

PROGRAM LETTER 97-1

TO: All LSC Program Directors

FROM: John A. Tull, Director
Office of Program Operations

DATE: August 7, 1997

RE: The Attorneys' Fees Restriction

This Program Letter is intended to provide interpretive guidance regarding some of the most frequently asked questions concerning the Attorneys' Fees restriction in 45 CFR Part 1642.

1. Does the Attorneys' Fees Restriction Apply to a Private Attorney Who Co-counsels on a Case with an LSC Recipient?

Under §1642.4(b), a private attorney who receives compensation from an LSC recipient to represent an eligible client in a case is subject to the attorneys' fees restriction. Thus, a private attorney may not claim, or collect and retain any attorneys' fees in the case for which he or she is being compensated by the recipient.

Attorneys who are co-counseling with a legal services program on a pro bono basis, however, may seek and recover fees for the portion of the work done by them. Part 1642 makes it clear that the attorneys' fees restriction does not apply to pro bono private attorneys. Accordingly, a private attorney who co-counsels with an LSC recipient on a case for an eligible client, but who does not receive any compensation from the recipient, would not come under the restriction. LSC does not define as compensation reimbursement for costs and expenses which

an LSC recipient may make to a pro bono private attorney, either as co-counsel or sole counsel. *See* §1642.6.

Please note that the LSC recipient co-counsel may not assign his or her portion of the fees to the pro bono private co-counsel or assist the private co-counsel in claiming what would otherwise be the LSC recipient co-counsel's share of the fees. Henceforth, recipient co-counsel should make clear that any claim for fees clearly notes that the claim is being requested on behalf of the uncompensated private co-counsel only, and that any award, order or payment of attorneys' fees should be payable directly to the private co-counsel.

2. Does the Restriction Preclude a Recipient from Claiming Attorneys' Fees on Behalf of the Client?

Yes. LSC's Program Letter 96-1, dated May 17, 1996, gave recipients general guidance about the parameters of the restrictions pending LSC's process to promulgate interim and final regulations to implement the appropriations restrictions. In the Program Letter, we included the following statement on the attorneys' fees restriction:

“A recipient may not, even for strategic purposes, include a claim for attorneys' fees for the recipient.”

This led some recipients to believe that it is permissible to include a claim for attorneys' fees in a pleading on behalf of the client. However, the final rule does not permit claiming fees on behalf of a client.

Section 1642.2(d) reads:

“To claim attorneys' fees means to include a request for attorneys' fees in any pleading.”

Section 1642.3 reads:

“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.”

These two regulatory provisions prohibit claiming any attorneys' fees, and are not limited to claiming fees for the recipient. The language in the program letter quoted above was intended to address the issue of whether claims could be made for strategic reasons, and did not speak to the issue of whether claims for fees could be made on behalf of a client. Based on the final rule, LSC will hereafter view as non-compliance with the attorneys' fees restriction any “claim” for

attorneys' fees requested by an LSC recipient, whether the claim is made for the recipient or on behalf of the client.

3. Does the Attorneys' Fees Restriction Extend to Cases where Courts Award Attorneys' Fees where None Had Been Claimed?

Yes. The attorneys' fees restriction applies to the independent acts of "claiming" or "collecting and retaining" fees. Thus, even if a recipient has not claimed fees, it may not collect and retain them if they are awarded to compensate the attorney of the prevailing party. Henceforth, the recipient should inform the court that it is not permitted to accept the fee award. It is then the court's decision as to the disposition of the fee.

4. Can a Recipient Collect and Retain Fees from Social Security Cases Received after June 11, the Effective Date of the Final Rule on Attorneys' Fees?

Unless the case was filed prior to April 26, 1996, the beginning date of the Congressional restriction,¹ attorneys' fees in social security cases may not be collected and retained after the effective date of the final regulation, which was June 11, 1997. However, because of the special nature of Social Security fees, LSC will permit recipients to take action to ensure that fees claimed as attorneys' fees before the final rule became effective be given to the client. Because this type of attorneys' fee is actually a part of the client's statutory retroactive benefits, the recipient in this situation may request SSA or the responsible agency to send directly to its client that portion of the client's retroactive benefits which the recipient had earlier claimed as attorneys' fees. If SSA has no mechanism to accommodate the recipient's request, the recipient may **immediately** upon receipt of the Social Security check endorse the check over to the client. Clear documentation of this transaction should be retained by the recipient sufficient to satisfy auditors or Corporation monitors.

5. Can a Recipient Assign Its Attorneys' Fees to a Third Party?

Questions have arisen regarding the possibility of a recipient assigning to a third party the fees which it has been awarded, but which it may not collect or retain under the regulation (see sections #3 & #4 above). For all cases filed since April 26, 1996, recipients are not permitted to assign fees to a third party. Since recipients may not collect and retain fees in the first instance, it would strain Congressional intent to permit recipients to do indirectly what they cannot do directly through bypassing the restriction by assigning their rights to collect fees.

6. Can a Recipient Claim, or Collect and Retain Attorneys' Fees in Child Support

¹Section 1642.4(a) provides that the prohibition on fees "shall not apply to cases filed prior to April 26, 1996, except that the prohibition shall apply to any additional related claims for the client made in such a case on or subsequent to April 26, 1996." This means that claims for attorneys' fees in cases filed prior to April 26, 1996, including social security cases, are exempt from the attorneys' fees restriction and recipients may both claim and collect and retain fees in such cases.

Cases under a Contract with the State where the State Statute Requires Contracting Providers to seek Fees on Behalf of the State?

A question has been asked regarding a recipient's claim of fees in child support collection cases under a contract with a state agency. In this particular situation, the state statute requires the contracting party (the recipient) to seek attorneys' fees on behalf of the state to reimburse the state for its costs to prosecute such cases.² Under this statutory scheme, recipients do not have any right to the fees. Because we believe Congress did not intend to impose the attorneys' fees restriction when the beneficiary of the fee award is the State and the LSC recipient is acting under a statutory mandate as its agent with regard to fees, the recipient's action under the contract is permissible. Other similar situations may not conform with Congressional intent; therefore, recipients should seek LSC's guidance regarding whether the restriction will apply.

7. If a Recipient Believes that Failure to Assert a Claim for Attorneys' Fees May Jeopardize the Client's Interest in the Case, Does 1006(b)(3) of the LSC Act³ Authorize a Recipient to Claim Fees Notwithstanding the Attorneys' Fees Restriction?

No. LSC will find any action claiming attorneys' fees to be violative of the restriction. In order to comply with the restriction and to assure that recipient attorneys can fulfill their ethical obligation in a case where attorneys' fees can be awarded, the recipient should make a judgment before accepting the case whether compliance with the restriction would jeopardize the client's interest. If the recipient believes that it would, the recipient should take whatever action is necessary under applicable rules of professional conduct such as disclosing to the client that the recipient's representation will likely jeopardize the client's interests and either declining representation or, if appropriate, accepting the case with the client's approval.

If you have further questions regarding the issues discussed in this Program Letter, or other issues concerning the Attorneys' Fees restriction, please feel free to contact your State Responsible Person, or Anh Tu at (202) 336-8946.

²Part 1642.2(b)(2) permits recipients to receive payments under contracts with governmental agencies for representation of clients. At issue here is whether the recipient may also file a claim for attorneys' fees when such fees are awarded to the governmental agency.

³1006(b)(3): The Corporation shall not, under any provision of this title, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association (referred to collectively in this title as 'professional responsibilities') or abrogate as to attorneys in programs assisted under this title the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this title are carried out in a manner consistent with attorneys' professional responsibilities."

Assisted Suicide Funding Restriction Act of 1997

Enclosed in this mailing is a copy of the Assisted Suicide Funding Restriction Act of 1997 (“Anti-Assisted Suicide Act” or “Act”), Pub. L. 105-12, which was enacted and became effective on April 30, 1997. The Act expressly applies to the Legal Services Corporation and its grantees and amends Section 1007(b) of the LSC Act. Section 9 of the Anti-Assisted Suicide Act amends Section 1007(b) of the LSC Act by adding subparagraph (11) to paragraph (b) of Section 1007. Section 1007(b) now provides that:

(b) No funds made available by the Corporation under this title, either by grant or contract, may be used -- ...(11) to provide legal assistance in a manner inconsistent with the Assisted Suicide Funding Restriction Act of 1997.

Section 5 of the Anti-Assisted Suicide Act (Restriction on use of Federal funds by advocacy programs) generally prohibits the use of LSC funds for advocacy to assist in, fund or support assisted suicide, euthanasia, or mercy killing, or to bring suit or provide any form of legal assistance for assisted suicide, euthanasia, or mercy killing.

The Corporation will provide guidance on the meaning and scope of this new restriction in the near future. However, recipients are currently subject to this restriction and have been since its enactment by Congress on April 30, 1997. Recipients should become familiar with the terms of the legislation and take any steps necessary to ensure compliance with this new law.