public had opportunity for comment, the Interim Final Rule could also provide for comment period. A Draft Final Rule would be prepared which would respond to any comments received and the Committee and Board could take up that Draft Final Rule at the April meeting (or possibly before then, depending on the number and complexity of the comments received).

Conforming Amendments to Part 1609 and Part 1610

Assuming the Board moves forward with rulemaking to remove the regulatory prohibition on attorneys' fees, there are conforming amendments to 45 CFR Parts 1609 and 1610 that the Board should consider making. These additional actions are discussed below.

Part 1609

As discussed above, Part 1642 contains provisions beyond the attorneys' fees prohibition which had, prior to the adoption of Part 1642, b

Finally, there is a cross reference in Part 1609 to the restriction in Part 1642 on claiming or collecting and retaining attorneys' fees that will become obsolete if the restriction is repealed. The Board could choose to do nothing with respect to this cross-reference. The referenced section would essentially be a null cross-reference of no effect. As such, leaving it in Part 1609 would not create a significant problem. However, having obsolete and meaningless regulatory provisions is not good regulatory practice and can at the very least lead to unnecessary confusion. This provides another good reason to include an action to amend Part 1609 at the time action is taken on Part 1642.

Part 1610

Part 1610 sets forth in regulation the application of the appropriations law restrictions to a recipient's non-LSC funds. Section 1610.2 sets forth the list of the restrictions as contained in section 504 of the FY 1996 appropriations act, and the implementing LSC regulations which are applicable to a recipient's non-LSC funds. Subsection (b)(9) is the provision that references the attorneys' fees restriction (504(a)(13) and Part 1642). With the current appropriations law no longer applying the restriction originally contained in section 504(a)(13), if the Board removes the restriction in Part 1642, section 1610.2(b)(9) will be obsolete.

The Board could choose to do nothing with respect to Part 1610. The referenced section would essentially be a null cross-reference of no effect. As such, leaving it in Part 1610 would not create a significant problem. Moreover, it may be that additional changes are made to the restrictions if the current reauthorization bills become law, which will result in other changes to Part 1610 that LSC may wish to make. Thus, it may make some sense to hold off for some time to see if additional rulemaking on Part 1610 is likely to be undertaken.

On the other hand, it is not at all clear if the reauthorization act will become law any time soon. Holding off on amending Part 1610 until more significant changes are necessary will allow a clearly obsolete and meaningless provision to remain in the regulation for an indeterminate period of time. Having obsolete and meaningless regulatory provisions is not good regulatory practice and can at the very least lead to unnecessary confusion. Accordingly, LSC could undertake a limited, technical rulemaking to remove section 1610.2(b)(9) and renumber the rest of the paragraph in connection with any other rulemaking it was undertaking to remove the attorneys' fees prohibition.

Enforcement Discretion Regarding Claims Made or Fees Accepted Between December 16, 2009 and the Effective Date of a New Regulation.

On December 17, 2009, LSC announced that, pending any rulemaking, LSC would suspend enforcement of the attorneys' fees prohibition as of December 16, 2009 (the date the appropriation law not containing the attorneys' fees restriction went into effect). Although separate from the rulemaking per se (since any new rule regarding the ability of recipients to claim or collect and retain attorneys' fees will be effective only as of the date of the adoption of a new rule), the Board's taking

enforcement discretion policy previously articulated. The Board may wish to take this time to articulate a further policy determination in this regard.

If the Board is going to remove the regulatory attorneys' fees restriction and permit recipients to include in claims and awards fees for prior performed work, the Board could determine that LSC will exercise its enforcement discretion and not take enforcement action against any recipient that filed a claim for or collected and retained attorneys' fees between the period of December 16, 2009 and the effective date of the regulation. Such a policy would appear to be consistent with the discussions the Board had in adopting the December 17, 2009 enforcement suspension policy and not inconsistent with Congress' intent that recipients be able to realize the benefits of the statutory change at the earliest possible date.

Alternatively, the Board could determine that actions taken during the interim period which amount to violations of Part 1642 will subject recipients (unless they qualified for the safe harbor announced in the December 17, 2009 policy guidance) to enforcement action. This course of action, however, does not appear consistent with Congressional intent and would not appear to serve any positive purpose.