

OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2003-1005

To: All LSC Program Executive Directors

Date: March 20, 2003

Subject: Clarification of November 12, 1999 External Opinion on Attorneys' Fees

On November 12, 1999, the Office of Legal Affairs issued an external opinion interpreting the Legal Service Corporation's (LSC) regulation on attorneys' fees, 45 CFR Part 1642. The issue was whether an LSC grant recipient may, consistent with the requirements of Part 1642, transfer time records relating to a former client's case to the former client's new private counsel, when the new counsel is seeking to recover attorneys' fees on the client's behalf. Based on the specific facts and circumstances of that case, we concluded that the recipient could transfer time records without violating the prohibition on claiming or collecting and retaining attorneys' fees. This Opinion seeks to clarify the proper scope and application of that interpretive guidance.

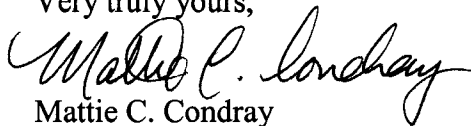
A recipient may transfer time records relating to its work for a former client to the former client's new private (non-LSC funded) attorney who seeks to make a claim for attorneys' fees on the recipient's former client's behalf. However, OLA wishes to clarify that this is the case only in cases in which it is the client and not the attorney(s) who has legal ownership over the attorneys' fees.

Section 1642.3 strictly prohibits recipients from claiming or collecting and retaining attorneys' fees for cases undertaken on behalf of their clients. "Attorneys' fees," for purposes of Part 1642, is defined as "an award to *compensate* an attorney of the prevailing party." 45 C.F.R. § 1642.2 (emphasis added). Accordingly, even if the recipient does not actually participate in either (1) the making of the claim or (2) the physical act of collecting or retaining an attorneys' fee award, Part 1642 nonetheless prohibits the recipient from receiving an award of compensation for services rendered. An award of attorney's fees belonging to the client's counsel (as opposed to the client) that are in any way based on time spent by the recipient on the client's case, will necessarily result in an award of compensation to which the recipient has a legal claim for the recipient's proportionate share of the work done on behalf of the former client when the recipient was still representing the former client regardless of whether the proceeds of the award should ever physically pass through the recipient's possession, or accounts. Thus, if the recipient has a legal right to the fees, then, absent a professional responsibility requirement to the contrary, the LSC recipient cannot provide those time records or otherwise cooperate with the client's attempts to collect the fees. However, if

the client is the sole owner of the fees, there is no risk of an award of compensation to the recipient and the recipient may provide time records to the client or client's new counsel.¹

Determinations as to whether a particular recipient may transfer time records to new, private counsel for the purpose of the new counsel making a claim for attorneys' fees on the client's behalf is one that will necessarily be made on an individualized, case-by-case basis depending on whether the attorneys' fees would be owned by the counsel or the client. Ownership of an attorneys' fee award is dictated by express statutory language, or judicial interpretation and construction of the statutory authority from which the right to claim attorneys' fees arises. As a result, ownership of an attorneys' fee award will vary from statute to statute, and/or jurisdiction to jurisdiction.²

Very truly yours,



Mattie C. Condray
Senior Assistant General Counsel
Office of Legal Affairs



Victor M. Fortuno
General Counsel
Office of Legal Affairs

mcondray@lsc.gov

(202) 336-8817

¹ It is important to distinguish the circumstances covered by this Opinion, however, in which the recipient no longer has a relationship with the former client and has no co-counsel relationship with the new counsel. When a recipient remains counsel to a client, the recipient may not claim, collect or retain attorneys' fees for a client in jurisdictions or situations in which the client would be the sole owner of the attorney's fees. Similarly, when a recipient is co-counsel with private counsel in a case, the private co-counsel may, separately, make a claim for attorneys' fees, but may not claim fees for the recipient's proportionate share of the fee, nor assign any portion of an award to the recipient. See Program Letter 97-1.

² See *Flannery v. Prentice*, 110 Cal. Rptr.2d 809, 813 (Cal. 2001) (a court's fundamental task in determining the ownership of a statutory award to attorneys' fees is to ascertain the legislature's intent and to effectuate the law's purpose); see e.g., *id.* (California state supreme court held that attorneys' fee award under California's FEHA belong to the attorneys for whose work they are awarded); *Stair v. Turtzo, Spry, Sbrocchi, Faul & LaBarre*, 768 A.2d 299, 307-08 (Pa. 2001) (Pennsylvania state supreme court held that a plaintiff who was granted a statutory attorneys' fee award for her success in an action for declaratory judgment and injunctive relief stated a cause of action by alleging that her former counsel unlawfully withheld from her the proceeds of that attorneys' fee award; there is no clear federal policy to confirm former counsel's exclusive interest in the award); *Streeter v. Thompson*, 751 S.W.2d 329, 331 (Tex. Ct. App. 1988) (Texas state appellate court held that the client, and not his attorneys, is entitled to the attorneys' fee award granted under the authority of the state's civil practice and remedies code); *General Inv., Inc. v. Thomas*, 422 So.2d 1279 (La. App. 1982) (Louisiana state appellate court held that an attorneys' fee award belongs to the attorney and not to the client under the state's civil code attorneys' fee award provision).