

OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2002-1008

To: John Morris Williams, Esq.
Executive Director
Legal Aid Services of Oklahoma
2915 North Classen Boulevard, Suite 110
Oklahoma City, OK 73106

Date: July 15, 2002

Subject: Attorneys' Fees Demand for Private Attorney Co-Counsel

CC: Gary Dart, Esq.
Legal Aid Services of Oklahoma
115 West Third Street, Suite 701
Tulsa, OK 74103

Gary Dart, Executive Director of Legal Services of Eastern Oklahoma, had requested an Office of Legal Affairs Opinion regarding the attorneys' fees demand for a private attorney who is co-counseling with a recipient. Owing to the urgency of the situation, we provided Mr. Dart and his staff attorney Laura Frossard with immediate guidance via e-mail. Mr. Dart confirmed our conversations by letter and requested a written opinion. As Legal Services of Eastern Oklahoma has merged into Legal Aid Service of Oklahoma, I am addressing our formal written opinion to you. Please contact me if you have any questions about this.

Issue Presented

A recipient staff attorney would like to co-counsel with a private attorney representing an eligible client in a consumer action. The private attorney would like to claim attorneys' fees. The recipient staff attorney, in compliance with LSC regulations, does not wish to claim or collect attorneys' fees. How should the attorneys draft the pleadings so that the recipient staff attorney can participate in the case without violating LSC regulations?

Conclusion

In cases in which private attorneys make permissible claims for attorneys fees while co-counseling with LSC recipients, the pleadings should explicitly state that the

Discussion

Congress prohibited LSC recipients from claiming or collecting and retaining attorneys' fees in § 504(a)(12) of the FY 1996 LSC appropriation, Pub. L. 104-134, 110 Stat. 1321 (1996), and has incorporated this restriction in each of LSC's subsequent appropriations. *E.g.* Pub. L. 107-77, 115 Stat. 748 (2001) incorporating 1996 restrictions by reference through Pub. L. 105-119, 111 Stat. 2440 (1997). LSC implemented this prohibition into its regulations at 45 C.F.R. Part 1642. The relevant part, 45 CFR § 1642.3, provides:

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.

This prohibition also applies to private attorneys in cases in which they receive compensation from a recipient to represent eligible clients. The regulation reads, in pertinent part:

Except as permitted in paragraph (a) of this section [regarding cases filed prior to April 26, 1996], the prohibition contained in § 1642.3 shall apply to any case undertaken by a private attorney on behalf of an eligible client when the attorney receives compensation from a recipient to provide legal assistance to such client under the recipient's private attorney involvement (PAI) program, judicare program, contract, or other financial arrangement.

45 C.F.R. § 1642.4(b).

Thus, a private attorney who is working for an eligible client on a non PAI basis, receiving no compensation from the recipient program, is permitted to collect attorneys' fees even when an LSC recipient co-counsels on the case. LSC further set forth this analysis in Program Letter 97-1 which states that "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."

<http://www.rin.lsc.gov/Rinboard/refrmats/progltrs/pglt97_1.htm>

Under these circumstances, a recipient staff attorney may co-counsel with a private attorney who is claiming attorneys' fees, but the recipient staff attorney must not claim nor collect and retain any attorneys' fees. To stay within this requirement, the pleadings should clearly state who is claiming the fees. As described in Program Letter 97-1: "recipient co-counsel should make it 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."

According to Part 1642, to 'claim' attorneys' fees means to "include a request for attorneys' fees in any pleading." 42 C.F.R. § 1642.2(d). To avoid any appearance that the recipient is claiming attorneys' fees, the pleadings should state unequivocally that the recipient attorney is not, and in fact *may* not, claim or collect and retain attorney's fees. Any such language should be as clear and straightforward as possible.

There may be multiple ways to draft such language; one example is as follows:

Plaintiff demands an award of reasonable attorney's fees for <Name of Private Pro-Bono Attorney>, but makes no claim for any attorney's fees for <Name of Recipient Staff Attorney>, <Name of Recipient Program>, or any employee thereof.

The pleadings could further specify, in a footnote or otherwise, that the recipient "is a recipient of funds from the Legal Services Corporation which prohibits recipients or their employees from claiming, collecting, or retaining attorneys' fees in any cases. 45 C.F.R. § 1642.3."

Very truly yours,

Mark Freedman
Assistant General Counsel[†]
Office of Legal Affairs

Victor M. Fortuno
General Counsel
Office of Legal Affairs

mfreedman@lsc.gov
(202) 336-8829

[†] Admitted in New York and New Jersey only.