OFFICE OF LEGAL A

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

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.

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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

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.

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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

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
Montgomery County, 175 F.3d at 303-04	Billing records that reveal the nature of the services rendered	fee agreement letter

Fidelity & Deposit Co. of Md v. McCulloch, 168 F.R.D. 516, 523

175 F.3d51at 303-In0.75Grd spJury.25 81 0.75 re 29 64..75 474.75 TD 0.0641 19Tc 0.6083 797lochj ET15 (of) Tj07. 516, 5, 631 Tj2

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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

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[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

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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 Under051 Tea1ase,

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