

as is now the case in a few local jurisdictions across the country.

Section 1604.5 Compensation

Although the statute prohibits all compensated outside practice, the exception in proposed paragraph (a) for work on cases held over from a previous private practice is justified under the general principle that neither LSC nor the recipient can interfere with an attorney's professional responsibilities to a client. Since the representation was undertaken before the lawyer became a legal services attorney, fairness dictates that the attorney should be permitted to take fees for completion of the work.

Paragraph (b) proposes that a recipient may permit an attorney to accept attorneys' fees for § 1604.4(c)(2)–(5) cases, as long as the fees are remitted to the recipient. Several project directors have questioned why an attorney cannot keep fees awarded for outside practice approved by the recipient. The answer is simple. The LSC Act provision on outside practice, § 1007(a)(4), prohibits all compensated outside practice, subject to overriding considerations of professional responsibility, but permits uncompensated outside practice under LSC guidelines.

What this section does, in essence, is to define as "uncompensated outside practice" any representation where the attorney does not seek or receive personal compensation for the representation. Thus, the attorney can perform work pro bono, without any fee, but can also undertake work where fees could potentially be awarded, as long as the attorney does not keep any such fee but remits it to the recipient.

Proposed § 1604.5(b)(2) provides that attorneys' fees shall be remitted to a recipient when allowed by applicable rules of professional responsibility. The Committee added the reference to the rules of professional responsibility because of a concern that restrictions on fee-splitting could, in some states, prohibit an attorney from turning over attorneys' fees from an outside practice case to the recipient. Recipients would need to consult the status of the law in their state. The Committee understands that, in general, fee-splitting between a staff attorney and a legal services organization such as a recipient is not restricted under state or local rules, but requests comments on the issue.

The Committee also raised the issue of how such attorneys' fees would be treated for tax purposes. Because the Corporation does not generally regulate the tax obligations of recipients' employees, this issue does not appear to be one that should be addressed by

regulation. Rather, it is a matter of local concern which a recipient may want to consider when drafting its policies on outside practice.

The LSC Act and LSC's regulation on fee-generating cases, 45 CFR Part 1609, have consistently been interpreted as prohibiting recipients from taking attorneys' fees from a client's recovery of damages or retroactive statutory benefits. That restriction is accordingly incorporated into this provision of the rule.

Paragraph (b)(3) is intended to make it clear that if a recipient receives attorneys' fees from one of its attorneys' outside practice cases, it could reimburse the attorney, the client, the pro bono or legal referral organization, or anyone else who had contributed resources to cover costs or out-of-pocket expenses to support the representation.

Section 1604.6 Use of Recipient Resources

For the five types of outside practice cases described in § 1604.4(c)(1)–(5), this provision proposes to allow attorneys to use some recipient resources if necessary to carry out the attorney's professional responsibilities. However, it would be up to the local recipient to establish policies that would determine whether its attorneys could use recipient resources for a specific case to the extent allowed by this rule. For § 1604.4(c)(1) cases, a recipient may allow its attorneys to use only a de minimis amount of program resources, including time. Under a "de minimis" standard, an attorney could make a brief phone call or use the fax machine during working hours, but would have to take leave for court appearances.

For § 1604.4(c)(2)–(5) cases, the standard is somewhat less strict. A recipient may allow its attorneys to use a limited amount of program resources, including time, for those cases. Under the "limited" standard, in addition to whatever an attorney could do under the de minimis standard, the attorney could, for example, make a brief court appearance during normal working hours without taking leave. An attorney could also be permitted to use a program computer or typewriter to prepare pleadings or other documents. However, if the attorney participated in a long trial or extended negotiation, he or she would normally be required to take leave to do so.

The Committee also agreed that, if a recipient had a procedure to identify copying, postage and similar costs, and the attorney reimbursed the recipient, the use of those resources would also be permissible under either standard. This

position is consistent with the longstanding LSC policy, which has been in place for most of LSC's history.

Finally, language is included that allows an attorney to use a recipient's resources only when the recipient's LSC or private funds are not used for any activities for which the use of such funds is prohibited.

The Committee seeks comments on the appropriateness of using recipient resources for any outside practice, and whether or not the distinction between "de minimis" and "limited" use of resources makes sense and is workable.

Section 1604.7 Court Appointments

This proposed section treats court appointments and mandatory pro bono representation separately from outside practice, because there are substantially different considerations for court appointments and mandatory pro bono than there are for pro bono or other outside cases that an attorney undertakes on a strictly voluntary basis.

Paragraph (a)(1) simply restates a general rule that applies to court appointments as well as to outside practice under the current Part 1604. Paragraph (a)(2) is based on § 1006(d)(6) of the LSC Act. It is intended to protect recipients from efforts that have been made by some judges to appoint legal services attorneys to handle court appointments in lieu of private attorneys, and/or to refuse to provide compensation for appointed cases handled by legal services attorneys, when private attorneys appointed to similar cases would have been paid. Paragraph (a)(3) is also a requirement carried over from the current Part 1604, although it makes more sense under this proposal, since the proposed rule makes it clear that legal services attorneys can handle court appointments on program time.

Paragraph (b) would allow a full-time attorney to use program resources to undertake representation permitted by this section, and paragraph (c) would allow the attorney to identify the recipient as his or her employer when engaged in such representation.

Paragraph (d) provides that, if an attorney is mandated to engage in pro bono representation by applicable state or local court rules or practices or by rules of professional responsibility, such representation shall be treated in the same manner as court appointments for the purposes of paragraphs (a)(1), (a)(3), (b) and (c) of this section. While the Committee recognizes that the ABA Model Rules do not currently mandate pro bono services for any attorney, the Committee also recognizes that mandatory pro bono is under active