

OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2001-1006

To: Edward Hoort, Executive Director
Legal Services of Eastern Michigan
547 South Saginaw Street
Flint, MI 48502

Date: March 19, 2001

Subject: Attorney's Fees Check Mistakenly Listing a Recipient as a Co-Payee.

Issue Presented

May a recipient endorse a check made payable to itself and one of its staff attorneys when the check is for attorney's fees earned by the attorney prior to the attorney's employment at the recipient, involving a client not otherwise represented by the recipient, and the recipient is listed as a co-payee by mistake?

Conclusion

Under these particular circumstances, it is permissible for the recipient to endorse this check and allow the attorney to deposit it in his private account. The attorney's fees were earned by the staff attorney prior to his employment with the recipient, working for a client not otherwise represented by the recipient, the recipient made no claim for these fees and the recipient will not collect nor retain these fees in any way. The recipient is listed as a co-payee on the check entirely by mistake and obtaining a replacement check could greatly further delay ultimate payment.

Analysis

You contacted me on March 12, 2001, with the following situation. A staff attorney at Legal Services of Eastern Michigan ("LSEM") joined your program approximately nine months ago. He had been in private practice and handled workers compensation cases. In one of those cases which had settled prior to his employment with LSEM, the State of Michigan still owed this attorney his attorney's fees. The client in that case has not been otherwise represented by LSEM. The State recently issued that check, but mistakenly listed both the attorney and LSEM as payees. You believe that this was a clerical error based on his current employment with LSEM. Neither LSEM nor the attorney had requested that the State do this. LSEM has not participated in any way in claiming these fees, nor does LSEM intend to collect these fees, retain them, or exercise control over them in any way. You have considered asking the State to re-issue this check in the attorney's name only, but you are concerned that it may take the State many months to do so, further delaying this attorney's receipt of fees he earned almost a year

ago. You have asked if LSEM may endorse the check so that the staff attorney may deposit it in his private bank account. LSEM would at no time hold or accept the check or any of the funds from it.

The LSC regulations state that “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.” 45 C.F.R. §1642.3. The case that generated this fee was not undertaken on behalf of a client of LSEM and does not fall within the scope of the regulation. A related issue had been addressed in an external opinion dated July 29, 1997, stating that “a recipient’s part-time attorneys may engage in the outside practice of law on their own time and seek and retain attorneys’ fees from such outside cases” because they are not cases undertaken on behalf of a client of the recipient.

Furthermore, this situation does not involving LSEM ‘claiming or collecting and retaining’ attorneys’ fees as prohibited in Part 1642. LSEM has not claimed the fees in this case nor asserted any rights to them. Regarding collecting and retaining, we have interpreted this to mean that recipients are prohibited from “receiving and cashing or otherwise holding onto the check [for fees] for any period of time, including time sufficient to take action to donate or assign the funds ” and thus recipients cannot assign attorneys fees to a third party. External Opinion Letter on July 29, 1997. In this situation though, LSEM is not assigning the check to a third party, but is instead merely allowing the attorney to whom the check is also made out, and who is the only one entitled to the fees, to deposit it. There is no reason to believe that the State intended that any of the fees go to LSEM; the settlement did not provide for any fees for LSEM, which was not involved in the case. LSEM is merely correcting a clerical error without ever exercising any actual control or possession over the check or the funds and obtaining no benefit from them.

While it would be preferable to have the check reissued, we recognize that this attorney has already been waiting over nine months for payment. As such, under these circumstances, LSEM can endorse the check allowing the attorney to deposit it in his private bank account. Please contact me if I can be of any further assistance.

Very truly yours,

Mark Freedman
Assistant General Counsel
Office of Legal Affairs

Victor M. Fortuno
General Counsel
Office of Legal Affairs