

OFFICE OF LEGAL AFFAIRS

PRIVILEGED & CONFIDENTIAL

MEMORANDUM

TO: Danilo Cardona
Acting Vice President for Programs

FROM: Victor M. Fortuno
Vice President for Legal Affairs
& General Counsel

DATE: January 12, 2000

SUBJECT: Opinion on LSC Access to Grantee Client Information

This opinion is provided in response to your request for an opinion as to the proper application of the attorney-client privilege in the circumstances arising from an audit of the Case Service Report (“CSR”) system at the Legal Aid Bureau of Maryland (“LAB”).

LAB’s Statement of Position

LAB’s position on this matter was summarized in its September 24, 1999, memorandum, which was attached to your request, and amplified by the legal analysis prepared for LAB by the Brennan Center for Justice and forwarded to the Legal Services Corporation (“LSC” or “the Corporation”) on October 19, 1999. In particular, LAB has asserted the attorney-client privilege and client confidentiality to deny access to the client’s legal problem in the form of the problem code^{1/} assigned for CSR purposes when that disclosure is linked to the client name and has not otherwise been made known to third parties.

^{1/} For clarity, the term “problem code” as used throughout this opinion will refer solely to the two-digit number assigned to the client’s legal problem. The terms “category” or “category description” and “subcategory” or “subcategory description” will be used to refer to the terminology on the case service reporting documents that classify the client’s legal problem. For example, “01” is the problem code in the Consumer/Finance category assigned if the client’s legal problem falls within the subcategory of bankruptcy or debtor relief. While this terminology may facilitate the legal analysis, it may be – indeed it is likely that – the question posed by LAB and LSC’s Office of Compliance and Enforcement (“OCE”) uses problem code in its more generic sense, incorporating both the numeric representation and the descriptive material related to the legal problem. Therefore, the legal opinion will address all possible dimensions of the problem code.

Issue Presented

You requested an opinion as to the circumstances under which Maryland law would protect information from disclosure under a claim of attorney-client privilege or confidentiality and whether LAB's assertion of privilege was proper in the case of client name and the CSR problem code which had not otherwise been disclosed to a third party.

The question of privilege does not arise in the reporting of the data directly, as the case statistics are aggregated and reported to LSC without any individual identifying information. Rather, the issue of privilege has arisen in the context of LSC reviews and the Office of Inspector General ("OIG") audit of the LAB's compliance with the CSR requirements.

As we have been given to understand, LAB has refused to confirm the problem code (and/or the subcategory description) assigned to particular cases, resulting in the auditor or LSC monitor being unable to establish if the case was properly coded under the CSR system. However, access to a listing of client names and problem codes may be necessary to identify potentially duplicate cases. Moreover, access to the subcategory description assigned to a case may be necessary in order to be able to confirm adherence to the program's adopted priorities. In addition, we understand that the "OIG" may rely on the confirmation process of the problem code to assure that legal services have been provided.

Summary of Conclusions

The line between the level of generality for permissible disclosure of the services provided and the level of specificity which impermissibly impinges upon the substance of the confidential communications is, of course, not clearly drawn. Whether the LSC problem codes may be deemed to be within the privilege is a close call. It is, however, our considered opinion the client name and the client's legal problem, *described at a level of generality represented by the basic CSR categories*, are not privileged. Also, we do not believe that the client name and the problem code (in numerical form), such as on a listing for the identification of potentially duplicate cases, are privileged – provided, of course, that the listing does not otherwise define the problem codes. A colorable claim of privilege can, however, be made for certain of the specific subcategory descriptions of the legal problem *when linked to the client's name*.

As regards client name and financial eligibility information, typically the financial eligibility information provided by the client will *not* relate to the legal advice being sought and will, therefore, fall outside the privilege. While such information may be a client secret or provided in confidence, LSC auditors and monitors are statutorily entitled

to access the client's name and financial eligibility information so long as they are not protected by the attorney-client privilege.

The same is true with respect to client name and citizenship attestation forms and/or alien status documentation. Such information will not, in the normal course, relate to the legal advice sought, but is required solely to establish eligibility for assistance from an LSC-funded legal provider. Therefore, the information and the documentation are outside the privilege, and whatever other confidentiality may otherwise attach has been removed by statute.

Similarly, retainer agreements are not generally privileged. Rather, to the extent it relates to the fact of the attorney-client relationship and generally states the nature of the services to be provided, the retainer agreement contains no privileged information and is akin to fee arrangements which, with a few exceptions, are outside the privilege. Thus, LSC monitors and auditors should have unredacted access to client retainer agreements that do not include specific facts or disclose the substance of the representation.

As for client identity and the statement of facts, they are available to federal auditors and monitors (but not the opposing party in the litigation or negotiation except where permitted, through discovery proceedings after litigation has begun). Whether or not the litigation or negotiation for which the statement of facts was prepared has actually ensued, LSC is statutorily permitted access to the statement prepared in anticipation of such an event. Thus, a grantee may not limit access to only those cases in which the client's identity and issue have already been divulged to a third party.

Analysis

Statutory Authority for Access to Attorney-Client Privileged Materials

We first review the Legal Services Corporation Act ("LSC Act"), 42 U.S.C. § 2996 *et seq.*, and other applicable statutes, including the 1996 Omnibus Appropriations Act (Pub. L. No. 104-34, 110 Stat. 1321) ("the 1996 Act"), to define the parameters of LSC's authority to access privileged or confidential attorney-client communications. Under § 1006(b)(3) of the LSC Act, the Corporation is prohibited from interfering with any attorney in carrying out his or her professional responsibilities to his or her client and requires LSC to ensure that activities are carried out in a manner consistent with the attorney's professional responsibilities.^{2/} In addition, § 1007(a)(1) of the Act requires

^{2/} Section 1006(b)(3) provides, in relevant part, that LSC "shall not, under any provision of this title, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association (referred to collectively in

LSC to ensure the preservation of the attorney-client relationship and protect the integrity of the adversary process from any impairment in the granting of funds for the provision of legal assistance.^{3/} Together, these provisions attempt to insulate the attorney-client relationship and the ethical obligations that attach to that relationship from undue interference by LSC as a third-party funder. The attorney-client privilege is a fundamental component of that protected relationship.

Of course, the LSC Act also contains express authority for the Corporation to enforce, monitor, and evaluate grantee activities to ensure compliance with the LSC Act, other statutory requirements and the Corporation's rules, regulations, and guidelines.^{4/} However, as expressly stated in § 1006(b)(3), LSC cannot act pursuant to these provisions of the Act in any manner that would interfere with the attorney's professional responsibilities.

Furthermore, § 1009(d)^{5/} makes clear that neither LSC nor the GAO has access to reports or records which are protected by the attorney-client privilege in the exercise of the recordkeeping and auditing authorities under the Act.^{6/} Thus, under the LSC Act,

this title as 'professional responsibilities') . . . [and] . . . shall ensure that activities under this title are carried out in a manner consistent with attorneys' professional responsibilities."

^{3/} Section 1007(a)(1) provides that LSC, in the provision of grants and contracts for legal assistance, shall "insure the maintenance of the highest quality of service and professional standards, the preservation of attorney-client relationships, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients."

^{4/} Section 1006(b)(5) provides:

[LSC] shall issue rules and regulations to provide for the enforcement of [the restrictions in this paragraph and the limitations on class action suits] which rules shall include, among other available remedies, provisions, in accordance with the types of procedures prescribed in the provisions of section 1011, for suspension of legal assistance supported under this title, suspension of an employee of the Corporation or of any employee of any recipient by such recipient, and, after consideration of other remedial measures and after a hearing in accordance with section 1011, the termination of such assistance or employment, as deemed appropriate for the violation in question

Section 1007(d) provides that LSC "shall monitor and evaluate and provide for independent evaluations of programs supported in whole or in part under this title to insure that the provisions of this title and the bylaws of the Corporation and applicable rules, regulations, and guidelines promulgated pursuant to this title are carried out."

^{5/} Section 1009(d) states that "[n]otwithstanding the provisions of this section or section 1008, neither the Corporation nor the Comptroller General shall have access to any reports or records subject to the attorney-client privilege."

^{6/} Section 1008 provides in relevant part that LSC has the authority to "(a) . . . require such reports as it deems necessary from any grantee" and "(b) . . . prescribe the keeping of records with respect to funds provided by grant or contract and [to] have access to such records at all reasonable times for the purpose of insuring compliance with the grant or contract or the terms and conditions upon which financial assistance was provided."

auditors and monitors of LSC do not have access to attorney-client privileged materials or to any other client confidences protected by the standards of professional responsibility. Unlike federal auditors or monitors, Independent Public Accountants (“IPAs”) under direct contract to the grantee pursuant to § 1009(c) have been held in applicable ethics opinions to be agents of the grantee and, thus, encompassed within the attorney-client privilege.^{7/} Hence, access to privileged materials by IPAs in the course of their annual audits of grantees appears to be permissible and the IPA would appear to be bound by the same confidentiality restrictions with respect to such privileged material as the attorney.

When, pursuant to the 1988 amendments to the Inspector General Act, an Office of Inspector General (“OIG”) was established at LSC, the OIG auditors became subject to the same access limitations as the Corporation itself. While the IG Act provides for access to all records and other materials available to the Corporation that relate to its programs and operations, the privileged materials maintained by grantees were not “available” records to which the OIG has statutory access.^{8/}

The 1996 Act expanded the annual financial audits performed by the IPAs to encompass statutory and regulatory compliance under the guidance and oversight of the OIG.^{9/} Section 509(g) of the 1996 Act authorizes the OIG to conduct on-site monitoring, audits, and inspections of grantees as necessary for programmatic, financial and compliance oversight. LSC is directed in § 509(k) to follow up on significant findings and recommendations referred by the OIG to ensure the timely resolution of reported instances of noncompliance.

To facilitate the audit and oversight process, §§ 504 and 509 of the 1996 Act expressly authorize access to specific records maintained by LSC grantees. For example, § 504(a)(8) authorizes access by federal auditors and monitors to the plaintiff’s statement

Section 1009(c) provides generally for LSC to conduct or to require the grantee to conduct an annual financial audit; and for GAO to inspect “the books, accounts, financial records, files, and other papers or property belonging to or in use by such grantee” relating to the disposition of LSC funds.

^{7/} Cf. United States v. South Chicago Bank, No 97 CR 849-1, 97 CR 849-2, 1998 WL 774001 at *3 (N.D. Ill. Oct. 30, 1998) (“auditors are not generally part of the circle of persons, including secretaries and interpreters, for example, with whom confidential information may be shared without destroying the privilege”). However, the court in that case cited United States v Arthur Young & Co., 465 U.S. 805 (1984), in support for that proposition and a review of Arthur Young does not disclose a basis for such reliance.

^{8/} Of course, the Inspector General does have subpoena power not otherwise available to any component of the Corporation.

^{9/} See, § 509(a)-(c). Section 509(f) provides that the annual financial and compliance audits are to be lieu of the annual financial audits required by § 1009(c) of the LSC Act.

of facts which must be prepared and signed by the client prior to the filing of any complaint or any pre-complaint settlement negotiations. Section 504(a)(10) requires recipients to maintain and to make available to federal auditors or monitors records of the time spent on each case or matter, and records for the receipt and disbursement of LSC and non-LSC funds, which are to be separately maintained. Access to these records is required, notwithstanding § 1006(b)(3), the prohibition on LSC's interference with an attorney's professional responsibilities. Likewise, § 509(h) entitles federal auditors or monitors to access "financial records, time records, retainer agreements, client trust funds and eligibility records, and client names," notwithstanding § 1006(b)(3). However, that section expressly excepts "reports or records subject to the attorney-client privilege" from the access requirements.

The 1996 Act did not fundamentally alter the inaccessibility of attorney-client privileged materials. It did override the standards of professional responsibility with respect to certain specified materials, but continued to protect even these materials if subject to the privilege. Moreover, except for the materials expressly referenced in that law, federal auditor and monitor access to all other materials remains limited by the client confidentiality and privilege protections embodied in the LSC Act. Under this statutory enforcement scheme, LSC grantees may deny federal auditors and monitors access to all *privileged* materials. Moreover, they may also deny access to all client *confidential* material, except for retainer agreements, client eligibility records, client names, the plaintiff statement of facts, and other client confidences that may be referred to by the grantee's financial or time records and client trust funds.

At no time did the statutory scheme for the enforcement of the LSC Act or other applicable law envision, much less mandate, unfettered access by LSC auditors and monitors to the privileged or confidential client communications. Nor is the protection of privileged materials from outside, third-party auditors unique to LSC. For example, attorneys hired by insurance companies to represent an insured may not, absent client consent, submit detailed billing statements or other information on an insured's case to an outside auditing firm hired by their employer. (See D.C. Ethics Opinion No. 290, April 20, 1999, and opinions cited therein.)

The Attorney-Client Privilege

The attorney-client privilege is one of the oldest recognized privileges at common law. The purpose is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." Swidler & Berlin v. United States, 118 S.Ct. 2081, 2084 (1998) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). "The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the

provision of legal services and ultimately the administration of justice.” Id. at 2088 (O’Connor, J., dissenting). The privilege also operates as a safeguard on the proper functioning of the adversary system. United States v. Zolin, 491 U.S. 554, 562-63 (1989). These systemic benefits are commonly understood to outweigh the harm caused by the exclusion of critical evidence. Swidler & Berlin, 118 S.Ct. at 2088.

The traditional elements of the attorney client privilege, as set forth in United States v. United Shoe Machine Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950), that identify communications that may be protected from disclosure in discovery are:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communications were made
 - (a) is a member of the bar of a court, or his or her subordinate, and
 - (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed
 - (a) by the client
 - (b) without the presence of strangers
 - (c) for the purpose of securing primarily either
 - (i) an opinion of law or
 - (ii) legal services or
 - (iii) assistance in some legal proceeding, and
 - (d) not for the purpose of committing a crime or tort; and
- (4) the privilege has been
 - (a) claimed and
 - (b) not waived by the client.

Supreme Court Standard 503^{10/} states the privilege more succinctly: A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communication made for the purpose of facilitating the rendition of professional legal services to the client. Under this standard, the privilege extends to communications between the lawyer (and/or his representatives) and the client (and/or his representatives) for the purposes of obtaining legal services or advice. The client need not be involved in litigation for the privilege to attach.

^{10/} Although Congress has not adopted this statement of the privilege as part of the Federal Rules of Evidence, the Standard is still a useful guide to the law of the privilege as a restatement of the federal common law which is applicable in Federal court. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 605 (8th Cir. 1977). The standard also defines a client as a person who is rendered professional legal services by a lawyer or who consults a lawyer with a view to obtaining professional legal services; a representative of a lawyer is one employed by the lawyer to assist in the rendition of legal services; and a communication is confidential if it is not intended to be disclosed to a third person other than in furtherance of the rendition of legal services or reasonably necessary for the communication to occur.

Where the attorney-client privilege properly attaches, its protection of the confidential communication is absolute.^{11/} The privilege clearly protects client confidences from discovery or use as evidence in civil matters,^{12/} justifies a refusal to respond to grand jury subpoenas or other evidentiary demands in criminal matters,^{13/} and stands against agency enforcement proceedings,^{14/} including those based on statutory reporting requirements.^{15/} Arguably, the privilege would prevail over routine audit requirements even absent the express protections for such material in the LSC and 1996 Acts.

As the privilege admittedly causes the loss of otherwise truthful evidence, courts will generally narrowly construe scope of the privilege in an evidentiary setting. Jaffe v. Redmond, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting); In re Sarrio, S.A., 119 F.3d 143, 147 (2d Cir. 1997); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977). Thus, the elements of the privilege must be present and may have to be proven depending on the circumstances. However, the Supreme Court has rejected the use of balancing tests in defining the contours of the privilege, as an uncertain privilege is virtually none at all. Swidler & Berlin, 118 S.Ct. at 2087, (citing Jaffee, 518 U.S. at 17-18; Upjohn, 449 U.S. at 393). As the Court stated in Upjohn, 449 U.S. at 393:

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

^{11/} To be clear, the principle of confidentiality embodied in Rule 1.6 of the ABA's Model Rules of Professional Conduct (hereinafter, "Rule 1.6") is much broader than the attorney-client privilege, and the latter is best viewed as an instance of the former. Conceptually, it is helpful to think of the *attorney-client privilege* as a subcategory of the broader category of *client confidences and secrets*.

^{12/} See FED. R. EVID. 501.

^{13/} See, e.g., Swidler & Berlin v. United States, 118 S.Ct. 2081 (1998).

^{14/} See, United States v. Arthur Young & Co., 465 U.S. 805, 815-16 (1984) (stating statutory enforcement authority of IRS is "subject to the traditional privileges and limitations").

^{15/} United States v. Sindel, 53 F.3d 874, 876-77 (8th Cir. 1995) (finding where client identity is privileged, attorney is justified in not completing IRS statutorily required report on cash transactions).

Courts are also becoming increasingly strict regarding waiver of the privilege.^{16/} As the purpose is to preserve confidentiality of communications between the client and the attorney, any breach of that underlying confidentiality forfeits the client's right to claim the privilege as to any and all others. United States v. El Paso Co., 682 F.2d 530, 538-39 (5th Cir. 1982); Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981). The privileged can be waived expressly or by implication, including by virtue of conduct inconsistent with the confidential nature of the communications at issue. Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991) (waiving privilege by disclosure to SEC and DOJ during investigation). The disclosure of the confidential communications to *any* third party – whether or not adverse to the client's interests – can result in waiver or voiding of the privilege. While the privilege is held by the client and it is he/she who has the ability to waive it, conduct by the lawyer which is inconsistent with the confidential nature of the client's communications, such as disclosure of the communications to a third party, can effectuate an "involuntary" waiver – or voiding -- of the privilege.

In a growing number of jurisdictions, even inadvertent disclosure of privileged (as opposed to confidential) materials effectively waives the privilege as to all other third parties and as to all communications with that client relating to the same subject matter.^{17/} In re Sealed Case, 877 F.2d 976, 977-78, 980 (D.C. Cir. 1989) (finding disclosure during routine audit by defense agency waives privilege); Westinghouse, 951 F.2d at 1424-26 (waiving privilege by disclosure under traditional doctrine occurs, even where agency agrees not to disclosure); Permian, 665 F.2d at 1219 (rejecting "selective" disclosure as inconsistent with privilege). Short of court-compelled disclosure or other equally extraordinary circumstances, the courts do not distinguish between various degrees of "voluntariness" in waivers of the attorney-client privilege. In re Sealed Case, 877 F.2d at 980.

^{16/} We have limited this analysis to the attorney-client privilege. In certain cases, the information sought may also be subject to the attorney work-product privilege. Where it applies, the work product privilege is not waived by the sharing of the information with non-adversary third parties, such as independent auditors. See In re Pfizer Inc. Securities Litigation, No. 90 Civ. 1260 (SS) 1993 WL 561125 at *6 (S.D.N.Y. Dec. 23, 1993).

^{17/} The rule that inadvertent disclosure effectively waives the privilege as to all other third parties and as to all communications with that client relating to the same subject matter is generally applied to attorney-client privileged materials, but not necessarily as to client confidences. For example, disclosure of confidential information such as that obtained for purposes of establishing an applicant/client's financial eligibility for LSC-funded services might well not operate as a waiver with respect to other confidential communications with that client. Similarly, even with respect to the disclosure of privileged material in an "extrajudicial" context, such as a routine audit, the waiver may operate only with respect to the information actually disclosed and not extend to undisclosed privileged communications with that client. United States v. South Chicago Bank, *supra* n.7, at *4 (citing In re Von Bulow, 828 F.2d 94, 102 (2d Cir. 1987)).

Governing Law

LAB bases its action on the definition of attorney-client privilege in Maryland law, which defines the privilege as protecting communications relating to the seeking of legal advice of any kind from a professional legal advisor in his capacity as such, if the communication is made in confidence by the client, and the privilege has not been waived.^{18/}

Maryland law, however, does not control the scope of the privilege in the instant matter. Rather, federal common law prevails over state rules of professional conduct when the question of privilege arises under a federal statute. United States v. Sindel, 53 F.3d 874, 876-77 (8th Cir. 1995).^{19/} Therefore, we respond to your inquiry in terms of the federal common law, not Maryland law, on privilege.

Generally, the identity of the client and the fee arrangement are not protected by attorney-client privilege. The heart of the privilege is the substance of the confidential communications between attorney and client and not the peripheral or collateral aspects of the business relationship. However, even client identity and fees can, under *exceptional* circumstances, qualify for the privilege, as when disclosure would be tantamount to revealing a protected confidential communication. Similarly, the fact of representation, dates, and the general subject matter or nature of services rendered are generally not encompassed within the privilege. However, the line between the level of generality for permissible disclosure of the services provided and the level of specificity which impermissibly impinges on the substance of the confidential communications is not clearly drawn. For example, it is generally permissible to describe work performed as “tax advice,” “domestic relations” work, “litigation,” “drafting documents,” or “legal research” -- but not to provide any additional detail that might reveal litigation strategy, the areas of the law being researched, or the nature or substance of the documents prepared, conversations or conferences held.

^{18/} See MD. CODE ANN. CTS. & JUD. PROC. § 9-108 (1986); see also, E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 718 A.2d 1129, 1138 (Md. 1998) (stating the privilege “prevents the disclosure of confidential communications made by a client to his attorney for the purpose of obtaining legal advice.”).

^{19/} Sindel involved an attorney’s claim of privilege in refusing to disclose the identity of two clients when reporting to IRS cash transactions in excess of \$10,000 as required by statute. The court applied federal common law over the local rules of professional responsibilities reasoning that Congress could not have intended to carve out fifty different privilege exemptions to the statutory reporting requirement. The Supreme Court has also endorsed construing the scope of the privilege as guided by “the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” Swidler & Berlin, 118 S.Ct. at 2084 (quoting FED. R. EVID. 501); Funk v. United States, 290 U.S. 371, 381 (1933).

We have not attempted to canvass the attorney-client privilege under federal common law to identify all circumstances under which confidential communications would be protected from disclosure. Rather, we have tried to focus on the case law relevant to the facts particular to the LAB circumstances -- that is, client identity and the nature of the legal assistance provided. As we here review the applicable law in this area, we attempt to address the legal authorities relied on by LAB in its September memorandum.

As a general rule, the attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal representation. Sindel, 53 F.3d at 876; Fisher v. United States, 425 U.S. 391, 403 (1976). Thus, the heart of the attorney-client privilege is the substance of the communications between the client and the attorney. United States v. Long, 328 F. Supp. 233, 235-36 (E.D. Mo. 1971). The essential elements of the attorney-client privilege must attach to the communication for which protection is sought. Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963).^{20/} Importantly, the communication must be to an attorney (or his representative)^{20/} and for the purpose of obtaining legal services. However, not all transactions between the lawyer and client are privileged. Peripheral matters or business matters merely collateral to the provision of legal services are not privileged. Id.

As a general matter, the privilege does not protect the fact of representation,^{21/} the client's identity,^{22/} or matters incident to the business relationship between the attorney and the client, such as the fee arrangement, the retainer agreement, the number of hours billed, costs incurred, and fees paid.^{23/} "The authorities are substantially uniform against any privilege as applied to the fact of retainer or identity of the client. The privilege is limited to confidential communications, and a retainer is not a confidential

^{20/} For purposes of the privilege, "the attorney-client relationship extends to the network of employees acting under the direction of the attorney," which can include intake workers. In re Stoutamire, 201 B.R. 592, 595-97 (S.D. Ga. 1996) (relying on GA law). Thus, client identifying information and eligibility information provided at intake does not fall outside the privilege because of any lack of attorney-client relationship at that point in the process. Rather, the information is not privileged to the extent that it is not in furtherance of the legal advice being sought. However, the ABA Committee on Professional Ethics and a number of state bar ethics committees have held that a client's identity, while generally not privileged, constitutes a secret or confidence protected by the ethical rule against disclosing client confidences. For a compilation of these opinions, see *Restrictions by Funders and the Ethical Practice of Law*, 67 Fordham L. Rev. 2187 at fn. 212.

^{21/} See United States v. Pape, 144 F.2d 778 (2d Cir.), cert. denied, 323 U.S. 752 (1944); Colton, 306 F.2d at 637.

^{22/} See Sindel, 53 F.3d at 876; In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986); In re Grand Jury Subpoenas v. Anderson, 906 F.2d 1485, 1488 (10th Cir. 1990).

^{23/} See id.

communication”^{24/} The general rule is further amplified in 70 C.J.S., *Witnesses* §502 (1955):

The existence of the relation of attorney and client is not a privileged communication. The privilege pertains to the subject matter, and not to the fact of the employment as attorney, and since it presupposes the relationship of attorney and client, it does not attach to the creation of that relationship. So, ordinarily, the identity of the attorney’s client, or the name of the real party in interest, and the terms of employment will not be considered as privileged matter. The client or the attorney may be permitted to testify as to the fact of his employment as attorney, or as to the fact of his having advised his client as to a certain matter, or performed certain services for the client.^{25/}

Federal courts have recognized three exceptions to this general rule which would permit the client’s identity and fee arrangements to be privileged. These exceptions include the “legal advice” exception which protects the client’s identity when a strong probability exists that disclosure would implicate the client in the very crime for which legal advice was sought; the “last link” exception which prevents disclosure when it would incriminate the client by providing the last link in an existing chain of evidence; and the “confidential communications” exception which protects the identity of the client if disclosure would necessarily reveal the substance of the confidential communications. See Sindel, 53 F.3d. at 876-77; Anderson, 906 F.2d at 1491; United States v. Goldberger & Dubin, 935 F.2d 501, 505 (2d Cir. 1991); United States v. Leventhal, 961 F.2d 936, 940 (11th Cir. 1992). The legal advice and last link exceptions are generally limited to criminal cases, and are not likely to be relevant for our purposes. However, the confidential communication exception can arise where “so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.” National Labor Relations Board v. Harvey, 349 F.2d 900, 905 (4th Cir. 1965) (deciding identity of client for whom attorney hired a private investigator to report on activities of union organizer would be privileged if purpose of investigation related to legal advice, but not if attorney was used merely as intermediary).

As the privilege attaches only when an attorney-client relationship exists, the fact of representation is not privileged. Similarly, the privilege attaches only to communications related to the provision of legal services, and not to other transactions,

^{24/} National Labor Relations Board v. Harvey, 349 F.2d 900, 904 (4th Cir. 1965) (quoting United States v. Page, 144 F.2d 778, 782 (2d Cir.), cert. denied, 323 U.S. 752 (1944)).

^{25/} Id. (quoting rule as stated in Behrens v. Hironimus, 170 F.2d 627, 628 (4th Cir. 1948)).

such as the rendering of business advice or personal services. Thus, disclosure of the general subject matter of the representation or the general nature of the legal services rendered is usually permitted. However, the precise nature of or any detail concerning the nature of the services provided is likely to reveal the substance of the confidential communications, and is, therefore, privileged. See Montgomery County v. Microvote Corp., 175 F.3d 296, 303-04 (3d Cir. 1999). Needless to say, the line between the permissibly general and the privileged specifics is not clearly drawn,^{26/} as the following case summaries illustrate:

Case Name/Cite	Materials Privileged	Materials Not Privileged
<u>Montgomery County</u> , 175 F.3d at 303-04	Billing records that reveal the nature of the services rendered	fee agreement letter
<u>Fidelity & Deposit Co. of Md v. McCulloch</u> , 168 F.R.D. 516, 523 (E.D. Pa. 1996)	Billing records to extent records reveal nature of services performed	
<u>In re Grand Jury Investigation</u> , 631 F.2d 17, 19 (3d Cir. 1980)		fee arrangements absent legal advice exception
<u>Colton</u> , 306 F.2d at 636	Specific details of services performed that may reveal substance of the matters discussed or the advice given	date and general nature of legal services performed such as litigation, drafting documents, and tax advice
<u>Diversified Indus., Inc.</u> , 572 F.2d at 600-01	Final investigation report as it contained legal advice	memorandum from law firm describing in detail its plans for conducting investigation into corporation corruption charges as it contained no confidential communications and revealed little more than relationship between law firm and corporation, the purpose for which the law firm had been retained, and the steps the law firm intended to take to discharge obligations
<u>Burton v. R.J.Reynolds Tobacco Co.</u> , 177 F.R.D. 491, 499-500 (D.Kan. 1997)	Fact and general subject matter of meeting with legal department when purpose is legal advice and would reveal substance of legal advice	fact of a communication or meeting with legal counsel and general topic of discussion without revealing substance of discussion and acts of attorney on business matters
<u>Elliott Assoc., L.P. v. The Republic of Peru</u> , 176 F.R.D. at 97-98	Invoices or billings showing detailed, specific services rendered or precise nature of representation, litigation strategy or areas of law researched	invoices or billing statements when contents similar to fee arrangements and include only general purpose of work performed

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Elliott Associates, L.P. v. The Republic of Peru, 176 F.R.D. 93, 97-98 (S.D.N.Y. 1997).

Case Name/Cite	Materials Privileged	Materials Not Privileged
<u>In re Grand Jury Witness Richard J. Salas</u> , 695 F.2d 359, 362 (9th Cir. 1982)	Bills or time records revealing the nature of the services provided, such as researching particular areas of the law	
<u>United States v. Long</u> , 328 F.Supp. at 235-36	Specific details about what was said in relation to the problem is protected	the general nature of the legal services rendered, such as, litigation, drafting documents, tax advice or work on domestic relations problems

The cases relied on by LAB are not to the contrary. These cases recognize the general rule that client identity, fee arrangements, and other matters incident to the creation of the attorney-client relationship are merely collateral to the legal services provided, and are, therefore, not privileged. See In re Grand Jury Subpoena v. Horn, 976 F.2d 1314, 1316-17 (9th Cir. 1992); National Labor Relations Board v. Harvey, 349 F.2d 900, 903-905 (4th Cir. 1965); In re Criminal Investigation No. 1/242Q, 602 A.2d 1220, 1222-23 (Md.App. 1992). These cases also acknowledge the same exceptions to the general rule as identified above, and apply these exceptions in the same manner as the cases noted above. Horn, 976 F.2d at 1317-18 (finding client identity, fee arrangements, and trust accounts are not privileged; legal advice, last link and confidential communication exceptions do not apply in this case);^{27/} Harvey, 349 F.2d at 905-07 (remanding to lower court to determine if confidential communication exception applies to protect client identity in this case); In re Criminal Investigation, 602 A.2d at 1223-24 (discussing legal advice, last link and confidential communications exceptions and finding none applicable to request for fees paid).

Therefore, the question remaining is whether LAB properly invoked the attorney-client privilege to refuse to disclose the client's legal problem whether in the form of the problem code or the subcategory description assigned for CSR purposes when that information could be linked to the client's identity in cases where no other public disclosure of the client's problem had been made.

^{27/} The court went on to find other aspects of the subpoena to constitute an unjustified intrusion into the attorney-client relationship in that it would have required the production of "letters of consultation and retainer agreements describing the intended scope of the attorney-client relationship, billing records describing the services performed for his clients and the time spent on those services, and any other attorney-client correspondence relating to the performance of legal services and the rates therefor. Such documents may reveal the client's motivation for seeking legal representation, the nature of the services provided or contemplated, strategies to be employed in the event of litigation, and other confidential information exchanged during the course of the representation." In addition, the subpoena sought documentation relating to financial transactions of the clients on which they have been seeking advice. These positions are generally consistent with the principles discussed above, although they apply the privilege more broadly than other circuits -- i.e., retainer agreements, time spent and rates for services.

Application of Federal Common Law Privilege to LAB Circumstances

As posed in your request, the dispute concerns LAB's assertion of the privilege to deny access to problem codes (and/or the category/subcategory descriptive material) when linked to the client's name. LAB does not dispute the general rule that the client's identity is not privileged. It does, however, claim that the problem codes (and/or the category/subcategory descriptions of the client's legal problem) are privileged as revealing the substance of a confidential communication and, when combined with the client identity, qualify for the confidential communication exception to the general rule.

The problem code is a two digit number assigned to the client's legal problem and reported as part of the Case Service Reports. Problem codes are not directly addressed by the 1999 CSR Handbook, nor are they defined or explained in any regulation or other instruction from LSC. The only apparent reference in the CSR Handbook to problem codes is in Section V: Documentation Requirements, which requires that, for each case reported to LSC, there should be documentation in the case management system that describes the client's legal problem(s).

The problem codes are identified on the CSR Form itself. Potential legal problems are divided into ten categories, with problem codes assigned to more specific subcategories ranging from one to ten per category. The ten main categories are: Consumer/Finance, Education, Employment, Family, Juvenile, Health, Housing, Income Maintenance, Individual Rights and Miscellaneous. Education contains a single problem code; Employment, Health and Juvenile each have three subcategories;^{28/} Housing and Individual Rights each have five subcategories;^{29/} Consumer/Finance and Income Maintenance each have nine;^{30/} and Family is the most specific, with ten subcategories.^{31/}

^{28/} The Employment subcategories are: Job Discrimination and Wage Claims. For Health, the subcategories are: Medicaid and Medicare; and for Juvenile, the subcategories are: Delinquent and Neglected/Abused/Dependent. The last subcategory in each is "other."

^{29/} The Housing subcategories are: Federally Subsidized Housing Rights, Homeownership/Real property, Landlord/Tenant (Not Public Housing), and Other Public Housing. The Individual Rights subcategories are: Immigration/Naturalization, Mental Health, Prisoner's Rights, and Physically Disabled Rights. The last subcategory in each is "other."

^{30/} Consumer/Finance subcategories are: Bankruptcy/Debtor Relief, Collection, Contracts/Warrants, Credit Access, Energy, Loans/Installment Purchase, Public Utilities, and Unfair Sales Practice. Income Maintenance subcategories are: AFDC/Other Welfare, Black Lung, Food Stamp/Commodities, Social Security, SSI, Unemployment Compensation, Veterans Benefits, and Workers Compensation. The last subcategory in each is "other."

^{31/} The Family subcategories are: Adoption, Custody/Visitation, Divorce/Separation/Annulment, Guardianship/Conservatorship, Name Change, Parental Rights Termination, Paternity, Spouse Abuse, and Support. Again, the last subcategory is "other."

There are six Miscellaneous subcategories.^{32/} The 54 subcategories, thus, identify the client's problem with varying degrees of specificity, from a general reference to "education" to a precise reference to "parental rights termination."

The question of privilege does not arise in the reporting of the data directly, as the case statistics are aggregated and reported to LSC without any individual identifying information. Rather, the issue of privilege has arisen in the context of LSC reviews and OIG audits of the grantee's compliance with the CSR requirements. In that context, LAB has refused to confirm the problem code (and/or the subcategory description) assigned to particular cases, resulting in the auditor or LSC monitor being unable to establish if the case was properly coded within the CSR system. Access to a listing of client names and problem codes may be necessary to identify potentially duplicate cases. In addition, access to the subcategory description assigned to a case may be necessary to check for adherence to the program's adopted priorities.^{33/}

The general rule is that the attorney may disclose the fact of his employment as an attorney, the general subject matter of the representation, and the general nature of the legal services provided. On the other hand, privilege protects the precise nature of the legal services provided and any detailed description of those services or matters considered which are likely to reveal the substance of the communications between attorney and client. Acceptable generalizations of the nature of services provided are "gave tax advice" or "worked on domestic relations problems."

While some might argue that it possibly constitutes an unwarranted disclosure, in our judgment *the problem code* – that is, the two-digit number – standing alone, is not privileged, since it fails to communicate anything about substance of the communications between the client and the attorney. Moreover, the ten main CSR categories of legal

^{32/} Miscellaneous legal problems are categorized as: Incorporation/Dissolution, Indian/Tribal Law, License, Torts, Wills/Estates, and other.

^{33/} The problem code alone would not serve for this purpose as the program's priorities are unlikely to be given a numerical value corresponding to the problem code. Also, the need for access may vary depending on the specificity of the program's stated priorities. As noted above, the OIG may also rely on the confirmation of the problem code as a surrogate for confirming the level of assistance provided, an issue more directly related to the closing code of a case. LAB contends that it has limited its privilege claim to those cases in which the client's legal problem has not been disclosed to some other person, as in a court filing or even a letter or phone call by the attorney on behalf of the client. While consistent with its claim of privileged communication, the limitation does not relieve the tension between the need to maintain the privilege and LSC's compliance objectives. Whether legal assistance meeting the definition of a "case" has been provided should generally not be an issue for cases closed at the "Brief Service" level or higher. It is an issue with "Advice and Counsel" and "Referred After Legal Assessment," which are precisely the categories for which LAB will most likely to be asserting the privilege. Finally, to the extent that "confirmation" of the problem code, the subcategory description, or the closing code requires access to the case file documentation of the actual communications between the attorney and the client about the client's legal problem, it will raise attorney-client privilege problems of its own.

problems^{34/} are sufficiently general as to constitute a non-privileged statement of services provided.

The individual subcategories, however, pose a closer – and, in some cases, a significantly more difficult – question as they vary in the degree of specificity with which they describe the client’s legal problem. On the one hand, the problem code for “Education” is obviously no more specific than the general category which it represents. Arguably, other subcategory descriptions, such as “Landlord/tenant,” “SSI,” “Torts,” “Medicaid,” or “Immigration/Naturalization” reveal little more than a general subject matter, similar to “tax” advice or “domestic relations” problems. However, other subcategories, particularly in the Family category, are far more problematic. Identifying the client’s legal problem as “Adoption,” “Name Change,” “Spouse Abuse” and “Parental Rights Termination” conveys more specific information about the substance of the attorney-client communication than the earlier examples.

Courts have found billing statement descriptions of the areas of law researched to be privileged, as are other details of the services rendered which may reveal the substance of the matters discussed or the advice given. Colton, 306 F.2d at 636; United States v. Long, 328 F. Supp. at 235-36; Elliott, 176 F.R.D. at 97-98. Given these authorities, we cannot say with any certainty whether a court would ultimately compel disclosure of the client’s legal problem with this degree of specificity. It does appear, however, that LAB may, at a minimum, have a colorable claim of privilege with respect to some of the subcategory descriptions.

Finally, confirmation of the problem code or the category or subcategory descriptions, even if the problem code and/or subcategory description is not itself privileged, may give rise to other privilege concerns. To the extent such confirmation requires access to documentation in the client’s file which describes the legal problem presented and the advice given in more detail than the problem code or subcategory description, this type of specific detail about the communications between attorney and client is protected by the attorney-client privilege. Other than a notation of the problem code or subcategory description itself, it is hard to conceive of documentation that would not be within the privilege. Disclosure of this information in combination with the client name would be tantamount to revealing the substance of the confidential communications. Therefore, it would be considered privileged. Sindel, 53 F.3d at 876-77.

^{34/} As noted above, the ten main categories being Consumer/Finance, Education, Employment, Family, Juvenile, Health, Housing, Income Maintenance, Individual Rights, and Miscellaneous.

Even if not privileged, the client's legal problem may be a confidence, the disclosure of which may violate the attorney's professional responsibilities to the client. Under the LSC Act, the Corporation's enforcement and monitoring responsibilities are to be carried out in a manner consistent with the attorneys' professional responsibilities. §1006(b)(3). As relevant here, the 1996 Act waives this requirement only with respect to client name, eligibility records, retainer agreements and plaintiff statements. §§ 509(h), 504(a)(8). As noted above, the client's identity is not ordinarily privileged. Likewise, the client's financial and alien eligibility status are, normally, matters collateral to the legal representation being sought. As such, client eligibility will not ordinarily be considered a privileged communication. Both identity and eligibility status may, however, be confidential or secret. That confidentiality will not bar access to these materials, however, because of the statutory waiver of professional responsibility concerns. § 509(h).

The client's legal problem, however, is not a component of the client's eligibility.^{35/} As conceived of by the LSC Act, client eligibility was solely a financial determination. Thus, an eligible client was defined as one financially eligible for legal assistance. § 1002(3). Through appropriations provisions, citizenship and/or alien status have been added as eligibility factors. However, a program's case priorities and other restrictions on the types of services that can be provided do not factor into the client's eligibility. These restrictions operate uniformly on all eligible clients and do not distinguish eligible from ineligible clients. Moreover, communications concerning the client's legal problem are clearly for the purpose of obtaining legal services and advice and, hence, squarely within the privilege. The justification for treating client eligibility as a non-privileged collateral matter would, therefore, not apply to the client's legal problem.

Based on the foregoing analysis, to the extent privileged, the client's legal problem is protected from disclosure. If the expression of the client's legal problem falls within a non-privileged category, it may still be protected from disclosure as a client confidence or secret. The 1996 Act overrides confidential (but not privileged) statements of the client's legal problem when part of a retainer agreement or included in the plaintiff statement of facts. However, as noted above, LAB is most likely to assert the privilege or confidentiality for advice and counsel or referred after legal assistance cases – the types of cases least likely to require either a retainer agreement or plaintiff statement. As to these cases, the 1996 Act does not otherwise require access to confidential legal problems.

^{35/} The CSR Handbook generally recognizes the distinction between client eligibility and restricted legal assistance, and, while both are elements of a reportable case, treats them as separate factors.

Thus, access to the client's legal problem may be denied in certain cases as privileged. Even if not privileged, the information may still be protected under § 1006(b)(3). Moreover, detailed documentation of the client's legal problem and the legal assistance provided goes to the heart of the attorney-client privilege and the principle of client confidences and secrets, and access to these substantive communications would be denied.

What May Be Accessed by LSC Auditors and Monitors

It may be helpful to review in brief, but in greater detail that set out in the Summary of Conclusions, *supra*, that information which should in all or most cases be accessible to LSC auditors and monitors. At the outset, it should be clear that, as a general rule, the problem code and the descriptive material related to the client's legal problem which is not linked to the client's identity when provided to LSC auditors and monitors would be accessible. With regard to the specific problem presented, we believe that the client name and the client's legal problem described at a level of generality represented by the basic CSR categories are not privileged. Moreover, we do not believe that the client name and the problem code (in numerical form), such as on a listing for the identification of potentially duplicate cases, are privileged -- provided the listing does not otherwise define the problem codes. A colorable claim of privilege can, however, be made for certain of the specific subcategory descriptions of the legal problem when linked to the client's name.

The above principles are also applicable to other areas of potential conflict on access. For example, client name and financial eligibility information are not generally privileged. The financial eligibility information provided by the client will not in the normal course relate to the legal advice being sought and will therefore fall outside the privilege. While such information may be a client secret or provided in confidence, LSC auditors and monitors will, by statute, have access to such secrets or client confidences that are not protected by the attorney-client privilege.^{36/} The same result will obtain with respect to access to client name and citizenship attestation forms and/or alien status documentation. Such information will not in the normal course relate to the legal advice sought, but is required solely to establish eligibility for assistance from an LSC-funded legal provider. Therefore, the information and the documentation are outside the privilege, and, whatever other confidentiality may attach has been waived by statute.

^{36/} We note that 45 CFR § 1611.7 states that client financial eligibility is to be documented "in a manner that protects the identity of the client, for audit by the Corporation" and provides an exception only in the case of an LSC investigation of a complaint relating to a specific client's eligibility. As this regulation has not been updated since 1983, we would argue that the statutory authority provided in § 509(h) of the 1996 appropriations act and carried forward by subsequent appropriations acts supercedes the more narrowly drawn regulation. However, the regulation ought to be updated to avoid future disputes.

Similarly, retainer agreements are not generally privileged. Rather, to the extent they relate to the fact of the attorney-client relationship and generally states the nature of the services to be provided, the retainer agreement contains no privileged information and is akin to fee arrangements which, with a few exceptions, are outside the privilege.^{37/} Thus, LSC monitors and auditors should have unredacted access to client retainer agreements – so long, of course, as the given retainer agreement does not contain specific facts or set out the substance of the representation.^{38/}

Access to client identity and statement of facts is governed by the FY1996 appropriations act and Part 1636 of the Regulations. By statute, access to the statement of facts is provided to federal auditors and monitors, but may not be accessed by the opposing party in the litigation or negotiation except where permitted through discovery proceedings after litigation has begun. § 504(a)(8). Whether or not the litigation or negotiation for which the statement of facts was prepared has actually ensued, the statute permits auditor access to the statement prepared in anticipation of such an event. Thus, a grantee may not limit access to the cases in which the identity of the client's issue has already been divulged to a third-party. While not expressly waived by the statute, the confidentiality protections of § 1006(b)(3) of the LSC Act would not apply to the statement of facts when access is sought by the Corporation or other federal or federally-funded auditor or monitor. § 1636.3(a). The regulation does attempt to preserve these confidentiality protections as against adverse and all other third parties. § 1636.3(b). Finally, the regulation also attempts to preserve the attorney-client privilege with respect to the statement of facts. *Id.*; see also, preamble at 62 FR 19418 (April 21, 1997). The attorney-client privilege is likely to be deemed to have been waived with respect to any written statements actually shared with an authorized auditor or monitor. However, to the extent such materials prepared in anticipation of litigation may also be covered by the work product privilege, that privilege is not waived by sharing with auditors and would continue to protect the statements from compelled disclosure to adversaries and other third parties in litigation.

We hope the opinion helps to clarify the question of Corporation auditor and monitor access to client information and materials. If you have any remaining questions or we can otherwise be of further assistance, please let me know.

^{37/} See note 31, *supra*. The same argument would apply to § 1611.8 on retainer agreements.

^{38/} We understand that retainer agreements may vary across the country and do not mean to suggest that specific facts or statements as to the substance of the representation contained in a retainer agreement would have to be disclosed.