

45 CFR Part 1614**Private Attorney Involvement****AGENCY:** Legal Services Corporation.**ACTION:** Final rule.

SUMMARY: This rule substantially adopts as a Corporation regulation Instruction 63-8: Attorney Involvement by Recipients of Funding, published in the Federal Register on November 29, 1983. This instruction provided direction to recipients of Legal Services Corporation funding on allocating amounts of the recipient's financial support from the Corporation to provide the opportunity for involvement of private attorneys in the delivery of legal assistance to eligible clients. The rule formalizes the structures and procedures of the continued Corporation interest in private attorney involvement.

EFFECTIVE DATE: June 20, 1984.

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SUPPLEMENTARY INFORMATION: The Legal Services Corporation published a proposed rule setting forth the policy adopted by the Board of Directors on October 2, 1981, requiring that a substantial amount of recipient funds be made available to provide opportunities for involvement of private attorneys to deliver legal assistance to eligible clients. The proposed rule appeared in the Federal Register on March 23, 1984 (49 FR 10950). Interested parties were

given until April 23, 1984, to submit comments on the proposed rule.

Seventy-seven comments were received and fully considered including 34 from programs, 20 from bar associations, 8 from support programs, 1 from Congress, 9 from private parties and 6 others.

Section 1614.1 adopts a previous Board resolution defining "substantial amount" as at least twelve and one-half percent (12½%) of the recipient's Legal Services Corporation annualized basic field award. In response to comments, a waiver provision has been added to permit a recipient to request relief from the requirement when "the nature of the population served, and the available attorney population" make compliance impossible. Recipients of migrant or Native American funding are to use their best efforts to meet the requirements or the Corporation must be satisfied that private legal involvement is not feasible.

Research demonstrates that there are several effective and economical ways in which to involve private attorneys, on either a voluntary or a partially-compensated basis, in the delivery of legal services to eligible clients. Over the years, it has become clear that mixed delivery systems provide for effective and economical delivery service.

Section 1614.1(c) is a newly added subsection, transferred from § 1614.4(c), and rewritten to indicate that it represents a statement of purpose, and not an absolute mandate. The purpose of the Corporation's policy of involving the private bar is to make the most of the limited resources available for legal assistance to eligible clients.

Section 1614.2(b) is modified by making the 12.5% requirement applicable to national and state support programs effective January 1, 1985.

Some comments suggested the removal of the language "subject to review and evaluation by the Corporation" from § 1614.2(c) on the grounds that all activities of recipients are subject to such review and evaluation, and therefore the quoted language is either redundant or implies additional review. No additional review is implied, and the Corporation retains the language cited, which was previously published in the Instruction.

The regulation defines a wide range of activities permitted to involve the private bar in the delivery of legal assistance to eligible clients. The primary consideration is, of course, that the highest quality of civil legal services be provided to the clients in an effective and economical manner. In response to comments, § 1614.3(a)(1) has been

modified to clarify that modified *pro bono* programs are considered permissible in fulfilling the PAI requirement. The regulation outlines specific methods to be undertaken by recipients to involve private attorneys in providing such legal assistance and states the components various systems should include.

Specific financial considerations and procedures which the recipient must utilize to account for costs allowable for private attorney involvement are set out in detail in § 1614.3(d). In response to comments, subsection (d)(5)(iii) has been modified to allow programs to use program-wide staff directives or inclusion in collective bargaining agreements as well as job descriptions for assignment of responsibility for PAI activities. Subsection (d)(9) has been modified on the basis of comments received to exclude secretaries, intake persons, and receptionists from the keeping of timesheets.

Section 1614.3(d)(9) provides that grants for private attorney involvement shall be accounted for by recipients on a cost-reimbursable basis. This means that, at the end of a grant period, funds transferred for private attorney involvement activities to a sub-grantee must be returned to the recipient if not actually expended for private attorney involvement activities. It does not mean that costs must first be incurred by a sub-grantee and reimbursement sought from the recipient.

Section 1614.3(d)(10) no longer contains the requirement in the instruction for interim billing. While such a practice would maximize efficient management and promote cash flow controls for recipients, numerous comments requested deletion of that requirement.

The regulation maintains the procedural measures implemented in instruction 83-8 and 1984 Grant Applications. The recipient must develop a specific plan and a budget which shall be a part of the recipient's refunding application or initial grant application. In response to comments on the instruction, the annual requirement that each program certify that it is spending the sums necessary to comply with this Part has been removed.

The regulation concludes that the Office of Field Services will not endorse or approve revolving litigation fund systems, whose purpose is to encourage the acceptance of fee-generating cases which are discouraged by the Act and 45 CFR Part 1609. This prohibition, however, does not prevent payment of costs or reimbursement of expenses incurred by private attorneys in normal situations where litigation might result

in attorney fees. Examples of such situations would be case assignments through a *judicare* or *pro bono* panel.

List of Subjects in 45 CFR Part 1614

Legal services, Private attorneys.

For the reasons set out above, a new 45 CFR Part 1614 is added as follows:

PART 1614—PRIVATE ATTORNEY INVOLVEMENT

- Sec.
1614.1 Purpose.
1614.2 General policy.
1614.3 Range of activities.
1614.4 Procedure.
1614.5 Prohibition of revolving litigation funds.

Authority: Sec. 1007(a)(2)(C) and Sec. 1007(a)(3); 42 U.S.C. 2996(a)(2)(C) and 42 U.S.C. 2996(a)(3).

§ 1614.1 Purpose.

(a) This part is designed 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 encourage the involvement of private attorneys in the delivery of legal assistance to eligible clients. At least twelve and one-half percent (12½%) of the recipient's LSC annualized basic field award shall be devoted to the involvement of private attorneys in such activities. Funds received from the Corporation as one-time special grants shall not be considered in determining the private bar involvement requirement. The Corporation may in exceptional circumstances grant a waiver from the 12½% requirement upon application by a recipient and a demonstration to the satisfaction of the Office of Field Services that, because of the nature of the population served, and the available attorney population, the recipient is unable to comply with the requirement.

(b) 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 broad participation in those activities undertaken with those funds, or shall demonstrate to the satisfaction of the Corporation that such involvement is not feasible.

(c) Because the Corporation's PAI requirement is based upon an effort to generate the most possible legal services for eligible clients from available, but limited, resources, recipients should attempt to assure that the market value of PAI activities substantially exceeds the direct and indirect costs being allocated to meet the requirements of this Part.

§ 1614.2 General policy.

(a) This Part implements the policy adopted by the Board of Directors of the Corporation on October 2, 1981, and ratified and modified by the Board on November 21, 1983, requiring that a substantial amount of funds be made available to encourage the involvement of private attorneys in the delivery of legal assistance to eligible clients through both *pro bono* and compensated mechanisms, and that such funds be expended in an economical and efficient manner.

(b) Effective January 1, 1985, recipients of national and state support grant awards shall apply the percentage requirement to that portion of their programs related to any direct advocacy activities on behalf of eligible clients.

(c) Private attorney involvement (PAI) 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 eligible clients. Decisions concerning implementation of the substantial involvement requirement rest with the recipient through its governing body, subject to review and evaluation by the Corporation.

§ 1614.3 Range of activities.

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

(1) Direct delivery of legal assistance to eligible clients through organized *pro bono*, reduced fee plans, *judicare* panels, private attorney contracts, and those modified *pro bono* plans which provide for the payment of nominal fees by eligible clients and/or organized referral systems; except that "revolving litigation fund" systems, as described in Section 1614.5 of this Part, shall neither be used nor funded under this Part nor funded with any LSC support;

(2) 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

(3) Support provided by the recipient in furtherance of activities undertaken pursuant to this Section 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.

(b) 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:

(1) The priorities established pursuant to Part 1620 of these regulations;

(2) The effective and economical delivery of legal assistance to eligible clients;

(3) The linguistic and cultural barriers to effective advocacy;

(4) The actual or potential conflicts of interest between specific participating attorneys and individual eligible clients; and

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

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

(1) Intake and case acceptance procedures consistent with the recipient's established priorities in meeting the legal needs of eligible clients;

(2) Case assignments which ensure the referral of cases according to the nature of the legal problems involved and the skills, expertise, and substantive experience of the participating attorney;

(3) Case oversight and follow-up procedures to ensure the timely disposition of cases to achieve, if possible, the result desired by the client and the efficient and economical utilization of recipient resources; and

(4) 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.

(d) The recipient shall utilize financial systems and procedures to account for costs allowable in meeting this Part. Such systems shall have the following characteristics:

(1) They shall meet the requirements of the Corporation's *Audit and Accounting Guide for Recipients and Auditors*:

(2) They shall accurately identify and account for:

(i) The recipient's administrative, overhead, staff, and support costs related to private attorney involvement activities;

(ii) Payments to private attorneys for support or direct client services rendered;

(iii) Contractual payments to individuals or organizations which will undertake administrative, support, and/or direct services to eligible clients on behalf of the recipient consistent with the provisions of this Part; and

(iv) Other such actual costs as may be incurred by the recipient in this regard.

(3) 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 part of the audit.

(4) 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 Part.

(5) Programs must maintain the internal records necessary to demonstrate that funds have been utilized for private attorney involvement consistent with this Part. Internal records should include:

(i) Contracts on file which set forth payment systems, hourly rates, maximum allowable fees, etc;

(ii) Bills/invoices which are submitted before payments are made;

(iii) Job descriptions, program directives or provisions included in collective bargaining agreements which set forth specific program staff PAI requirements; and

(iv) Staff time records.

(6) If any direct or indirect time of staff attorneys or paralegals is to be allocated as a cost to private attorney involvement, such costs must be documented by detailed timesheets accounting for all of those employees' time, not just the time spent on private attorney involvement activities. This time-keeping requirement does not apply to such employees as receptionists, secretaries, in-take persons or bookkeepers.

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

(8) Non-personnel costs shall be allocated on the basis of reasonable operating data. All methods of allocating funds shall be clearly documented.

(9) Contracts concerning transfer of LSC funds for PAI activities shall indicate that such funds will be accounted for by the recipient 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 be responsible for unspent funds. This part does not pertain to contracts with individual lawyers or law firms who only provide legal services directly to eligible clients.

(10) Each recipient which utilizes a compensated private bar mechanism, whether judicare, contract, or some other form, shall develop a system which includes:

(i) A schedule of uniform encumbrances for similar cases;

(ii) A procedure to determine net encumbrances;

(iii) A mechanism to relate specific encumbrances to specific cases; and

(iv) a way to determine whether encumbrances assigned are an accurate estimate of actual costs incurred.

(11) Encumbrances shall not be included in the calculation of whether a program has met the requirements of this Part, nor should they be recorded as an expense for audit purposes. Only actual expenditures or those amounts shown as accounts payable or accrued liabilities according to generally accepted accounting principles at the end of the fiscal period may be utilized to determine whether or not the program has met the requirements of this Part.

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

§ 1614.4 Procedure.

(a) The recipient shall incorporate the plan and budget required by Instruction 83-6 to meet the requirements of this Part which shall be part of the refunding application or initial grant application. The budget shall be modified as necessary to fulfill this Part. That plan shall take into consideration:

(1) The legal needs of eligible clients in the geographical 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 U.S.C. 2996f(a)(2)) and Part 1620 of the Regulations (45 CFR Part 1620) adopted pursuant thereto;

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

(3) The results of the consultation as required below.

(b) 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.

§1614.5 Prohibition of revolving litigation funds.

(a) The Office of Field Services shall not endorse or approve revolving litigation fund systems which systematically encourage the acceptance of fee-generating cases by advancing funds to private attorneys for costs, expenses and/or attorney fees.

(b) This prohibition does not prevent reimbursement or payment of costs and expenses incurred by private attorneys in normal situations in which litigation may result in attorney fees, such as case assignments through a *judicare* or *pro bono* panel.

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