SUGGESTED MODIFICATIONS OF PART 1611

Section 1611.1 Purpose. [No change]

Section 1611.2 Definitions. [No change]

Section 1611.3 Maximum income level.

(a) [No change]

(b) Unless specifically authorized by the Corporation, a recipient shall not establish a maximum annual income level that exceeds one hundred and twenty-five percent (125 percent) of the current official Federal Poverty Income Guidelines.

(c)-(e) [No change]

Section 1611.4 Authorized exceptions.

A person whose income exceeds the maximum income level established by a recipient may be provided legal assistance under the Act if:

(a) The person's circumstances require that eligibility should be allowed on the basis of one or more of the factors set forth in Section 1611.5(b)(1); or

(b)-(c) [No change]

Section 1611.5 Determination of eligibility.

(a) [No change]

(b) In addition to income, a recipient shall consider other relevant factors before determining whether a person is eligible to receive legal assistance.

(1) Factors which may be used to reduce income shall include:

(A) Current income prospects, taking into account seasonal variations in income;

(B) Fixed debts and obligations, including Federal, state and local taxes, and medical expenses;

(C) Child care, transportation, and other expenses necessary for employment;

(D) Expenses associated with age or physical infirmity of resident family members; and

(E) Other factors related to financial inability to afford legal assistance.

(2) Factors which may be considered in denying assistance to an otherwise eligible individual shall include:

(A) The minimal cost of obtaining private legal representation with respect to the particular matter in which assistance is sought;

(B) The minimal consequences for the individual if legal assistance is denied;

(C) The existence of substantial liquid or non-liquid assets;

(D) Other factors related to financial inability to afford legal assistance, which may include evidence of a prior administrative or judicial determination that the person's present lack of income results from refusal or unwillingness, without good cause, to seek or accept suitable employment; and

(c) A recipient may provide legal assistance to a group, corporation, or association if it provides information showing that it lacks, and has no practical means of obtaining funds to retain private counsel, and if it:

(1)-(2) [No change]

Section 1611.6 Manner of determining eligibility.

(a)-(b) [No change]

(c) Information furnished to a recipient by a client to establish financial eligibility shall not be disclosed to any person who is not employed by the recipient in a manner that permits identification of the client, without express written consent of the client, except that the recipient shall provide such information to the Corporation when:

(1) The Corporation is investigating allegations that question the financial eligibility of a particular previously identified client;

2) The information sought by the Corporation relates solely to the financial eligibility of that particular client; and

(3) The information sought by the Corporation is necessary to confirm or deny specific allegations relating to that particular client's financial eligibility.

The information provided to the Corporation by the recipient shall not be disclosed to any person who is not employed by the Corporation. Prior to providing the information to the Corporation the recipient shall notify the client that the recipient is required to provide to the Corporation the information sought.

Section 1611.7 Change in circumstances. [No change]

APPENDIX A - LEGAL SERVICES CORPORATION POVERTY GUIDELINES

FOR ALL STATES EXCEPT ALASKA AND HAWAII

Size of Family Unit:[1]	Maximum Income
1	$5,850
2	7,775
3	9,700
4	11,625
5	13,550
6	15,475

FOR ALASKA:[2]

1	$7,338
2	9,738
3	12,138
4	14,538
5	16,938
6	19,338

FOR HAWAII:[3]

1	$6,738
2	8,950
3	11,163
4	13,375
5	15,588
6	17,800

---

[1]For family units with more than six members, add $1,925 for each additional member in a family.

[2]For family units with more than six members, add $21,400 for each additional member in a family.

[3]For family units with more than six members, add $2,213 for each additional member in a family.

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE: December 8, 1977

TO: All Legal Services Programs

FROM: Alice Daniel, General Counsel

SUBJECT: Eligibility Determinations

We have been asked to clarify some questions that hav arisen concerning eligibility determinations.

Section 1611.5(b) states that: "In addition to income, a recipient shall consider other relevant factors before determining whether a person is eligible to receive legal assistance." Subsection 1611.5(b)(6) states that one factor to be considered is "the cost of obtaining private legal representation with respect to the particular matter in which assistance is sought." This subsection does not authorize a legal services program to provide representation to a person whose income is above the authorized maximum solely because the person is unable to afford private representation. Such an interpretation would nullify the prohibition against serving an individual whose income is above the maximum established by the Corporation.

The purpose of the provision is to make clear that a legal services program is authorized to deny legal assistance to eligible individuals in matters where inexpensive private representation is available.

Subsection 1611.5(b)(7) requires that a program take into account "the consequences for the individual if legal assistance is denied." This provision permits a recipient to provide legal assistance to an income-eligible individual in an emergency situation even if the particular matter is not within the priorities established by the program, or to deny assistance to an eligible individual in a trivial matter. It does not authorize serving an over-income person.

Subparagraph (8) requires a program to take into account "other factors related to financial inability to afford legal assistance." This provision requires a

program to make suitable deduction for a relevant factor making a person less able to pay for private counsel than the person's income would suggest. It also requires a program to take into account factors such as substantial nonliquid assets.

Section 1609.3 provides that "no recipient shall use funds received from the Corporation to provide legal assistance in a fee-generating case unless other adequate representation is unavailable." This section does not provide a separate basis for determining eligibility. The unavailability of "other adequate representation" does not permit representation unless the person is also eligible under Section 1611. Section 1609.3 provides an additional limitation on representation. Section 1609.4 sets forth the circumstances in which "other adequate representation is deemed to be unavailable" and a program may provide representation in a fee-generating case to an eligible individual.

LEGAL SERVICES CORPORATION
733 Fifteenth Street, N.W., Washington, D. C. 20005 (202) 376-5100

Thomas Ehrlich
President
E. Clinton Bamberger, Jr.
Executive Vice-President

January 16, 1978

Michael H. Marcus, Esq.
Multnomah Bar Association
Legal Aid Service
[illegible] Board of Trade Building
[illegible] N. Fourth Avenue
Portland, OR 97204

Dear Michael:

In your letter of January 5, 1978 you asked for clarification of my memorandum of December 8, 1977 concerning eligibility determinations.

The December 8 memorandum was sent out because of an identified ambiguity in 1611.4 which has led a number of programs to misapply the Regulation. The words "one or more" in 1611.4(a) are misleading, because they suggest that any one of the factors set forth in 1611.5(b) would support a finding of eligibility, but in fact some of them should lead to the contrary conclusion.

The Regulation is deficient in failing to indicate what effect to give to each of the factors listed under 1611.5(b). For example, an applicant's possession of substantial "liquid net assets" should lead to the decision that the person is ineligible, not the reverse. The "age or physical infirmity of resident family members" should be taken into account, but only to the extent that these factors directly affect the family's income and other financial resources. Some programs have concluded that the mere presence of elderly members in a family is sufficient to find eligibility.

It is correct that a program may not provide representation to an over-income individual <u>solely</u> because of the factors described in 1611.5(b)(6) or (7), but it is an overstatement to say that these factors are relevant only to the <u>rejection</u> of an otherwise eligible client. A program may certainly consider these factors in connection with others listed in the subsection before determining to

provide assistance to an over-income person. Since every program has discretion to provide assistance to an over-income person who is eligible on the basis of one of the factors listed in 1611.4, most programs weigh a combination of the factors.

I had not thought of my advice to Gary Roberts concernin representation of a class including ineligible individuals as resting on Section 1611.5(d). That Section contemplates representation of a "group" which might be represented as an individual plaintiff (e.g., NWRO v. Commissioner); but you are correct in saying that the members of such a group might also be treated as a class, and of course it is not required that every member of the group be eligible.

My advice to Gary was based on Section 1007(a)(1) of the Legal Services Corporation Act, 42 U.S.C. 2996f, which states that the Corporation shall "insure the maintenance of the highest quality of service and professional standards and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligibl clients." It appears to me that there are many situations in which the interests of an individual client are best served by a class action, and further, that the eligible members of the class might not be represented adequately if ineligible members were excluded from the class certificat

If a question should arise concerning application of 1611.5 to a particular person, please feel free to call and discuss the matter.

We plan to clarify Part 1611 as part of a general revision of our Regulations this spring. If there are any other sections you think need clarification, please let me know.

Very truly yours,

Alice Daniel
General Counsel

LEGAL SERVICES CORPORATION
7[illegible] Fifteenth Street, N.W., Washington, D. C. 20005 (202) 376-5100

Thomas Ehrlich
President
E. Clinton Bamberger, Jr.
Executive Vice-President

February 15, 1978

John L. Cromartie, Jr., Esq.
Executive Director
Georgia Legal Services Program
101 Marietta Tower, Suite 2121
Atlanta, GA 30303

Dear John:

Thanks very much for your letter of February 8, 1978, enclosing a memorandum dated February 2, 1978, from Ed Hart. I regret the confusion caused by my memorandum of December 8, 1977 concerning eligibility determinations. I am enclosing another copy of it, together with a copy of my letter dated January 16, 1978 to Michael H. Marcus, responding to some of his questions concerning the memorandum.

I have not issued any subsequent memorandum on the subject, but I think that careful rereading of the December 8 memorandum and of my letter to Mike Marcus should resolve most of the questions.

Section 1611.4 of Corporation Regulations authorizes a program to provide assistance to a person whose income exceeds the maximum established by the program if

> (a) the person's circumstances require that eligibility should be allowed on the basis of one or more of the factors set forth in Section 1611.5(b); or
>
> (b) the person is seeking legal assistance to secure benefits provided by a governmental program for the poor; or
>
> (c) the person would be eligible but for receipt of benefits from a governmental income maintenance program.

LEGAL SERVICES CORPORATION

The December 8 memorandum has no application whatsoever to the factors listed in (b) or (c). The memorandum was issued after we learned that some legal services programs had misapplied the factors listed in 1611.5(b). The clients involved were substantially above income. In one, a client whose income was $26,000 a year was given assistance when he presented the program with letters from two attorneys who refused to represent him without payment of a fee he could not afford to pay. The program thought that representation was authorized by 1611.5(b)(6). In another case the program provided representation to a substantially overincome person solely because he was over 65 years old. The program thought representation was authorized by 1611.5(b)(5). As explained in the published Comment to Section 1611, that subsection permits representation of an overincome person only if age or physical infirmity cause unusually high expenses that can be deducted from the income of the person seeking legal assistance.

Ed's memorandum asks about representation of a client with "marginal income". If a person's income is marginally above the maximum established by the program, it is likely that proper deduction for one or more of the factors listed in 1611.5(b) will permit representation. In addition, as explained above, the person may be represented without regard to income if he or she is seeking assistance in a public entitlement matter, or if the program chooses to disregard income received from a "governmental income maintenance program."

Please advise all interested persons in your program of the contents of this letter and its enclosures. I hope

LEGAL SERVICES CORPORATION

their concerns will be resolved. If a question should arise concerning the eligibility of a particular person, I hope that you and your staff will feel free to call and discuss the matter with me.

Best regards.

Very truly yours,

Alice

Alice Daniel
General Counsel

Enclosures

LEGAL SERVICES CORPORATION
733 Fifteenth Street, N.W., Washington, D.C. 20005 (202) 376-5100

Dan J. Bradley
President

July 2, 1979

Robert U. Johnsen, Executive Director
Smyth-Bland Legal Aid Society
Lincoln-Freeman Building
113 North Park Street
Marion, Virginia 24354

Dear Mr. Johnsen:

Margaret Poles, Acting Regional Director, has referred your June 13, 1979, inquiry regarding eligibility to the General Counsel's office for response. Although your letter and Ms. Harris' original inquiry do not give sufficient information to determine whether or not Mr. Willis Nichols is eligible for legal services, perhaps I can clarify some of the general considerations that your program should take into account in making that determination.

As Ms. Poles indicated in her June 1, 1979, letter to Ms. Harris, in determining the eligibility of an applicant whose cash income exceeds the program's maximum income limits, you should consider the factors listed in Section 1611.5(b) of the Corporation's Regulations. Subsections 1-4 of that section refer to factors that may be considered as adjustments to the gross cash income of the individual applicant. For example, Ms. Harris indicated that Mr. Nichols has "several notes owing at one of the local banks here in Marion;" subsection 3 permits a program to consider "fixed debts and obligations . . ." in determining whether an applicant is eligible to receive legal assistance. In other words, if Mr. Nichols makes regular payments on his outstanding debts and, as a result, his remaining disposable cash income is within your program's eligibility guidelines, Section 1611.5(b)(3) would permit, although not require, your program to determine that it could provide him with legal assistance.

LEGAL SERVICES CORPORATION

You refer in your June 13, 1979, letter to Alice Daniel's December 8, 1977, memorandum regarding eligibility determinations. This memorandum refers specifically to the factors enumerated in Sections 1611.5(b)(6)-(8), indicating clearly that consideration of these factors does not authorize serving over-income persons. It does not refer to the factors enumerated in Sections 1611.5(b)(1)-(4), which, in essence may be considered adjustments to gross income that would permit a program to determine that an over-income applicant is, in fact, eligible for legal assistance.

I hope that this letter clarifies this matter, and enables you to make a determination in Mr. Nichols' case. If you have any additional questions or need further clarification, please feel free to contact me.

Sincerely,

Linda E. Perle

Linda E. Perle
Assistant General Counsel

cc: Margaret Poles

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE: June 21, 1982

TO: Mary Wieseman

FROM: Gerald M. Caplan

SUBJECT: Suggested Modifications on Eligibility, Part 1611

Your memorandum falls into two parts: routine changes to tidy up the regulations, and substantive changes. I think the Board should first address matters of substance. At a later date, the Stubbs Committee might want to take up clarifying amendments and minor revisions.

For the moment, I have two suggestions:

1. The change in eligibility suggested by your cover memorandum, forbidding representation of groups not composed primarily or exclusively of poor persons.

In order to evaluate this proposed revision, the Board will need some knowledge of practices to date. On what kinds of matters has representation been extended to groups composed primarily of non-eligible clients? What groups?

2. I don't think the proposals for information about client eligibility go far enough. Shouldn't the Corporation have the ability to perform routine audits to see if programs are following the regulations? I doubt if there is a widespread problem, but are we wise in yielding to the view that we cannot audit absent specific complaints?

cc: Linda Perle

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE: June 28, 1982

TO: Mary Wieseman, Office of General Counsel

FROM: Gerald M. Caplan

SUBJECT: Eligibility Memorandum, Second Thoughts

I have reviewed Linda Perle's memorandum and am having second thoughts as to the wisdom of our approaching the problem exclusively by revising existing regulations. Linda's research suggests the limitations of our approach. We are so hemmed in, it appears, by existing legal restraints -- the Act, the regulations, the opinions -- that the Corporation has little room to navigate in upgrading its capacity to monitor the degree of compliance by program attorneys with the various eligibility standards.

Let me suggest another way. We should ask first what authority the Corporation needs to enable it to assess the degree of compliance by program attorneys. We should start by accepting that there is substance to the repeated charges that program attorneys occasionally accept cases that fall outside the eligibility rules. Then we should ask whether the Corporation has sufficient means to identify this misconduct. Ideally, what authority should we have that we do not now possess?

This approach allows us to propose amendments to our legislation as well as revise existing regulations. It also permits us to go back to the ABA and ask it to reconsider certain opinions it has issued that make our task more difficult. For example, the ABA opinion that holds that the name of a client who is indigent is privileged may well need reexamination. Not only does this holding interfere with our ability to measure compliance, but, as Linda Perle suggests, it rests on premises that seem demeaning to the poor.

In short, our need is to think imaginatively. We are not prisoners of the past. We should not be confined by our own prior General Counsel opinions unless we think they make sense and unless we believe that this new Board would be comfortable with them. We should not hesitate to be aggressive where we believe we have a case to make.

cc: Linda Perle

LEGAL SERVICES CORPORATION
733 Fifteenth Street, N.W., Washington, D.C. 20005

Writer's Direct Telephone
(202)

M E M O R A N D U M

DATE: June 28, 1982

TO: Linda Perle

FROM: Bucky Askew

RE: Your Memo on Revision to Part 1611

In response to your June 23 memo on revisions to Part 1611 of the Regulations regarding client eligibility, I would offer the following comments.

I. Section 1611.5(c)(2)

Under Section 1611.5(c)(2) Corporation recipients have provided representation to qualified groups not primarily composed of eligible persons. Such representation has typically involved issues or activities which cut across a broad spectrum of the community but which particularly affect legal services clients. Included have been such areas as community safety, housing supply, employment, nutrition, family abuse, energy and public utilities. For a variety of reasons poor persons are not frequently in a position to participate actively in the groups. Child care requirements, expenses, and lack of transportation often bar extensive direct poor

community involvement. Consequently, there are groups that have as their primary purpose the furtherance of the interests of eligible clients, but are not primarly composed of them.

For example, Alaska Legal Services (ALSC) has provided assistance to bush village councils. The members of these councils are usually not client eligible (although some would be) but the vast majority of village residents are client eligible. Currently, the program is assisting the Village of Nelson Island in attempts to secure funding for development of low income housing on the island. There are no private attorneys within several hundred miles of many villages so requests for such assistance from ALSC is common.

Lane County Legal Aid Services (LCLAS) in Eugene, Oregon, has assisted two neighborhood groups that have low income clients involved in the groups but are not primarly composed of client eligible persons. In one instance LCLAS helped the Whiteaker Community Council develop a cooperative low-income housing project in a neighborhood where 25 per cent of the residents were low income. The program refused to represent the same group on other issues such as historic preservation. LCLAS also represented the West University Neighbors by providing advice and assistance regarding a crime prevention program. The neighborhood in question was the lowest in income in the City of Eugene.

Evergreen Legal Services (ELS) has provided representation to several very small and poor Indian tribes in Western Washington. ELS has assisted the lower Elwah Tribe, a newly recognized tribe with no liquid resources, to clear the title and rights of way to property to help the tribe develop low income housing for tribal members. ELS provided advice to the Squaxin Island Tribal Council on law enforcement powers of the tribe when the Council was seeking to protect tenants of low income housing. ELS also assisted the tribe by doing an analysis of mental health resources available for treatment of tribal members from the state of Washington. These areas of law are very complicated and the cost of advice would have been prohibitive. ELS has assisted a seniors group in Vancouver, Washington, in establishing a food bank for low income persons. The Upper Skagit Tribe received assistance from ELS in establishing a smoked fish business which will employ low income tribal members.

These are obviously anecdotal examples and are all from the same region. We believe that we would find similar examples in all of the regions. Should a more complete data base be necessary to assess the impact of modifying or doing away with Section 1611.5(c)(2) a more elaborate survey would be necessary. Clearly that could be done but would require reasonable lead time before a report might be available.

II. Section 1611.6(c)

I think that your proposed modification of Section 1611.6(c) is a reasonable one and I have no substantial problem with it. I would, however, suggest the following language in lieu of the first sentence of the final paragraph of your proposal:

> "The information provided to the Corporation by the recipient shall be disclosed only to those persons employed by the Corporation who are directly involved in the investigation and disposition of the specific allegations at issue."

Our goal should be the maximum protection of client privacy and confidentiality and maintenance of the integrity of the attorney/client relationship, consistent with our responsibility to ensure general, as well as specific, compliance with the Act and Regulations.

With respect to suggestions that your language might not go far enough and that it may limit our ability to perform routine compliance audits, I would take exception. Under Section 1611.6(a) we have ample authority to monitor and audit program compliance with eligibility standards. And we do. Typically during a monitoring visit, random files are reviewed to determine whether intake procedures have been followed and whether financial eligibility has been established. If during

such a review, the monitor (typically a Regional Office staff person) finds that there is a problem with eligibility determinations, he or she will make recommendations for improving the system; or if necessary when the problem is severe, can require the program to adopt new intake procedures to assure that client eligibility is not only assured but is also documented. For such general compliance reviewes client identity is not necessary nor useful. Given that, I would recommend that current client privacy protections be maintained unless compelling reasons demand otherwise (e.g. specific complaints).

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE: July 8, 1982

TO: Jerry Caplan

FROM: Gerry Singsen Gerry

SUBJECT: Eligibility Regulation Proposals (attached)

I have reviewed, briefly, the memo from Linda to Mary and from Mary to you. It all seems fine to me, with the exception of some concerns raised by the last paragraph of Mary's cover memo.

I don't really know how often programs represent groups that are not able to retain counsel but are working on primary purposes to further the interests of the poor. It has happened, of course. For example, groups formed to create non-profit housing development corporations for the purpose of obtaining HUD funds to build low income housing frequently include a significant percentage of people with incomes above the poverty line, along with eligible individuals. I'm not sure what HUD regulations require on this. The above income individuals, however, tend to be ministers, elderly persons on fixed incomes, community social services workers, and the like. They have no disposable income of their own, let alone enough to pay for the kind of highly technical and extended legal assistance that gets a project off the ground. Since the work is speculative, few private attorneys will do it for poor persons. And requiring the group to divest itself of all persons above eligibility may strip the group of both needed skills and direction. Once there is seed funding from HUD, of course, the legal services attorney may be able to back out and let a private attorney carry the matter to construction, since fees can be billed in the development cost. A negative side of that, however, is that the fees end up in the capitalization, which increases the building's debt service and rental.

Perhaps someone could gather some facts on the issue. I would hazzard a guess, at the moment, that at least part of what is in people's minds is stories about representing the civil liberties union, or a civil rights group, or the Black Panthers, or someone like that. My experience, for what its worth, is that most of that work, to the degree it happens, is done on one's own time, and doesn't violate the act at all. The regulatory change under discussion wouldn't affect that at all. Programs are so resource poor that if they can avoid it, they don't take on ineligible clients. I think it is largely a myth (Breger fosters it in his paper) that program attorneys are controlling cases, taking on their own personal ideological preferences, and not listening to local poor persons actual requests for assistance. Why not take this opportunity to test it. Have someone call ten or fifteen programs and ask they how many group clients thay have, and whether any of them are eligible under primary purpose rather than income. If any are, ask why they were accepted and get some facts. Call the Housing and Economic Development Law Centers too, since they both deal in areas likely to involve group representation, and get their information and ideas.

cc.: Mary Wieseman
Clint Lyons

MEMORANDUM

DATE: July 7, 1982

TO: Jerry Caplan

FROM: Gerry Singsen Gerry

SUBJECT: Auditing of Client Eligibility

I have briefly reviewed Pat's memo of July 1, and here are a couple of thoughts.

I think there are clear problems, as pointed out in Pat's memo on the single auditor issue, with a single auditor in the context of auditing client eligibility, particularly if we want the auditor to go behind the question of proper documentation to make an independent investigation of whether a client has lied. The dual master problem is clear; is the client being questioned on behalf of the program's audit or on behalf of the Corporation's oversight function. Different interests and responsibilities are involved.

There is a history of correspondence between LSC and AOA regarding the issues of client eligibility audits. The letters are in the General Counsel's files (Linda Perle can probably locate them). AOA ended up with an independent eligibility file system, I believe, but I'm not sure of either the exact limits or the results of any follow-up litigation. As to the experience of Pennsylvania, it may be instructive in this general area that funding was cut off for reasons having little or nothing to do with the ability to audit eligibility. As in most cases in legal services, the actual facts of proper conduct, if not very strongly asserted, may not be able to overcome the political rhetoric. Similarly, taking bold steps to cure small problems may have little effect on pre-existing myths about activities. The basic program is what has to be sold.

cc.: Pat Yogus
Clint Lyons
Mary Wieseman

LEGAL SERVICES CORPORATION

MEMORANDUM

Date: July 1, 1982

To: Gerald Caplan

From: Patrick J. Yogus by Robert Jones

Subject: Auditing of Client Eligibility

You requested that I prepare a memorandum explaining the Audit Division's current policy regarding auditing client eligibility, and commenting on the audit ramifications of including the audit of client eligibility within the scope of the annual financial audit.

CURRENT AUDIT POLICY REGARDING CLIENT ELIGIBILITY

The current scope and objectives of the annual financial audits are limited to determining whether:

1. The financial statements present fairly the recipient's financial position and results of operations in accordance with generally accepted accounting principles applied on a consistent basis.

2. The accounting system and related internal controls of the recipient are operating effectively and adequate records are being maintained.

3. Costs incurred are reasonable, applicable to the legal assistance program, and eligible under LSC requirements.

With respect to eligibility of costs, the audit must include sufficient tests to ensure that (a) costs are eligible under LSC criteria discussed in Chapter 4 of the Audit Guide (see attached), and (b) the recipient is in compliance with the accounting terms and conditions of the grant or contract.

The scope of the annual financial audits does not include the requirement to audit the eligibility of clients. The Corporation had concluded that financial eligibility information provided by a client would be protected by the attorney-client privilege and, therefore, that information should not be made available to auditors.

I have attached a letter dated September 8, 1976, from LSC's General Counsel which documents the policy governing audits of client eligibility. The letter indicates in part:

> Our regulations require a program to obtain all information necessary to determine eligibility, and after deleting information identifying the client, to preserve the records for audit and review by the Corporation. A similar review by the state would be appropriate. We believe that periodic review by the Corporation will ensure that the staff is complying with established procedures and not providing assistance to ineligible clients.

The responsibility for the review of client files from which identifying information has been deleted was assigned to the Office of Field Services. It has been the Corporation's policy that assurances through these reviews that recipients were complying with established procedures is sufficient to ensure that they are not providing assistance to ineligible clients. The September 8, 1976 letter discusses the basis for this policy in more detail.

RAMIFICATIONS OF AUDITING CLIENT ELIGIBILITY THROUGH THE AUDIT PROCESS RATHER THAN THE MONITORING PROCESS

We currently have on file an ABA opinion dated December 10, 1979, (see attached) that makes it clear that client trust accounts may be audited, provided that the program chooses the auditors carefully and makes them aware of the need for confidentiality in handling identifiable client information which would be revealed pursuant to the audit. It would appear that this opinion could be logically extended to the audit of client eligibility. Therefore, it would be feasible to include the audit of client eligibility in the scope of the annual financial audit or through separate independent audits. The change may be desirable from the standpoint that the Division responsible for ensuring compliance would not also be responsible for reporting upon the level of compliance.

If the audit procedure were restricted to our current procedure, i.e., having access only to files with all identifying information removed, the auditors could not opine on whether or not

the clients served were eligible. They could only opine on whether or not the clients' procedures for determining eligibility had been followed. In order for an auditor to conclude as to the actual eligibility or ineligibility of a client, he would normally have to verify the eligibility information directly with the client or by other means such as reference to welfare roles, confirmation with state welfare departments, or other such means.

The ABA opinion of December 10, 1979, refers to an independent auditor employed by the program. The LSC Board of Directors is currently considering appointing a single auditor for all recipients. I do not know whether or not the change in relationship between the program and the auditor would change the ABA's opinion; however, that eventuality might impact the feasibility of including the audit of client eligibility in the scope of the annual financial audit.

OTHER PERTINENT INFORMATION

We contacted the Pennsylvania Legal Services Center which administers HHS Title XX funds and provides grants to a number of our recipients in Pennsylvania. A spokesman for PLSC stated that annual audits of Title XX eligibility are performed through a separate contract with the same auditors who also perform the PLSC financial audits. The auditors are given full access to client files, which they examine on a random sampling basis using an agreed upon work program. The auditors' contract includes a confidentiality provision, which prevents release of client names to HHS, PLSC, etc. PLSC receives a written report of the auditors' results, and has been satisfied with this approach. If the Corporation decides to use a similar approach, we may wish to consult further with PLSC officials on their experience.

PJY/jb-mj

cc: Gerry Singsen
Clint Lyons
Mary Wieseman
Linda Perle

CHAPTER 4 - INELIGIBLE COSTS

4-1 CRITERIA

This chapter establishes criteria for determining the eligibility of costs incurred under LSC grants or contracts. The general concept of eligibility is that all costs incurred by the recipient must be necessary and reasonable for the effective operation of the program. Reasonable costs are defined as costs which reflect the actions of a prudent person after considering the circumstances at the time the costs were incurred.

4-2 INELIGIBLE COSTS

LSC has identified the following costs which are ineligible charges to LSC grants or contracts:

1. Costs not adequately supported by vendors' invoices, payroll registers or other documents.
2. Costs that are unreasonable or unnecessary.
3. Costs of the following (to exclude audit contracts, all of which are exempt) incurred without the prior written approval of the regional director.
   a. Consultant contracts in excess of $2,500.
   b. Consultant fees in excess of $192.75 per eight-hour day.
   c. Single purchases of equipment or property having a purchase price in excess of $5,000.
   d. Leases of equipment when the purchase price of the equipment would exceed $5,000.
4. Costs specifically excluded by the grant or contract agreement or LSC rules, regulations, or guidelines.

4-3 PARAMETERS FOR ELIGIBILITY CRITERIA

1. Consultant services secured on behalf of program management, i.e., labor/management representation, defense of law suits against the recipient, etc., are subject to regional office approval in accordance with the criteria noted above.

2. Consultant services secured on behalf of a client of a recipient, i.e., co-counsel, expert witnesses, etc., are not subject to regional office approval under the criteria noted above. Costs incurred for such services should be in accordance with properly approved recipient policies.

(Revised September 1981)

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

77 S. WACKER DR., 6TH FLOOR, CHICAGO, ILLINOIS 60606 TELEPHONE 621-9250 or 9251

CHAIRMAN
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December 10, 1979

DEC 17 1979

Mr. Dan J. Bradley, President
Legal Services Corporation
733 Fifteenth Street, N.W.
Washington, D. C. 20005

Re: Informal Opinion No. 1443 -
Examination by Outside Auditors of Client Trust Funds Records of Legal Services Program

Dear Mr. Bradley:

You have asked this Committee's advisory opinion on the question indicated below.

The Legal Services Corporation, established by Congress, financially supports a large number of legal services programs to provide legal assistance in non-criminal proceedings or matters to persons unable to afford legal assistance.

The statutory charter of the Corporation declares that attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Model Code of Professional Responsibility of the American Bar Association and the high standards of the legal profession. The statutory charter declares that the Corporation shall not interfere with an attorney's carrying out his professional responsibilities to his client as established in the Model Code and shall not abrogate the authority of a state to enforce the standards of professional responsibility generally applicable to attorneys in the state, and that the Corporation shall ensure that the programs carry out the supported activities in a manner consistent with attorneys' professional responsibilities.

The statutory charter of the Corporation declares that the Corporation shall conduct, or require the local program to provide for, an annual financial audit, and make the audit report available for public inspection.

The statutory charter provides, however, that the Corporation shall not have access to any reports or records subject to the attorney-client privilege.

The Corporation has published an audit and accounting guide for program auditors. The guide requires each supported program to maintain records of receipts and disbursements of client funds, and to do so in a manner that provides an adequate audit trail for the transactions.

Most supported programs engage independent accountants to make the required audit.

The records of client funds, of course, identify the clients and the nature of the transactions or events with respect to which the program received and disbursed funds of or for the clients.

You ask whether or not lawyers who serve clients through a local legal services program can, without violation of professional responsibilities to clients, allow outside auditors to examine the client trust account records, when the auditors are employed by the program to do so in order to meet requirements imposed upon the program by the program's funding source.

It is this Committee's opinion that such an audit does not necessarily entail a violation of professional responsibilities to clients.

This opinion is limited to interpretation of the Model Code of Professional Responsibility as adopted by the American Bar Association.

Canon 4 of the Model Code obligates a lawyer to preserve the confidences and secrets of a client. The obligation is of ancient origin, based on public policy in the administration of justice.

We perceive nothing in the Model Code that makes the professional obligation inapplicable to lawyers employed by legal services programs wholly or partly supported by public funds or that excludes a non-feepaying client from the protection and benefit of the professional obligation.

Disciplinary Rule 4-101(A) defines "confidence" as information protected by the attorney-client privilege under applicable law and defines "secret" as other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing to the client or would be likely to be detrimental to the client.

In this Committee's view, information reflected in a lawyer's records of client trust funds could, in some circumstances, be either a confidence or a secret, especially the latter. See Informal Opinions 1188 (1971) and 1287 (1974).

In Formal Opinion 334 (1974) we reaffirmed our belief that staff lawyers or legal services programs should not disclose confidences and secrets of a client in the absence of understanding consent of the client, and that, in disclosing to the program's policy-making or governing boards information about clients and cases, the lawyers should follow procedures to preserve the clients' anonymity.

This is not to say, however, that a legal services program cannot properly employ responsible specialists from outside the program to examine and audit the program's financial records. Indeed, such an independent audit of trust funds may be prudent, if not necessary, in proper management of a law office, whether or not supported by governmental grants.

Disciplinary Rule 4-101(D) recognizes that a lawyer uses the services of persons in addition to himself in order to render legal services to clients, but obligates the lawyer to use reasonable care to prevent those persons from disclosing or using confidences or secrets of a client. Ethical Consideration 4-2 recognizes that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office. Ethical Consideration 4-3 recognizes that, unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for accounting and other legitimate purposes, if he exercises due care in the selection of the agency and warns the agency that the

information must be kept confidential. In Informal Opinion 1364 (1976), which dealt with a law firm's use of a computerized data processing bureau for efficient record keeping, this Committee expressed belief that such use of outside specialists is comparable to the use of employees and associates and, accordingly, is embraced within the rule that refers to "others whose services are utilized by him." We cautioned, however, that client relationships may suggest that the lawyer notify a client in advance, such as when the lawyer has reason to believe the client does not realize that modern business and legal practice and technology require the use of outside agencies and persons.

We conclude that a legal services program may properly employ an independent accountant, chosen with reasonable care, to examine and audit the program's records of receipts and disbursements of client trust funds, if the independent accountant undertakes confidentiality in the handling of the information. //

In reaching our opinion, we assume that neither the independent accountant nor the local program reveals to the program's funding source or other third party any information that identifies a particular client or that otherwise is a confidence or secret of a client. //

We find it unnecessary here to address the applicability of Disciplinary Rule 4-101(C)(2), which allows a lawyer to reveal a confidence or a secret when the revelation is required by law.

We also find it unnecessary here to determine the extent to which a lawyer's duty not to reveal a client's confidences and secrets is waived if the lawyer or the legal services program gives advance notice to clients that the records of client trust funds are subject to examination by outside auditors.

We also find it unnecessary here to determine the application of the Freedom of Information Act, nor do we have jurisdiction to do so. We note, however, that the statutory charter of the Legal Services Corporation declares that the Corporation is subject to the FOIA.

We note also that regulations promulgated by the Corporation require a supported program to make certain information available to the public, but not information furnished to the program by a client nor material used by a program in providing representation to a client.

Very truly yours,

Sherman S. Welpton, Jr.
Chairman

SW:yw

September 8, 1976

William McNally, Esq.
Executive Director
Greater Boston Legal Aid Society
27 School Street, 5th Floor
Boston, MA 02108

Dear Mr. McNally:

You have asked my opinion concerning the appropriate scope of state audit review of the identity of clients of legal services programs and of financial eligibility information provided by them in order to qualify for representation. I believe that any state audit must be undertaken in a manner that is consistent with the provisions of the Legal Services Corporation Act concerning audit of local programs by the Legal Services Corporation or the Comptroller General of the United States.

The Legal Services Corporation Act requires us to enforce regulations governing financial eligibility for assistance, and Section 1008(a) authorizes the Corporation to require whatever reports may be necessary to insure that recipients of Corporation funds comply with the Act and our Regulations; but Section 1009(d) of the Act states that "neither the Corporation nor the Comptroller General [of the United States] shall have access to any reports or records subject to the attorney-client privilege." Congress thus weighed accounting needs against the value of protecting the attorney-client privilege, and made a considered judgment that necessary accountability could be achieved without requiring disclosure of confidential information. We agree with the Congressional judgment

that the confidences of legal services clients are entitled to the same protection as those of private lawyers' clients, and see no loss of accountability resulting from our lack of access to information protected by the attorney-client privilege.

We believe that it is possible to insure that a program is complying with applicable regulations governing eligibility without disclosure of eligibility information provided by identifiable clients. Our regulations require a program to obtain all information necessary to determine eligibility, and after deleting information identifying the client, to preserve the records for audit and review by the Corporation. A similar review by the state would be appropriate. We believe that periodic review by the Corporation will insure that the staff is complying with established procedures and not providing assistance to ineligible clients.

Canon Four of the ABA Code of Professional Responsibility prohibits a lawyer from revealing confidences or secrets of a client, and courts have held that financial eligibility information provided by a client is within the privilege. In 1974 the ABA Committee on Ethic and Professional Responsibility issued Informal Opinion 1287 stating that it would be a violation of Rule 4-101 for a legal services office to disclose the names, addresses, telephone numbers of its clients to outsiders. In April of this year, the Board of Governors of the ABA passed a resolution opposing the Title XX reporting requirements then in effect because of the ethical problems they posed. NLADA took the same position. On May 19, 1976, HEW revoked the objectionable regulation requiring individual recipient basic data files. Consistent with those opinions, and with Congressional

policy expressed in Section 1009(d) of the Legal Services Corporation Act, we believe it would be improper for a legal services program to divulge either the names of its clients or identifiable financial eligibility information to a state auditor.

Sincerely,

Alice Daniel
General Counsel

AD:ld

Opinion No. L78-3

LEGAL SERVICES CORPORATION
Fifteenth Street, N.W., Washington, D. C. 20005 (202) 376-5100

Thomas Ehrlich
President
F. Clinton Hamberger, Jr.
Executive Vice-President

March 10, 1978

Ward L. Koehler, Esq.
Long and Koehler
Suite 12-A
El Paso National Bank Building
El Paso, Texas 79901

Dear Mr. Koehler:

In your letter of February 27, 1978, you asked whether the Board of Directors of the El Paso Legal Assistance Society could require a potential client applying for legal representation to sign a waiver of the attorney-client privilege, in order to permit the Board to review financial eligibility information furnished by the client.

Section 1611.6(c) of the Legal Services Corporation Regulations prohibits a legal services program from disclosing financial eligibility information, in a manner that permits identification of a client, to any person who is not employed by the program, unless the client consents to such disclosure. The American Bar Association Committee on Ethics and Professional Responsibility has made clear that such information is protected by the attorney-client privilege, and that members of the advisory committee or Board of Directors of a program should not be given confidences or secrets of the client because there is no lawyer-client relationship between the client and the Board or any member of it. Section 1006(b)(3) of the Legal Services Corporation Act requires the Corporation to insure that legal services activities are conducted in a manner consistent with the ABA Code. Further, Section 1007(a)(1) requires the Corporation to "insure the maintenance of the highest quality of service and professional standards, [and] the preservation of attorney-client relationships."

Section 1009(d) of the Legal Services Corporation Act is a significant expression of the Congressional judgment that the client of a legal services program is entitled to the same inviolate attorney-client relationship as the client of a private law firm. It states that neither the Corporation nor the Comptroller General of the United States shall have access to any reports or records subject to the attorney-client privilege. It is noteworthy that Section 1009(d) occurs in the context of a series of provisions dealing with audit by the Comptroller General of the Legal Services Corporation and its grantees. The section shows that Congress weighed accounting needs against the attorney-client privilege and made the considered decision that the value of protecting the privilege outweighs the minor accounting inefficiencies that may result from denying the Corporation or the Comptroller General access to protected information. We do not think that Congress intended that the information protected by Section 1009(d) of the Act should be revealed to the Board of Directors of a legal services program.

The Report of the House Committee on Education and Labor (H.R. 93-247, 93rd Cong. 1st Sess.) states that eligibility shall be determined "in a manner that produces utmost trust and confidences between attorney and client", and that Congressional direction is implemented in Section 1611.6(b) of Legal Services Corporation Regulations. Requiring waiver of the attorney-client privilege would be inconsistent with that mandate.

We appreciate the concern of your Board of Directors in insuring that financial eligibility guidelines are followed, but that can be done without requiring waiver of the attorney-client privilege. In consultation with the Corporation's Regional Director, the Board can insure that the application

forms used by the program are adequate to obtain all necessary information, and that program personnel are properly trained to use the forms correctly. Periodically, a member of the Board could review a random sample of intake applications, from which the client's name had been deleted, to insure that over-income applicants are not being served. Finally, of course, the competence and integrity of program staff are the major means of insuring that the eligibility guidelines, and all other Corporation Regulations, are being followed.

The Corporation firmly believes that the clients of a legal services program are entitled to high quality assistance, dignified treatment, and to the maximum extent possible, all the advantages that would be available if the person were able to afford private legal assistance.

For all these reasons, your request for a waiver of Section 1611.6(c) must be denied.

Very truly yours,

Alice Daniel
General Counsel

cc: David Gilbert
Israel Galindo

LEGAL SERVICES CORPORATION
Fifteenth Street, N.W., Washington, D. C. 20005 (202) 376-5100

June 14, 1976

Martha Robinson, Esq.
Chairperson
Ethics Committee
Los Angeles County Bar Association
606 S. Olive Street, Suite 1212
Los Angeles, California 90014

Dear Ms. Robinson:

As you know, the Legal Services Corporation was established by an Act of Congress to provide financial support to legal services programs assisting the poor, who otherwise would not have access to our system of justice. The Legal Aid Foundation of Long Beach is a recipient of Legal Services Corporation funds at a current annual level of approximately $432,000. We have been informed that the Board of Directors of the Legal Aid Foundation of Long Beach has asked your committee whether it is ethically proper for a staff attorney of the Foundation to divulge to the Board financial eligibility information furnished to the Foundation by a named client.

The Legal Services Corporation Act requires us to enforce regulations governing financial eligibility for assistance, and Section 1008 authorizes the Corporation to require whatever reports may be necessary to insure that recipients of Corporation funds comply with the Act and our Regulations, but Section 1009(d) of the Act states that "neither the Corporation nor the Comptroller General [of the United States] shall have access to any reports or records subject to the attorney-client privilege." Congress thus weighed accounting needs against the value of protecting the attorney-client privilege and made a considered judgment that necessary accountability could be achieved without requiring disclosure

of confidential information. We agree with the Congressional judgment that the confidences of legal services clients are entitled to the same protection as those of private lawyers' clients, and see no loss of accountability resulting from our lack of access to information protected by the attorney-client privilege.

We appreciate the concern of the Board of Directors of the Legal Aid Foundation of Long Beach, which is interested in insuring that the program is complying with Board policies governing financial eligibility, but we believe those policies can be enforced without disclosure of confidential information. After investigation, we are satisfied that the procedures followed by the Legal Aid Foundation of Long Beach are adequate, and we have full confidence in the integrity of the staff in carrying them out. The Legal Aid Foundation preserves for audit and review by its Board of Directors and the Corporation eligibility records that delete information identifying the client. Periodic review by the Corporation and by the Board will insure that the staff is complying with established procedures and not providing assistance to ineligible clients.

Canon Four of the ABA Code of Professional Responsibility and Section 6068(e) of the California Business and Professions Code prohibit a lawyer from revealing confidences or secrets of a client, and in People v. Canfield, 12 Cal. 3rd 699, 704 (1974), the Court held that financial eligibility information provided by a client is protected by the privilege. The Corporation is in agreement with the view expressed in Formal Opinion 334 of the American Bar Association Committee on Ethics and Professional Responsibility (August 1974) that a client of a legal services program does not have a lawyer-client relationship with members of its governing body. The Los Angeles County Bar Ethics Committee reached a similar position in Opinion No. 339 (September 27, 1973, revised December 4, 1973), as did the North Carolina Bar in Ethics Opinion CPR 68. Consistent with those opinions, and with the

Legal Services Corporation Act, we believe it would be improper for the Legal Aid Foundation of Long Beach to divulge the information requested by the Board of Directors.

If you have any questions about the position taken by the Legal Services Corporation in this matter, George Berns, Deputy Director for Region IX, would be pleased to discuss them with you. His address and telephone number are: Legal Services Corporation, San Francisco Regional Office, American Savings Building, 690 Market Street, Suite 700, San Francisco, California, 94104, 415+556-6952.

Sincerely,

Alice Daniel
General Counsel

cc: George Berns, Esq.
Toby Rothschild, Esq.
Charles E. Greenberg, Esq.
Committee on Professional Ethics, State Bar of California

AD:ld

LEGAL SERVICES CORPORATION

The Legal Services Corporation is responsible for providing funds to programs around the country that offer free legal assistance to persons unable to afford such services. The Legal Services Corporation Act imposes on the Corporation the further responsibility to "insure that all attorneys, while engaged in legal assistance activities supported in whole or in part by the Corporation, refrain from . . . any . . . activity prohibited by the Canons of Ethics and Code of Professional Responsibility of the American Bar Association . . ." 42 U.S.C. §2996f(a)(10).

One of the most revered duties of any attorney is his or her responsibility to preserve the confidences and secrets of a client. This responsibility is described in Canon 4 of the Code of Professional Responsibility and the Disciplinary Rule (DR 4-101) that relates to that Canon. In a series of opinions over the last decade, the American Bar Association has clearly established that the identity of a client served by a legal services program is a "secret" within the meaning of Canon 4, and, hence, protected from disclosure except under certain narrowly defined circumstances. Where legal assistance is supported with funds appropriated by Congress, the lawyer's duty to preserve th secrets of his or her clients may conflict with the responsible agency's legitimate need to ensure that funds are used in the manner for which they were intended. Therefore, it seems reasonable to expect the agencies to seek some accommodation between accountability and professional responsibility, particularly where the alternatives are unacceptable.

Although both current and proposed Administration on Aging regulations recognize the client's right to confidentiality and seek to ensure that client identity information is not released an agency providing legal services without client consent (see current 45 C.F.R. §1321.139 and proposed 45 C.F.R. §1321.19), I understand that Nevada and other state agencies administering Title III either do not appreciate the problem or care about th consequences of their demand which they justify by reference to a provision of HEW's administration of grants regulations, 45 C.F.R. §74.24. This provision deals with access to grantee rec and states that HEW or its representatives "shall have the righ of access to any books, documents, papers, or other records of

grantee which are pertinent to the HEW grant, in order to make audit, examination, excerpts, and transcripts." Clearly these two provisions must be read so as to effectuate the underlying purposes of each. The funding agency's right to access must not be exercised at the expense of client confidentiality where it does not need to be.

The conflict between the interests is by no means irreconcilable. Washoe Legal Services offered to permit an independent auditor hired by the program to verify the statistical information submitted to the state agency. The auditor would have access to client identity information, but would be under an ethical obligation similar to that of an attorney to keep the information confidential. This solution has been used successfully by legal services programs in Pennsylvania to account for their Title XX funds. A recent Informal Opinion of the American Bar Association (No. 1443) has sanctioned this alternative as well.

Washoe's offer, which is decidedly reasonable in that it would permit its attorneys to meet their ethical obligations to their clients while still meeting the legitimate needs of the state agency to ensure that funds it administers are being used for the purposes for which they were intended, was repeatedly rejected or met with clearly unacceptable restrictions which violated the obligation in issue. Although in recent days some progress has been made toward reaching an acceptable resolution, Washoe still has no firm guarantee that its Title III funding will continue beyond the brief period allowed for appeal of the termination decision.

Assuming that the decision to terminate is upheld, Washoe Legal Services will be faced with a Hobson's choice: either they must turn over the names and addresses of their clients to the funding agency in violation of their ethical obligations to those clients, risking possible bar-imposed sanctions in the process, not to mention placing in issue continued funding from the Legal Services Corporation, or forego substantial supplemental funding that has enabled them to provide much needed services to additional senior citizens residing in the area served by the program. Not only is it unnecessary and unreasonable that Washoe should be faced with this choice, it also invites a result that is inconsistent with the clear congressional mandate of The Comprehensive Older American Act Amendments of 1978 (P.L. 95-478) that Legal Services

LEGAL SERVICES CORPORATION

Corporation funded programs be given preference in decisions awarding Title III legal services funds.

Section 307(a)(15)(B) requires state plans for the use of those funds to assure that, in addition to selecting the best entities to provide legal services, area agencies on aging will contract for the use of these funds with either Legal Services Corporation grantees or agencies that agree to coordinate their services with the Corporation funded projects in the area. Section 307(a)(15)(A) also requires state plans to assure that area agencies on aging enter into contracts with providers who can demonstrate the experience or capacity to deliver legal services and who will agree to be subject to those specific restrictions currently imposed on programs by the Legal Services Corporation Act that the Commissioner of the Administration on Aging determines to be appropriate.

If the agencies that administer Title III funds insist that legal services attorneys violate their ethical obligations to their clients as a condition of funding, Legal Services Corporation grantees, which in many areas are the only experienced programs capable of providing legal services to the elderly, will not be able to contract with those agencies. Section 306(a)(2) requires that at least 50 percent of the amount allotted for social services in an area under Title III be used for three categories of services including legal services, and that some funds must be expended in each area for each of the three categories. Area agencies on aging may be in the anomolous position of not being able to meet their statutory mandate to spend funds on legal services because of the justifiable inability of legal services programs to accept the funds subject to the proposed conditions.

As General Counsel to HEW you are in a unique position to effect a reasonable resolution to this problem since, as a lawyer, you are personally acquainted with the ethical obligations involved, and as an HEW official, you are charged with final interpretation of the statutes and regulations at issue. I therefore urge you to take the following steps: First, to seek a stay of the termination proceedings against Washoe Legal Services, and second, to secure

LEGAL SERVICES CORPORATION

the adoption of an official position, applicable to all legal services programs funded by HEW, that recognizes the ethical obligation of attorneys not to reveal the secrets and confidences of their clients. I am certain that procedures can be established that would provide state agencies with the information they believe necessary to fulfill their audit responsibilities to HEW, without forcing a breach of client confidences or the termination of services.

I would be happy to discuss this issue further with you at your earliest convenience.

Sincerely,

Mario Lewis
General Counsel

cc: Washoe Legal Services

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
THE OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

THE GENERAL COUNSEL

1 MAY 1980

Mario Lewis, Esquire
General Counsel
Legal Services Corporation
733 Fifteenth Street, N.W.
Washington, D.C. 20005

Dear Mr. Lewis:

This is in response to your letter concerning the client confidentiality obligations of Legal Services Corporation grantees which also receive funds under HEW-administered programs, such as Title III of the Older Americans Act. I am in complete agreement with your suggestion that HEW's position on the requirements for federal and state auditing of Department-funded legal services programs take into account the obligations of legal services attorneys to protect the confidences of their clients.

As you are aware, the Title III program is a joint federal-state program and is run primarily by the states, with HEW providing federal matching funds. At the time I learned about the termination of Title III funding for Washoe Legal Services by the Nevada Department of Human Resources, the Commissioner on Aging, Robert Benedict, who has responsibility for administering the Older Americans Act, had already contacted the state agency. He had, in writing, requested the state agency not to terminate Washoe Legal Services solely on the grounds of its refusal to disclose a list of the Title III clients it had served. Upon request, the Commissioner also provided a copy of his statement to Washoe Legal Services, and it is my understanding that the legal services program has obtained an injunction against termination of its Title III grant. At the same time, in response to your letter, I have asked my staff to pursue the matter with the Commissioner on Aging and the state agency. A copy of the Commissioner's most recent letter to Nevada is enclosed, and my staff will be following up on it.

With respect to the general policy issue you raised, I share your goal of developing policies that would permit

Legal Services Corporation grantees to furnish Title III, or other HEW program, services consistent with the confidentiality obligations of the attorneys providing those services. The final Title III regulations, published in the Federal Register on March 31, 1980, (45 FR 21126), reflect this concern and authorize access by government monitoring agencies only to that information which is required to ensure that the programs funded are administered properly and serve only eligible clients. The preamble to the regulation explains that we expect monitoring agencies to use the least intrusive means possible to obtain necessary information, and suggests the use of an independent auditor, as you recommended in your letter.

Needless to say, this present policy is not cast in stone, and I would be glad to meet with you to discuss any further specific proposals you might have for establishing an appropriate balance between the interests of both government and beneficiaries in the proper use of grant program funds and the right to confidentiality of beneficiaries receiving legal and other program services.

Sincerely,

Joan Z. Bernstein

Joan Z. Bernstein

Enclosure

cc: Robert C. Benedict
Commissioner on Aging

Cesar Perales
Assistant Secretary for
Human Development Services

LEGAL SERVICES CORPORATION
733 Fifteenth Street, N.W., Washington, D.C. 20005

David J. Bradley
President

Writer's Direct Telephone
(202) 272-4010

August 29, 1980

Joan Z. Bernstein, General Counsel
Department of Health and Human Services
300 Independence Avenue, S.W.
Washington, D.C. 20201

Attention: Helen Trilling, Esq.

Dear Ms. Bernstein:

This letter is intended as an initial response to your letter of May 1, 1980, inviting the Legal Services Corporation to suggest proposals "for establishing an appropriate balance between the interests of both government and beneficiaries in the proper use of grant program funds and the right to confidentiality of beneficiaries receiving legal and other program services." We have not attempted to describe in detail the specific course that HHS should take in developing and implementing a policy in this area. Rather, we have outlined the considerations that we recognize as applicable in the policy development process, and suggest the approaches we believe appropriate in light of the variety of considerations that are involved. We have also attempted to address the principal concerns expressed by various members of the HHS staff in our conversations over the last several months.

The primary issue that must be faced in designing any policy is the degree to which a client's right to privacy and a legal services attorney's ethical obligation to protect that client's confidences and secrets, including his or her identity, are superior to the demands of a funding agency for access to information maintained by the legal services program about the client and his or her legal problem. Neither the Corporation nor any of its grantees have suggested that a funding agency may not have legitimate needs for information about the clients served by a legal services program. The question is whether the information requested is, in fact, necessary for the agency to fulfill legitimate governmental interests and whether the need may be met by aggregate statistical data, by client-specific material cleansed of identifying information, or otherwise by independent or cooperative verification of data.

At the outset, it should be noted that where the issue of client confidentiality versus access to client information has been raised, the information needs the funding agencies have sought to satisfy have related to the performance of the legal services programs under the terms of their grants or contracts; the issue has not been raised as a result of suspected wrong-doing by individual clients, nor has the aim been to disqualify individual clients from receiving services. Thus, the government's information needs do not have any relation to the identity of individual clients.

In recent years the Supreme Court has recognized that individuals have constitutionally protected rights to privacy in avoiding compelled disclosure of personal matters, and have generally established that those privacy interests should be respected whenever possible by the government. Where a protected interest is jeopardized by state action the Court has balanced that privacy interest against the legitimate state interests that are at stake, and has required the state's action to be narrowly drawn. See, e.g., Roe v. Wade, 410 U.S. 113; 93 S. Ct. 705, 725 (1973); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 83; 96 S. Ct. 2831, 2847 (1976); Nixon v. Administrator, General Services Administration, 433 U.S. 725, 757; 97 S. Ct. 2777 (1977).

In addition to the protections guaranteed by the Constitution, there are limitations on an attorney's disclosure of client information that are mandated by the nature of any professional relationship as well as those specifically imposed by the ethical obligations of the legal profession. Professional relationships are premised on the development of mutual trust and confidence between the client and the service provider whose assistance is sought,1/ since the ability to provide adequate services depends on the full and free revelation by the client of all information that might relate to the problem at hand or other problems that may be of concern. The client who is not assured that these revelations are made in the strictest of confidence, cannot be expected to be totally candid about those matters that he or she would not want revealed to a third party.

Communications between lawyer and client have traditionally been regarded as confidential. Legal services clients have a recognized interest in and expectation of non-disclosure of information they have provided to their attorneys. The fact that a legal services program is publicly funded should not be taken to signify to a client receiving professional services that the transactions are not subject to protection or that the client's communications are open to scrutiny by a third party.

1/ Legal Services Corporation's regulations require that--

> A recipient . . . adopt a simple form and procedure to determine eligibility in a manner that promotes the development of trust between attorney and client.

45 C.F.R. §1611.6(a).

The attorney's obligation to protect a client's confidences and secrets is delineated by the ABA Code of Professional Responsibility and the opinions that interpret it. State codes of professional responsibility have generally adopted the ABA Code and have made its precepts an integral part of the law of each state. Attorneys who breach the provisions of the Code are subject to disciplinary action, including disbarment, by the bar or the courts of state. Canon 4 of the Code requires that a lawyer should preserve the confidences and secrets of a client.2/

The ABA Code recognizes that the obligation to preserve secrets and confidences is not without limits, however. In addition to practical limitations that may be required by modern law-office practices3/, the Code recognizes that there are circumstances under which the client's expectations may have to give way to other

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2/ According to Disciplinary Rule 4-101(A), confidences are those items of information that are protected by the attorney-client privilege as determined by the evidentiary rules of each jurisdiction; confidences would most likely include substantially all of the information that is to be found in a client's file that relates to the facts and legal issues of the case. Secrets, which are much broader in scope than confidences, are those other items of information gained in the professional relationship that the client has specifically requested to remain confidential, or the disclosure of which would be embarrassing or likely to be detrimental to the client; secrets would include financial and personal data about the client and, for legal services clients, the client's identity itself. Although, in general, opinions of the ABA have not recognized a client's identity to be a secret under the Code, an exception has been carved out for legal services clients in ABA Informal Opinion 1287 (June 7, 1976) which states that the names, addresses and telephone numbers of legal services clients are secrets within the meaning of DR 4-101. In addition, at least one State Supreme Court - Pennsylvania - has specifically included in its rules a provision making the identity of any client, whether represented by a legal services program, private attorney or other legal counsel, a secret under the state's ethical rules. The obligation of the attorney to preserve the client's secrets extends to information that may be available elsewhere, even if a matter of public record, like a court pleading.

3/ For example, it is recognized that confidential information may have to be revealed to partners, associates, paralegals, secretaries and other employees of the law firm in order to adequately provide necessary legal services (DR 4-101(D)), and that the reality of technology may require the revelation of some information to computer service bureaus, accounting firms and others under contract to the law firm. (Ethical Consideration 4-3).

considerations, as when required by law or court order. Thus, when ordered by subpoena enforceable by a court of competent jurisdiction, the lawyer may reveal confidences or secrets, and need not risk being held in contempt of court (DR 4-101(c)(2)).

In light of both the client's legitimate expectation of privacy and the lawyer's obligation to maintain the confidentiality of information entrusted to him or her, the stated government interest in particular identifiable client information must be carefully assessed in light of the actual demonstrated need for this information. Any policy developed by HHS should be premised on the fundamental notions that (a) all requests for access to information, whether confidential or not, should be justified by the need to fulfill a particular agency function, and (b) there is a strong, almost irrebuttable, presumption against access to confidential and/or client-identifying information that can be overcome only by a demonstration of need arising from a prevailing governmental interest that cannot be met in a less intrusive fashion.

The Corporation recognizes that it as well as other agencies with responsibility for monitoring the use of public funds have legitimate needs for access to information maintained by the programs they fund. Certainly, a policy that gave carte blanche access to all program records, whether confidential or not, could provide the funding agencies with some, although not all, of the information that they would need to monitor those programs, but would provide much unneeded and probably useless data, and run headlong into the confidentiality concerns discussed above.4/

4/ It should be noted that neither the Social Security Act nor the current HHS regulations actually require the inspection of individual case files. In 42 U.S.C. §1397e it is merely stated that "the Secretary shall provide for the continuing evaluation of state programs...." In 45 CFR §201.10(b) it speaks of "statistically selected samples of individual cases," and 45 CFR §228.70(a)(13) deals with "financial and other records pertaining to the program...." Thus, an HHS policy recognizing the special confidentiality concerns of legal services providers would not conflict with existing law. In fact, such a policy would be in harmony with the confidentiality policies expressed in 45 CFR §205.50 and 45 CFR §1619.4 (Legal Services Corporation regulation on Disclosure of Information).

An administrative consideration of importance to legal services programs having both HHS and Corporation funding is the desirability of administrative compatibility between the monitoring procedures of both funding sources. It is in the interests of simplified and uniform program administration, as well as the equitable treatment of clients, that the same protections apply to all client records, without regard to the funding source. Indeed, the designation of a particular funding source for services to a client may be simply a function of a program's cost allocation procedure. The question of whether to grant access to particular client records may turn on the random fact of the funding source designation and may involve granting the agents of one funding source access to records that another funding source would wish to have remain confidential. This anomoly would introduce an undersirable element of arbitrariness into legal services program administration, as well as tamper with the privacy rights of individual clients merely because of their funding source designation.

Most questions regarding quantity and type of services provided, eligibility of clients served, and maintenance of effort by programs can be answered, at least in the first instance, by aggregate statistical information compiled by programs from their own records. Only in those instances where there is some reason to doubt the validity of that statistical information should there be any reason to look behind the statistics themselves, and the funding agency should have the burden of justifying why, with several less intrusive alternatives available, it is necessary to have actual access to client-identifying information.

Most discrepancies between actual services and reported statistical data are probably explained by defects in the data collection and reporting systems. Such defects can be uncovered and corrections suggested by independent auditors, who may be the same auditors who perform required financial audits for legal services programs. Such auditors can judge the adequacy of a variety of systems and can confirm those judgments by random sampling of records. In recent years, with the expansion of contractually-administered human service programs, auditors have gained increasing experience in working with state and federal monitoring personnel to determine those areas of program operations of particular concern and to design the best approach to isolating the problem systems. Such auditors acknowledge a professional obligation to inform the funding source of significant problems identified by their review.

To the extent that questions about the validity of statistical information cannot be resolved by evaluating the systems that produced the data, other verification techniques can be utilized. Once again, the independent auditor can contract with the program to sample in more detail the records that provide the back-up for the statistics and can certify to the funding agency that statistics are accurate or can estimate a realistic error rate.

One issue among several raised by HHS staff is why it is preferable to employ an independent auditor, under contract to the legal services program, as opposed to an auditor or other employee of the funding agency. The difference is critical with respect to maintaining the client's privacy, a trusting relationship and the lawyer's ethical obligations. An auditing firm is bound by its own professional responsibility to maintain independence and objectivity in its review of the program. It owes both the program and the funding agency an obligation of unbiased disclosure of significant problems affecting program administration. Nevertheless, because of its contractual relationship with the program, the auditors are under the same confidentiality obligations with respect to client data as are employees of the program. The ABA has sanctioned the use of independent auditors to review identifiable client records, albeit in a slightly different context (Informal Opinion 1443, December 10 1979). By contrast, employees of the funding agency or auditors under contract to that agency are under no direct obligation to the program's clients to maintain the confidentiality of the data collected.

Other alternatives are available and have been used with mixed success by legal services programs around the country. Because some alternatives have imposed severe administrative or financial burdens,6/ several programs have decided to refuse funding and forego providing additional services rather than accept the burdensome alternative monitoring procedures required to protect client identifying data. However, other programs have reported more success with a variety of alternatives and these may be acceptable under specific local circumstances.

6/ One program informed us that they were forced to hire a full-time clerk to maintain a system of duplicate files. As a result, the program had administrative costs of $22,000, or 33%, on a $66,000 Title XX contract. Certainly, such disproportionate allocation of resources that should be devoted to client services should be avoided.

Underlying all of these various alternatives is the presumption that clients should not be requested to give their consent to the disclosure of information that they have given to their attorneys. Not only would such a request severely undermine the development of confidence and trust between the attorney and client, since the client would know at the outset that his or her confidences would not be maintained, but the notion of consent is inherently coercive. Even though requests for consent can be made at the conclusion of a client's case and special efforts made to ensure that clients understand that they are in no way obligated to give their consent, nevertheless, the Legal Services Corporation's experience with such a system in its attempt to measure client satisfaction with services as part of the Congressionally-mandated Delivery Systems Study indicates that response rates are generally low and the sample of clients drawn may be severely skewed. One of the most likely reasons for this result is that without the coercion, most clients are unlikely to give their consent to disclosure. Such a system is unlikely to produce information that would be useful as a monitoring tool.

In addition to verification of statistical data provided by programs, funding agencies may have other legitimate monitoring responsibilities or research needs that can be met in a variety of ways short of gaining access to identifiable client records. There is developing a relatively refined "state of the art" in the evaluation of quality of legal services. One approach to such assessments is to review the overall quality of a particular program, evaluating, among other things, the range of services offered, the quality of program management, staff qualifications, intake procedures, caseload management and review procedures. This approach starts with the assumption that the quality of a program's services is a function of the total program's operation, not the particular judgments made or services provided in individual cases. Client confidentiality is a basic tenet of this approach and individual files, cleansed of all identifiable client information, are generally only viewed as examples of particular systems in use in the program.

A second approach to quality assessment is a peer review system, whereby attorney evaluators discuss randomly selected case files with program staff providing the services. In order for such a system to be at all valuable, the evaluators must be attorneys who are familiar with the kinds of services that are actually being provided. Again, the confidentiality of the clients is scrupulously safeguarded, so that the evaluators will not learn anything that might undermine the evidentiary privilege.

This is in sharp contrast to the medical services programs (Medicare and Medicaid), in which payment is generally made on a fee-for-service basis for specified services provided to individiual patients. The payment system that developed under Medicare and Medicaid derived from the original policy choice to utilize the existing private-practitioner delivery system and, therefore, to impose strict individual practitioner accountability. The public provision of legal services has developed differently, on the basis of a staff program model with an integrated national administrative structure. Thus, the differential treatment of the protection afforded the delivery of publicly-financed legal and medical services is accounted for by differing historical policy choices and their administrative applications.

Throughout this letter I have attempted to discuss the issues and concerns without specifying the form that a policy designed to address them should take. Nevertheless, there are a few benchmarks that should be kept in mind in designing such a policy. First it should be national in application and focus. That is, it should apply to all programs funded by HHS, whether administered on a national, state or local level. State and local information requests turn on actual or perceived duties to HHS to ensure accountability in the use of federal funds. Standards must be established and enforced on a national level, to ensure fairness as well as consistency in application. The standards that are developed must supersede any locally-determined contract provisions to ensure that clients' rights are protected even if their attorneys are not aware of or willing to press for their ethical obligations. Any policy must treat confidentiality as an issue of paramount importance and must be premised on a strong presumption that information demands must be fully justified and that disclosure of client-identifying information will be presumed to be unwarranted except under unusual circumstances.

Finally, I assume that any action that is pending or planned against legal services programs, including those in Pennsylvania, that have refused to grant access to identifiable client data will be halted, pending final resolution of the issues discussed herein.

I look forward to having the opportunity to discuss these issues further and to begin to frame a permanent policy for all HHS-funded legal services programs. Please contact Linda Perle of this office if you have any additional questions.

Sincerely,

Mario Lewis
General Counsel

"... The continued use of the name of a deceased or former partner, when permissible by local custom, is not unethical, but care should be taken that no imposition or deception is practiced through this use."

In Formal Opinion 208, it was stated,

"The Committee again emphasized that the name of a former member of a law firm should not be used in any manner that would be misleading or deceptive. To comply with this limitation, it is not uncommon to show a former member is deceased or has retired from the practice by indicating after his name the date he became and the date he ceased to be a member of the firm."

The past partnerships listed should be direct predecessors of the present partnership.

Subject to the limitations herein referred to, the Committee is of the opinion that the proposed letterhead does not violate the Canons of Ethics.

Informal Opinion 1081 February 3, 1969
Audit of Legal Services
Office—Confidential Communications

You have directed the following inquiry to this Committee as to whether the auditing of case files of neighborhood legal services offices involves a possible violation of the Canons of Ethics. We are told that the general accounting office has need to examine such files and that access is needed to determine, among other things, the types of cases handled, the results obtained, and whether income eligibility requirements are being met. It is proposed that the information sought will be obtained from intake and case disposition forms used by the legal services offices, but that any information in the form which would enable the general accounting office to identify the client will be blocked out.

The Canon primarily involved, Canon 37, states in part:

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information."

In view of the care it is proposed be taken not to divulge information which would identify the client, it is our opinion that the furnishing of other information to the general accounting office would not violate Canon 37 of the Canons of Ethics. *See* Informal Opinion 1002. Moreover, in the opinion of the Committee, the proposal to block out certain items in the copy of the

intake and case disposition forms furnished to the general accounting office is proper and there appears to be no necessity to block out any other items.

Informal Opinion 1082
Branch Office of Law Firm

November 20, 1968

You have asked for an opinion with respect to the following:

"We are contemplating the opening of a branch office of our law firm in our city.... My basic question goes to the ethicality of having a main office and branch office in the same city. Our main office would remain in its present location, a downtown office building containing various business and professional tenants. Our branch office would be located approximately two to five miles away, in the western area of our city, consisting mainly of suburban residential areas and shopping districts.... Our city has a population of about 65,000 and is the trade center of an area approximately 500 miles in diameter. We are the largest city in our state. No other law firm in our city has a branch office....

"The second portion of my question goes to the ethicality of the type of sign used. There is one other law firm with an office in the general area we are contemplating, and they have established an office in a residence and have erected a yard sign. This firm's sign contains the words *"Lawyer A, Lawyer B*—Attorneys at Law." The letters are approximately two to three inches high. If our firm establishes a branch office, would it be ethical for us to erect a similar sign in the yard of the building we occupy, assuming we are the only tenants?

"The third part of my question goes to the permissible type of letterhead to be used by our firm in the event we do establish the branch office. I have enclosed a number of proposed letterhead styles, and would appreciate the opinion of the Committee as to which ones might be permissible.

First, it is our opinion that there would be no impropriety in establishing a branch office and using the firm name for that office as well as the principal office of the firm. *See* Informal Opinion 959.

Next, we believe that a single, dignified and unostentatious "yard sign" or "shingle" such as you describe, placed in the yard of the building of which your firm is the only occupant, would not be improper.

Finally, we believe that any of the proposed styles of letterheads (*See* Appendix A) would be ethically acceptable. Our personal preference, for purposes of clarity and because the branch office is identified as such with its address separately stated, is Example 2 in Appendix A.

AMERICAN BAR ASSOCIATION
COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Re: **Informal Opinion 1267**
OEO Legal Services Client
Survey Proposal

June 7, 1974

The Committee has been requested to issue its opinion on whether proposed procedures for surveys to be conducted by an outside non-profit research group which include interviews of clients of Legal Services Offices are such that the Legal Services Offices can ethically participate. The primary objective is stated to gain research data for the outside group, but in order to gain access to the data, the group would design the survey to produce data desired by the Legal Services Center whose clients were interviewed and in respect to client priorities.

Outlined procedures include:

(a) Initial telephone contact with the client by an employee of the Legal Services Office to determine whether the client is willing to be interviewed. (An offered alternative was contact by the outside research group to determine whether the client wished to be interviewed.)

(b) The questions asked would relate to such topics as client demographics, accessibility of the Legal Services Office, client satisfaction with services, citizen participation, legal education and legal service priorities. No questions would be asked concerning specific fact situations or individual cases.

The survey questions would be submitted to the Board of the Legal Services Office. The proposal stated that one of the Board's functions in reviewing the questions would be to make sure that none of them violated the lawyer-client privilege. As a further precaution, the client at the time of interview would be advised that he need not answer any specific question to which he objected.

(c) The clients to be sampled would be randomly selected by the staff of the Legal Services Office. (An alternate was offered that the staff or

the research group would be willing to perform this task using client records furnished by the Legal Services Office.)

(d) Procedures would be followed so that no individual client identification would be possible after the interview data had been collected.

The issues raised appear to be the following:

(1) Are the names, addresses and phone numbers of clients of Legal Services Offices such information that they are "confidences" protected by the attorney-client privilege or "secret" information made so by client request or "secret" by virtue of the fact that revealing the information might embarrass the client or be detrimental to him, so that revealing that information, absent consent, would be a violation of DR 4-101 (B)?

(2) If consent to interview is obtained, and the indicated assurances are given to the client that no questions will be asked which relate to the facts of his individual case and that his anonymity will be assured, does the Legal Services Office have a duty to make sure this is done?

(3) If the answer to (2) is yes, are the outlined procedures appropriate?

The questions will be answered in order:

(1) In the view of the committee, the names, addresses and telephone numbers of clients of a Legal Services Office are secret within the meaning of DR 4-101 (A) since it might be an embarrassment to the client for any number of reasons to have it revealed that he was a client of the Legal Services Office.

Accordingly, it would be in violation of DR 4-101 (B) for the Legal Services Office either to grant access to the records to the outside research group to select the random sampling of clients or to release the names, addresses, and phone numbers so that the outside research group could seek consent to interview the clients. All screening and client contact for the purpose of gaining consent to interview would have to be done by the Legal Services staff. Further, the staff would have to make sure that a full disclosure within the meaning of DR 4-101 (C) (1) was made to the client.

In the context of full disclosure to clients in poverty groups who in general would tend to be lacking in education and sophistication and might be more likely to be submissive to such requests, particular care must be taken to assure that they have a full understanding of what they are being asked to consent to and further that whether they consent is a completely voluntary matter with them, a consent which they can deny without a sense of guilt or embarrassment. As stated in F.O. 250, "The duty of an attorney to his clients is one of great delicacy and responsibility and sometimes of apparent hardship." That owed to the Legal Services client is no less than that owed to any other client.

AMERICAN BAR ASSOCIATION
COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Re: Formal Opinion 334 August 10, 1974

Legal Services Offices: Publicity; restrictions on lawyers' activities as they affect independence of professional judgment; client confidences and secrets.

CANONS, DISCIPLINARY RULES AND ETHICAL CONSIDERATIONS CITED: Canon 2; Canon 4; Canon 5; DR 2-101(A) and (B)(6); DR 2-103(D)(1); DR 7-107(G); DR 5-107(B); DR 7-101; DR 2-102; DR 2-104; DR 4-101(B)(1); EC 2-25; EC 23; EC 5-1; EC 2-27; EC 2-28; EC 5-24; EC 5-23; EC 5-21; EC 4-2; and EC 4-3.

Publicizing the services provided by a legal services office is proper within limits herein prescribed. The activities on behalf of clients by the staff of lawyers of a legal services office may be limited or restricted only to the extent necessary to allocate fairly and reasonably the resources of the office and to establish proper priorities in the interest of making maximum legal services available to the indigent and then only to an extent and in a manner consistent with the requirements of the Code of Professional Responsibility. Board supervision of the activities of a legal services office may not interfere with the lawyers' preservation of client confidences and secrets.[1]

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1. The Committee has heretofore issued a number of informal opinions upon various aspects of the above subject (Nos. 992, 1081, 1172, 1208, 1227, 1230, 1232, 1234, 1252, and 1287) and one formal opinion upon the subject generally (No. 324), some of which have been misunderstood in some quarters, and one of which (Informal Opinion 1232) it declined a request to reconsider (Informal Opinion 1262). In view of the importance of the subject, the Committee held a public hearing on October 25, 1973, in San Diego, California, on advance notice published in 59 *A.B.A.J.* 976 (1973). It was held during the annual meeting of the National Legal Aid and Defender Association. A large number of interested persons testified at the hearing. The Committee published a proposed opinion in 60 *A.B.A.J.* 329 (1974). Numerous comments were received and considered by the Committee. From all of this it is manifest to the Committee that there is widespread interest in the subject which justifies the issuance of another formal opinion elaborating and clarifying Formal Opinion 324, issued more than three years ago, and relating the various informal opinions cited to it.

The Standing Committee on Ethics and Professional Responsibility is limited in its opinions to interpretations of the Code of Professional Responsibility. It is not the committee's function to determine the most effective means of achieving the goal of making adequate legal services available to the indigent. Nonetheless, this Committee wishes to re-emphasize, at the outset of this opinion, the importance of all lawyers striving to make legal services available within the bounds of professional responsibility.

> "Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services." EC 2-25.

Most recently, the Legal Services Corporation Act of 1974 has provided funding to legal services offices through a public legal services corporation.

The general subject to which this opinion is addressed falls into three categories, each of which will be dealt with separately. They are publicity, independence of professional judgment, and preservation of confidences and secrets. The opinion does not involve ethical aspects of programs other than those of legal services offices; for example, it does not include prepaid legal service programs, which are concerned with making legal services available to all income groups rather than to the indigent.

1. Publicity

Canon 2 requires a lawyer to assist the legal profession in fulfilling its duty to make legal counsel available. To what extent may a legal services office publicize its activities or suggest to individuals that its services be utilized without involving the lawyers acting on its behalf in a violation of the restrictions on publicity[2] or on the seeking of legal business?[3]

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2. DR 2-101 and DR 2-102.
3. DR 2-103 and DR 2-104.

Previous opinions have allowed legal services offices to make known their availability to potential clients.[4] Informal Opinion 1227 states:

> "Our view is in keeping with history. In Formal Opinion 148, this committee sanctioned the publicizing of the availability of legal services without charge by lawyers with somewhat different social philosophies from those associated with [name omitted]. Consistency compels that we not waver from the sound principle there set forth to the effect that the various former canons cited by objectors were 'never aimed at a situation such as this, in which a group of lawyers announce that they are willing to devote some of their time and energy to the interests of indigent citizens whose constitutional rights are believed to be infringed. The adoption of the Code of Professional Responsibility only strengthens this observation, observing as it does in the first provision of EC-1: A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the professional services of a lawyer of integrity and competence.'"

DR 2-101(B), as amended by the House of Delegates of the American Bar Association in February, 1974, provides:

> "A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf, except that a lawyer recommended by, paid by, or whose legal services are furnished by, any of the offices or organizations enumerated in DR 2-103(D)(1) through (5) may authorize or permit or assist such organization to use such means of commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. . . ."[5]

There are, however, limitations upon the publicity which may be given the activities of a legal services office:

A. General Availability. Publicity reasonably calculated to educate persons as to their legal rights and responsibilities, to spread knowledge of the availability of legal services generally or with respect to representation on specific problems, or to inform others of the activities of a legal service program is ethical if carried on by a legal services office in compliance with DR 2-101(A) and (B), as amended February, 1974. Informal Opinion 1172 construed DR 2-101(A) as prohibiting any

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4. As early as Formal Opinion 148 (1935) the Committee held that the broadcast of an offer to represent indigent persons in asserting their constitutional rights was not improper. This opinion was cited with approval in Informal Opinion 786 almost thirty years later, the Committee saying "the problem of defending constitutional rights today is no less important than it was in 1935." Again three years later in Informal Opinion 992 the Committee reiterated the principles embodied in Formal Opinion 148. In Informal Opinion 1227 the Committee approved Informal Opinion 992, which in turn embodied Formal Opinion 148, indicating that under the Code of Professional Responsibility the same result would be reached as in these two opinions.

5. Legal Services offices treated in DR 2-103(D)(1).

5. Legal Services offices treated in DR 2-103(D)(1).

publicity which contains an "element of extolling any individual lawyer for his role in the case." The publicity of a legal services office should be designed to acquaint its public with the availability of the office's services, not those of individual attorneys it employs. Individual lawyers may be identified in private responses to inquiries to the extent permitted by DR 2-101(B)(6).

B. Particular Causes. A staff lawyer in a legal services office may advise a client of the client's right to initiate litigation. There is nothing to prevent a lawyer from serving a legal services office which makes known through any method of publicity not proscribed by a disciplinary rule that services are available to indigents with claims to assert such claims on their behalf. EC 2-3 is helpful as a guideline for staff lawyers, where it states in part:

> ". . . The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. . ."

C. Filing of Actions. The publicizing by a legal aid society of the filing of suits by lawyers employed by it was approved by a majority of the committee over a vigorous dissent in Informal Opinion 1172. The majority opinion recognized that there should be "no element of extolling any individual lawyer for his role in the case," as this would "introduce a wholly different consideration." Informal Opinion 1230 qualified that holding to the extent that, while there is nothing improper in furnishing to public media copies of pleadings which are matters of public record, information should be furnished only upon request because "the voluntary furnishing by counsel to the public media of pleadings prepared by him constitutes an invitation to those media to publish and comment upon the contents of these pleadings and is itself an extra judicial statement in contravention of DR 7-107(G)." The practices suggested in the opinion were intended "to put a brake on any tendency to rush into print or to draft complaints with an eye to biased publicity which might affect the impartiality of the tribunal."

Within these limitations, we hold that the publicizing of the activities of a legal services office is within the scope of the Code of Professional Responsibility and therefore there is nothing improper in a lawyer acting on behalf of an office which engages in such publicity.

2. Independence of Judgment

Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client. To what extent may a governing board prescribe organizational rules and regulations or operational methods of

a legal services office to limit or restrict the activities of lawyers acting on behalf of clients of the office without placing those lawyers in violation of the duty to exercise their independent judgment in legal matters? DR 5-107(B).

We hold that the activities on behalf of clients of the staff of lawyers of a legal services office may be limited or restricted only to the extent necessary to allocate fairly and reasonably the resources of the office and establish proper priorities in the interest of making maximum legal services available to the indigent, and then only to an extent and in a manner consistent with the requirements of the Code of Professional Responsibility.

A. Broad Policy Matters. The committee previously attempted answers to the problems presented in this area in Formal Opinion 324 and Informal Opinions 1232 and 1252.[6] Formal Opinion 324 states that:

> ". . . [T]he governing board of a legal aid society has a moral and ethical obligation to the community to determine such broad policy matters as the financial and similar criteria of persons eligible to participate in the legal aid program, selection of the various services which the society will make available to such persons, setting priorities in the allocation of available resources and manpower and determining the types or kinds of cases staff attorneys may undertake to handle and the type of clients they may represent."

B. Case-by-Case Supervision. The committee further held in Formal Opinion 324 that there should be no interference with the lawyer-client relationship by the directors of a legal aid society after a case has been assigned to a staff lawyer and that the board should set broad guidelines respecting the categories or kinds of cases that may be undertaken rather than act on a case-by-case, client-by-client basis.

The above holdings still appear to the committee to be sound and fully supported by the sections of the Code of Professional Responsibility.

Although no one has really taken issue with the principles embodied in Formal Opinion 324, questions have arisen in connection with the committee's application of those principles to specific cases, particularly in Informal Opinions 1232 and 1252 cited above.

Informal Opinion 1232 involved class actions, and we turn first to problems concerning them as illustrative.

C. Class Actions. If a staff attorney has undertaken to represent a client in a particular matter and the full representation of that client (aside from any collateral objective such as law reform) requires the filing of a class action in order to assert his rights effectively, then any

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6. These holdings were based primarily upon DR 2-103(D)(1) and 5-107(B), along with EC 5-24, but the Committee also cited EC 2-25, 2-27, 2-28, 5-1, 5-21, and 5-23.

limitation upon the right to do so would be unethical. Of course, in the case of any proposed class action it is the individual client who must make the decision to expand the suit into a class action after a full explanation of all of the foreseeable consequences. However, if the purpose of expanding the suit to a class action is not solely to protect the rights of the individual client, or a group of similarly situated clients, but primarily to obtain law reform, and law reform, as such, is not one of the authorized purposes of the legal services office, the case cannot be expanded to a class action unless the authorized purposes are changed to include law reform. This follows from our determination that it is a permissible function of the board in allocating resources to determine "the various services which the society will make available."

A governing board may legitimately exercise control by establishing priorities as to the categories or kinds of cases which the office will undertake. It is possible that, in order to achieve the goal of maximizing legal services, services to individuals may be limited in order to use the program's resources to accomplish law reform in connection with particular legal subject matter. The subject matter priorities must be based on a consideration of the needs of the client community and the resources available to the program. They may not be based on considerations such as the identity of the prospective adverse parties or the nature of the remedy ("class action") sought to be employed. EC-1.

D. Advisory Committees to Governing Boards. In Informal Opinion 1232, Inquiry No. 3 was: "Does the requirement in Condition No. 8 of prior consultation with an Attorney Advisory Committee of the Board of Directors prior to filing a class action violate the Code?"

This committee's answer was:

> "In our view this requirement does not violate the Code, as it is entirely proper to require a staff attorney or the Executive Director to consult with an Attorney Advisory Committee prior to bringing suit. This prior consultation does not mean that a class action cannot be brought without the approval of the Attorney Advisory Committee, but simply that there must be some discussion of the subject prior to the bringing of the class action. It may well be desirable to have a full discussion to avoid possible errors of judgment due to hasty action or action taken based on a distorted view of the facts, or the exercise of poor judgment."

We wish to add to that Opinion. It is difficult to see how the preservation of confidences and secrets of a client can be held inviolate prior to filing an action when the proposed action is described to those outside of the legal services office. It could be pointed out that the legal services office lawyers and the Advisory Committee may have equal access to "possible errors of judgment" or "exercise of poor judgment." However, if an Advisory Committee consisted entirely of lawyers, if it had no power to veto the bringing of a suit but was advisory only, and if

the requirement of prior consultation did not in practice result in interference with the staff's ability to use its own independent professional judgment as to whether an action should be filed, there would appear to be no harm in requiring such consultation. But if such a requirement did in fact result in interference with the exercise of the staff's independent judgment, it would be improper.

The members of the Advisory Committee should not be given confidences or secrets of the client, for there is no lawyer-client relationship between the client and the Advisory Committee or any member of it. The requirement of prior consultation should recognize that the obligation of the staff lawyers to preserve the confidences and secrets of clients applies to statements to and information conveyed to the advisory committee or for that matter a state bar committee or any other person or body not privy to the lawyer-client relationship.

E. Supervision by Senior Staff Lawyer. This Committee's response to Inquiry No. 2 in Informal Opinion 1232 reiterated that it is improper to require prior approval on a case-by-case basis before a class action is filed, citing Formal Opinion 324. To the extent that this response indicated that the prior approval of a senior lawyer in a legal services office could not be required, it is hereby expressly overruled. It must be recognized that an indigent person who seeks assistance from a legal services office has a lawyer-client relationship with its staff of lawyers which is the same as any other client who retains a law firm to represent him. It is the firm, not the individual lawyer, who is retained. In fact, several different lawyers may work upon different aspects of one case, and certainly it is to be expected that the lawyers will consult with each other upon various questions where they may seek or be able to give assistance. Staff lawyers of a legal services office are subject to the direction of and control of senior lawyers, the chief lawyer, or the executive director (if a lawyer), as the case may be, just as associates of any law firm are subject to the direction and control of their seniors. Such internal communication and control is not only permissible but salutary. It is only control of the staff lawyer's judgment by an external source that is improper.

F. State Bar Committee. The final two inquiries in Informal Opinion 1232 raised a different question. The first of these (Inquiry 4) and the Committee's response to it are illustrative:

"Is it proper under any circumstances to permit, in accordance with Condition No. 12, a committee of the State Bar to co-exist with the Board of Directors of a legal service program, regardless of the function of such committee?"

"There is nothing improper in permitting a committee of the State Bar to confer with the Board of Directors of a legal services program in the absence of the exercise of any control by the State Bar committee which would violate the guidelines set forth in Formal Opinion 324 or Informal Opinion 1208."

The correctness of the above conclusion seems inescapable but, in view of the question, rather meaningless. The final inquiry (Inquiry 5) questioned the ethical propriety of assigning such a committee on the state bar the function of advising the Office of Economic Opportunity on a continuing basis whether the program of the legal services office was operated in a manner consistent with the applicable canons, guidelines, and legislation and within the terms of its grant. This the committee likewise held to be proper.

It is true that the inquiry dealt with the so-called "watchdog" function of the state bar committee, but that function was exercised over the operation of the legal services office itself and not over the staff lawyers. The same would be true of State Advisory Councils, such as those to be established pursuant to Section 1004(f) of the Legal Services Corporation Act of 1974. It therefore involved no question of legal ethics.

As the Committee held: "We do not think that the existence of this committee to perform the functions outlined in the correspondence which you have sent us violates the Code of Professional Responsibility. It does not in any way control the actions of the staff attorneys who are responsible for carrying out the functions of the Legal Aid Society."

There is no ethical reason why a lawyer could not serve upon such a watchdog committee or council so long as the provisions of the Code of Professional Responsibility were respected, but to the extent that such special scrutiny was motivated by hostility to legal services offices, or the effect of the state bar committee's activities was to impair the rendition of proper legal representation to the indigent, service upon such a committee by a lawyer would be contrary to the ethical considerations of Canon 2.

G. Legislative Activity. Informal Opinion 1252 said:

> "In our view this proviso [former DR 2-103(D)(1)] does not bar the governing body of a legal aid society from broadly limiting the categories of legal services that its attorneys may undertake for a client,—in this instance excluding political activity and lobbying in support of a bill, rule, regulation or ordinance drafted for a client. The proviso is directed against interference with the exercise of the attorney's independent professional judgment in those matters which they do undertake on behalf of a client."

The Opinion certainly does not hold that a lawyer employed by a legal services office may not engage in law reform or seek to secure the passage of legislation. In fact, it says specifically that "any lawyer, whether he drafted legislation for a client or not, may of course as a citizen, gratuitously engage in activities of a political nature in support of it."[7]

What the opinion does hold is that the governing body of a legal aid society may broadly limit the categories of legal services its lawyers may

7. *See* Formal Opinion 148.

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undertake for a client, and that in doing so it may, but need not, exclude such categories as political activity and lobbying. There are three important qualifications inherent in this statement. First, in the absence of such affirmative action by the board, no such limitation exists. Second, the action of the board must be a broad limitation upon the scope of services established prior to the acceptance by the staff lawyer of representation of any particular client, and preferably made known to its public and staff in advance like any other limitation on the scope of legal services offered. Once representation has been accepted under DR 5-107(B) and DR 7-101 nothing can be permitted to interfere with that representation to the full extent permitted by law and the disciplinary rules, including of course legislative activity.

The phrase "independent professional judgment" is not specifically defined in the Code of Professional Responsibility and is not susceptible to easy interpretation but a reading of EC 5-1 through 5-24 will establish the spirit with which the lawyer's duty should be carried out: Subordination of the lawyer's own interests is implicit as is the correlative promotion of the client's legitimate objectives.

It has been suggested that even the limitations upon the activities of a legal services office permitted by Formal Opinion 324 are improper because, while a private law office may limit its activities in any way it pleases, as the services which it does not furnish will be available elsewhere, the indigent have nowhere else to turn and therefore any limitation upon the services available at a legal services office amounts to a deprivation of those services. The Code of Professional Responsibility does not ban such limitations. As a practical matter, the resources of a legal services office are always limited, and some allocation of them upon a basis of priorities must be made if they are to be effectively utilized. As long as this is done fairly and reasonably with the objective of making maximum legal services available, within the limits of available resources, it is not improper.

It has been urged that there are certain rights of indigent clients which can only be asserted through legislative means. There can be no limitation on the availability of the staff lawyer to give advice in connection with such legislative means. DR 5-107(B).

Finally, limitations upon the activities of a legal services office which stem from motives inconsistent with the basic tenet set out in EC 5-1 are always improper. As a general proposition it may be stated that the obligation of the bar to make legal services available to the indigent requires that no such limitations should be imposed upon a legal services office and no staff lawyer should subject himself to such limitations. Whether or not such reprehensible motives are present must necessarily be determined upon the facts of each individual case.

3. Preservation of Confidences and Secrets

Canon 4 requires a lawyer to preserve the confidences and secrets of a client. To what extent may a legal services office allow its activities to be examined and administered without violating the rule requiring the preservation by lawyers of the confidences and secrets of a client?

Formal Opinion 324 held that without causing a violation of DR 4-101(B)(1) or EC 4-2 and 4-3, the board of directors of a legal services office could require staff lawyers to disclose to the board such information about their clients and cases as was reasonably necessary to determine whether the board's policies were being carried out. Procedures to preserve the anonymity of the client approved in Informal Opinions 1081 and 1287 should be followed. It should be noted, however, that the information sought must be reasonably required by the immediate governing board for a legitimate purpose and not used to restrict the office's activities, and that in many contexts a request for such information by a board may be the practical equivalent of a requirement. Hence, a legal services lawyer may not disclose confidences or secrets of a client without the knowledgeable consent of the client. To the extent this is inconsistent with Formal Opinion 324, that opinion is overruled.

4. Conclusion

Much of the difficulty with the interpretation of Formal Opinion 324 and of the informal opinions discussed above lies in a general failure to distinguish between the disciplinary rules and the ethical considerations of the Code of Professional Responsibility. For the most part, the inquiries relate to what could be "required" and thus for the most part the answers were based upon the disciplinary rules. To say, as we have sometimes done, that a particular restriction upon the staff of a legal services office is not forbidden by the disciplinary rules is not to say that such a restriction is wise or is consistent with applicable ethical considerations. See EC 2-25, quoted above.

Viewing the problems discussed above on the aspirational level of the Code's ethical considerations, we stress that all lawyers should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the rendition of legal services by legal services offices for the benefit of the indigent and should seek to remove such restraints where they exist. All lawyers should support all proper efforts to meet the public's need for legal services.

As modified and interpreted above, the Committee's previous opinions are reaffirmed.

AMERICAN BAR ASSOCIATION
COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

November 2, 1977

Informal Opinion 1394
Revelation of Client Communications by Legal Services Agency to Inspectors from Funding Source

You have asked this Committee's advisory opinion on the question indicated below. You told us to assume the following facts.

A number of local nonprofit legal services corporations ("the local agencies"), organized and operated solely to provide legal services in non-criminal matters to low income persons, are located in a state that has adopted legal services programs eligible for partial support from funds administered by the United States Department of Health, Education, and Welfare ("HEW") under Title XX of the Social Security Act. The federal funds are channeled through a state government department (the "state social services department") that administers state social services programs. In this regard, the state social services department has entered into a contract with a statewide non-profit legal services corporation (the "statewide agency"), which coordinates and oversees the application of the Federal funds to the local agencies, and which sub-contracts with the local agencies for this purpose. Each sub-contract provides among other things (a) that the local agency shall maintain financial records relating to the funds paid to it by the statewide agency, and (b) that the records shall be subject at all times to inspection, review, or audit by state personnel and other personnel authorized by the state social services department and the statewide agency as well as by Federal personnel, and (c) that the local agency shall permit the statewide agency, the state social services department and Federal personnel to monitor (according to applicable state and federal regulations) the Title XX aspects of the program, but (d) that no provision in the sub-contract allows anyone to intrude on those portions of a case file if an attorney-client privilege would thereby

violated. An HEW regulation requires that such a contract or sub-contract relating to Title XX funds must "...provide for access to financial and other records pertaining to the program by state and Federal officials." Except as reflected by the sub-contracts, the local agencies have no relationship with, and are not subject to control by, either HEW or the state social services department, although their programs may be subject to a measure of supervision or control by other governmental agencies from whom they receive funds (for example, the Legal Services Corporation established by Congress). The local agencies permit the state social services department to inspect all fiscal records, and furnish copies of annual audits to the statewide agency and to the state social services department, but the information so revealed is in statistical form and does not identify particular clients. The state social services department has devised a program whereby it proposes to determine the quality of services furnished by the local agencies, and it insists that in order to do so its inspectors must examine all or some of the local agencies' files relating to particular clients and legal services furnished to them. The inspectors would not necessarily be lawyers. A typical file could contain information received and communications made in an attorney-client relationship and could contain attorneys' work products including memoranda reflecting trial strategy and tactics in matters involving litigation or proposed litigation. On occasion, the local agencies do or may represent clients in claims or suits against governmental agencies including the state social services department.

The basic question is whether the local agencies' staff lawyers would violate the Code of Professional Responsibility by opening files for full inspection as discussed above. The state social services department, and perhaps HEW, have indicated that if a local agency does not allow such inspection it will become ineligible to receive Title XX funds. Loss of the funds could substantially impair a local agency's ability to function.

Canon 4 of the Code of Professional Responsibility obligates a lawyer to preserve the confidences and secrets of a client. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional employment that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. DR 4-101(A). A lawyer may reveal confidences or secrets when required by law or court order. DR 4-101(C).

We perceive nothing in the Code that makes the professional obligations inapplicable to a lawyer employed by a legal services agency

wholly or partly supported by public funds or that excludes a non-fee-paying client from the protection or benefit of those professional obligations.

In Informal Opinion 1081 (1969), this Committee concluded that a legal services agency could properly furnish information to auditors and accountants to the extent necessary for determining the types of cases handled, the results obtained, and whether income eligibility requirements are being met, if care were taken not to divulge information that would identify particular clients. In Informal Opinion 1137 (1970), we recognized that a staff attorney for a legal aid society could properly reveal to a lawyer-audit committee of the sponsoring bar association financial information obtained from clients to the extent necessary to determine eligibility for the society's services, if the client were made to understand that in accepting the services he was agreeing to such disclosures. In Formal Opinion 324 (1970), we recognized that a governing board of a legal aid or legal services agency can properly employ reasonable procedures to review the actions of the agency's personnel to determine whether the board's policies are being followed, and in doing so may ask the agency's staff lawyers to furnish certain information pertaining to clients, and that a lawyer does not necessarily breach Canon 4 by divulging such information. In Formal Opinion 334 (1974), we reaffirmed our belief that staff lawyers for legal services agencies should not disclose confidences and secrets of a client without the understanding consent of the client, and that, in disclosing to the agencies' policy-making boards information about clients and cases, the lawyers should follow procedures to preserve the client's anonymity.

It is our opinion that staff lawyers for a legal services agency would not meet their obligations under Canon 4 if they permitted inspectors from outside the agency to examine files relating to client matters, when the files contain confidences and secrets within the meaning of DR 4-101, in the absence of the clients' understanding consent and waiver after full disclosure.

SUPREME COURT OF PE ANIA
Eastern District

FILED

IN RE: CODE OF PROFESSIONAL RESPONSIBILITY : NO. 54, SUPREME COURT RULES
:
: DOCKET NO. 1

O R D E R

AND NOW, this 31st day of July, 1979, it is hereby ORDERED pursuant to Article V, Section 10 of the Constitution of Pennsylvania that:

DR 4-101(B) of the Code of Professional Responsibility is amended by adding the words "including the identity of his client" at the end of subsection (1).

Accordingly, DR 4-101(B) shall hereafter read as follows:

"Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client, including his identity.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

BY THE COURT:

Chief Justice

A true copy SALLY MRVOS
Test:
Prothonotary, Supreme Court of Pennsylvania

REPORT FROM PRESIDENT OF THE CORPORATION

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE: July 30, 1982

TO: Committee on Operations and Regulations

FROM: Gerald M. Caplan, Acting President

SUBJECT: President's Report

An oral report will be presented to the Committee regarding an overview of Corporation activities.