

Michael S. Greco
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, Illinois 60610-4714
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

July 19, 2006

Frank B. Strickland, Chairman
Board of Directors
LEGAL SERVICES CORPORATION
3333 K Street, N.W., 3rd Floor
Washington, D.C. 20007-3522

Helaine Barnett, President
LEGAL SERVICES CORPORATION
3333 K Street, N.W., 3rd Floor
Washington, D.C. 20007-3522

Kirt West, Inspector General
LEGAL SERVICES CORPORATION
3333 K Street, N.W., 3rd Floor
Washington, D.C. 2007-3522

Dear Chairman Strickland, President Barnett and General West:

Through our Presidential Task Force on Attorney-Client Privilege, the American Bar Association has become aware of current efforts by LSC's Office of the Inspector General (OIG) to obtain from LSC recipient California Rural Legal Assistance, Inc. (CRLA) certain client information¹ and attorney work-product materials² that appear to be confidential under California statutory and/or decisional law. Under these laws, the Inspector General's efforts conflict with the rights of California residents who consult with counsel and with the corresponding obligations of California attorneys to assert and protect these rights.

This is a matter that has been of long-standing concern to the ABA and the subject of

¹We understand the Inspector General seeks, inter alia, the identities of all of CRLA's clients over a three year period. Under California law, the identities of these clients and the existence of attorney-client relationships appear to be confidential until publicly disclosed. Calif. Business & Professions Code, Section 6068(e)(1); *Hooser v. Superior Court*, 84 Cal.App.4th 997, 1005-1006 (2000); *People v. Speedee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1147-1148 (1999). A recent California decision appears to conclude that identities of persons consulting with counsel are further protected under the state's constitutional right to privacy. *Tien v. Superior Court*, ___ Cal.App.4th ___, 43 Cal.Rptr. 121, 129-130 (2006). Client-identity confidentiality is distinct from the state's Lawyer-Client Privilege codified at Calif. Evidence Code, Sections 950-959.

²Attorney work-product in California is defined under California Code of Civil Procedure, Sections 2018.20, 2018.30. The work-product doctrine in California is not limited to documents prepared in anticipation of litigation, but also applies to the work product of an attorney generated in his role as counselor. *Aetna Casualty & Surety Co. v. Superior Court*, 153 Cal.App.3d 467, 478-479 (1984).

ABA formal policies. In light of these policies, we write to urge LSC and the OIG to take action to confer with CRLA in an effort to address constructively and responsibly the dilemma in which the current Inspector General requests place the program, its attorneys and its clients.

In 1991, the ABA adopted formal Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor. Two of these standards are particularly relevant to our current concern. Standard 2.3 - Client Confidences - provides in part that:

A reviewing agency may not have access to records which contain information protected by the attorney-client privilege or by ethical provisions prohibiting the disclosure of confidential information obtained from a client *or by other statutory provisions prohibiting disclosure*, unless the client has knowingly and voluntarily waived such protections ...

A reviewing agency may reasonably expect a service provider to delete protected information from a record, if feasible, in order for monitors and evaluators to examine it. Records from which privileged or confidential information cannot be reasonably removed may not be disclosed to the reviewing agency.

Id., 2002 ed., italics added.

Standard 2.4 - Work Product - further provides:

A reviewing agency may not examine the work product of an attorney, paralegal or other professional employed by the service provider ...

Id. The ABA recognizes that there may be tensions between the OIG's ability to verify the LSC grantee's compliance with applicable laws and regulations and the need for providers to protect the confidences and secrets of their clients. See Commentary to Standard 2.3, pp. 53-54. Ultimately, we have concluded that the scope of attorney-client privilege is a matter of state law which should be examined to determine what, if any, information may be disclosed to a funding source without client consent. *Id.*, pp. 53-54.

We are cognizant, of course, that in 1996 Congress enacted the Omnibus Rescissions and Appropriations Act Pub. L. No. 104-134, 110 Stat. 1321-54 that includes Section 509(h), upon which authority we understand the Inspector General currently relies. Nevertheless, the ABA has on two separate occasions subsequent to the passage of 509(h) confirmed and expanded upon our earlier conclusion.³ In so acting, we observe that the existence of apparent authority does not

³ See letter of September 28, 2000 from L. Jonathan Ross, Standing Committee on Legal Aid and Indigent Defendants (SCLAID), to the Chairs and Ranking Members of the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, House Appropriations Committee; the Subcommittee on Commercial and Administrative Law, House Judiciary Committee; the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, Senate Appropriations Committee; and, the Senate Health, Education, Labor and Pensions Committee. www.abanet.org/poladv/congletters/106th/lsc1house092800.html. Mr. Ross' letter expressed SCLAID's opposition to the LSC Inspector General's proposal that the FY 2001 appropriations act give LSC full access to any and all privileged client information and attorney work product.

See also, ABA Policy Statement of 2001, Report 8A, ABA House of Delegates, adopted February 2001.

in itself dictate the wisdom of its exercise. LSC and other funders should respect the state laws under which their recipients' attorneys are licensed and must conduct their professional obligations. As is true in California, these laws often establish rights of confidentiality for clients who consult counsel without regard to whether those counsel are employed by legal services programs. Underlying the ABA Standards and Policies has been the following fundamental concern:

Equality of access and treatment are a sham if the least fortunate among us must give up reasonable expectations of privacy and confidentiality in order to gain access to legal services. Reasonable supervision of publicly-funded legal aid and legal services organizations can be accomplished without denying our poorest citizens the rights and privileges every other client is entitled to expect in a lawyer-client relationship.

Report accompanying ABA Policy Statement 8A (February, 2001), p. 1.

There are well-established protocols, including the use of unique identifiers, that permit reviewers effectively to audit for compliance without invading the privacy or other protections accorded to persons served by the audited entity. We continue to urge the OIG to take advantage of, rather than resist, the approaches described in these protocols. Consideration should also be given to the circumstance that many jurisdictions do not recognize selective disclosure of privileged or confidential information to third parties and that such third party disclosure may result in waiver of the privilege or confidentiality as to all.

Thank you for your consideration. Should you have any questions or need additional information, please do not hesitate to contact Bill Ide, Chair of the ABA Task Force on the Attorney-Client Privilege at 404.527.4650 or bide@mckennalong.com.

Sincerely,



Michael S. Greco

cc: William O. Whitehurst, Chairman-ABA Standing Committee on Legal Aid and Indigent Defendants
R. William Ide, Chairman-ABA Presidential Task Force on Attorney-Client Privilege

Pertinent portions of these policies are excerpted in the attachment accompanying this letter.

ATTACHMENT

Excerpts from ABA Policy Statement A2 (February 2001)

... [T]he American Bar Association urges that reporting and auditing requests by funding sources for programs providing legal services to the poor should be reasonable, should be limited to information which the funding source will actually review and for which it has a reasonable use and should be focused on the particular needs of the funding source to avoid putting unreasonable administrative burdens on the recipient.

... [S]ubject to applicable law, a funding source should access to records which are in the possession, custody and control of a recipient, which are properly within the scope of its review and which pertain to (1) the use of the funds provided by the funding source, and (2) a determination of compliance by the recipient with the terms and conditions of the grant or contract and with other applicable law which the funding source has the responsibility to enforce.

... [A] funding source should not have access to records which contain information protected by the attorney-client privilege, or by ethical provisions prohibiting disclosure of confidential information obtained from a client, or by statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the funding source.

... [N]either a funding source nor a recipient of funds should be permitted to require a client to waive the protections against the disclosure of confidential information as a condition of representation.

... [A] funding source should not seek to examine the work product of an attorney, paralegal, or other professional employed by the recipient of funds which is not otherwise publicly available.

... [A] recipient should be permitted to delete protected information from a record, if feasible, in order for the funding source to examine it and records from which privileged or confidential information cannot be reasonably removed should not be disclosed to the funding source.