




OFFICE OF LEGAL AFFAIRS

INTERNAL OPINION

Internal Opinion # IN-2003-2014

To: Danilo Cardona, Director, Office of Compliance and Enforcement

From: Victor Fortuno, General Counsel & Vice President for Legal Affairs 

Date: December 31, 2003

Subject: Attorney–Client Privilege and Access to Recipient Client Names, Problem Codes and Descriptions of Services.

cc: John Idleman, Acting Vice President for Administration

You have requested that the Office of Legal Affairs (OLA) reconsider a portion of the OLA January 12, 2000, opinion on LSC access to recipient client information (OLA 2000 Opinion) in light of the decision in *US v. LSNY*, 249 F.3d 1077 (D.C. Cir. 2001). You requested reconsideration of the following conclusions in the OLA opinion:

Whether the LSC problem codes may be deemed to be within the [attorney–client] privilege is a close call. It is, however, our considered opinion [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. 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*. . . . 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 – so long, of course, as the given retainer agreement does not contain specific facts or set out the substance of the representation.

OLA 2000 Opinion at 2–3.¹ You also referenced discussions on this topic at pages 3, 6 and 11 of the OLA 2000 Opinion.

¹ In both this opinion and in the OLA 2000 Opinion the terms “privilege,” “privileged,” and “attorney–client privilege” all refer to attorney–client privilege as recognized under *federal law*. Also in both documents the term

You expressed the view that this language in the OLA Opinion “is no longer operative” in light of *U.S. v. LSNY*, in which the D.C. Circuit enforced the LSC Office of Inspector General (OIG) subpoenas for client names that could be connected with CSR problem codes. The court rejected blanket assertions by an LSC grantee that client names connected to problem codes were protected from disclosure by attorney–client privilege and by rules of professional responsibility. The court remanded the case for any case specific privilege determinations. Based on this decision, you reached the following conclusion:

It is our understanding, then, that the prior OLA holding which indicated LSC may not review retainer agreements, which set forth the *matter in which representation is sought and/or the nature of the representation provided*, is no longer operative. Similarly the OLA holding which indicates LSC may not review client names associated with problem codes is also inconsistent with the opinion of the Court of Appeals.

SUMMARY OF CONCLUSIONS

Judging from your request and discussions that have been had, it appears that the OLA 2000 Opinion has caused unnecessary confusion.² Some of the conclusions reached in that opinion may have been stated too broadly and/or imprecisely. While the legal analysis in the OLA 2000 Opinion is still useful and instructive, please consider the specific *conclusions* of that opinion to be superseded by this opinion drawing on the benefit of the decisions of both the district court and the D.C. Circuit in *US v. LSNY*. We hope that this will prevent any future confusion on this important issue.

Section 509(h) of the LSC appropriation applicable since 1996 provides that LSC has access to client names, retainer agreements and other information, notwithstanding rules of professional responsibility, unless such information is subject to attorney–client privilege. Generally client names connected to LSC CSR problem codes or descriptions of legal services sought or provided (“problem codes or descriptions of services”) do not reveal privileged information. Nonetheless, in some situations, a recipient may be able to make colorable specific claims of privilege that client names connected with problem codes or descriptions of services would reveal privileged information for specific cases and/or clients. Similarly a recipient may be able to exclude specific names, problem codes or descriptions of services from otherwise permissible lists of such information when doing so would reveal privileged information as to

“problem code” refers to both the code number and the associated description of the legal problem, unless specified otherwise.

² Some of the confusion on this issue is reflected by the language of your request. To be clear, the 2000 OLA Opinion *did not* state that LSC can never review retainer agreements that set forth the nature of representation nor that LSC can never review client names associated with problem codes. The 2000 OLA Opinion explicitly concluded that LSC can generally access such information, but that situations *may* exist involving specific problem codes and/or descriptions of representation that would raise issues of attorney–client privilege. As discussed below, the courts looking at this issue reached the same general conclusions. These decisions make it easier for us to now state more clearly how this legal analysis applies to LSC review of retainers or problem codes in connection with client names.

those individual cases or clients. The same analysis applies to other §509(h) information such as financial eligibility information and eligibility records. Recipients must cooperate with LSC procedures for evaluating any such privilege claims. The privilege relevant here is as established under federal common law, rather than state law.

BACKGROUND AND ANALYSIS

The statutory scheme governing LSC's access to information in recipient records was summarized by the D.C. Circuit Court in *U.S. v. LSNY* as follows:

The Legal Services Corporation Act of 1974 authorizes the Corporation to supervise grantees' compliance with applicable laws. *See* 42 U.S.C. §2996e(b)(1)(A). In doing so, however, the Corporation generally must respect the professional responsibilities incumbent on grantees' attorneys:

The Corporation shall not, under any provision of this subchapter, 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 . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

Id. §2996e(b)(3). The Inspector General, because he bears the burden of auditing and investigating grantees, is granted broad subpoena powers. *See* 5 U.S.C. app. 3 §4(a)(1), 6(a)(4). He [and LSC] also enjoys a limited exception to §2996e(b)(3)'s restrictions:

Notwithstanding section [42 U.S.C. §2996e(b)(3)], financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, . . . except for reports or records subject to the attorney-client privilege.

Omnibus Appropriations Act of 1996, Pub.L. No. 104-134, §509(h), 110 Stat. 1321, 1321-59 (emphasis added). [Incorporated by reference into subsequent LSC appropriations.]

U.S. v. LSNY, 249 F.3d 1077, 1082 (D.C. Circ. 2001). Thus, LSC must generally respect the rules of professional responsibility that apply to LSC grantee attorneys, except for situations

covered by §509(h).³ We hasten to add, however, that LSC must always respect *attorney–client privilege*, even for §509(h) information. 42 U.S.C. §2996h(d), §1009(d) of the LSC Act (“Notwithstanding the provisions of this section or section 1008 of this title, neither the Corporation nor the Comptroller General shall have access to any reports or records subject to the attorney–client privilege.”); §509(h) (materials shall be available “except for reports or records subject to the attorney–client privilege”). The privilege is as construed under federal law, rather than state law. *See U.S. v. LSNY*, 249 F.3d at 1081–82 (applying federal privilege law not state privilege law in the §509(h) context) and *United States v. Sindel*, 53 F.3d 874, 876–77 (8th Cir. 1995) (federal common law privilege rules apply with respect to IRS reporting requirements, not state rules).

LSC requires that retainer agreements “shall clearly identify . . . the matter in which representation is sought [and] the nature of the legal services to be provided.” 45 C.F.R. §1611.8(a). The LSC CSR legal problem codes set out a number and description for categorizing recipient cases (*e.g.*, problem code 36 for paternity cases). LSC and the courts looking into this matter have treated these CSR descriptions and codes as one instance of “the matter in which representation is sought” that must be provided in the retainers that are subject to §509(h). In 2000, LSC recipients Legal Services of New York City (LSNY) and the Legal Aid Bureau of Maryland (LAB) refused to provide the OIG with client names connected with case numbers because of a claim of attorney–client privilege.⁴ The OIG had already collected certain problem codes connected with case numbers and thus had in its possession information that could connect client names with problem codes. Both programs made blanket refusals to provide any names: LSNY refused to provide any names at all, and LAB refused to provide any names in cases in which the client’s name and type of problem had not been disclosed to a third party.⁵ Both grantees offered to provide “unique client identifiers” in lieu of client names, but the OIG rejected this approach.

The OIG subpoenaed the requested client names. The subpoenas were upheld by the district court in *U.S. v. LSNY*, 100 F. Supp.2d 42 (D.D.C. 2000) and then by the D.C. Circuit Court in *U.S. v. LSNY*, 249 F.3d 1077 (D.C. Cir. 2001).⁶ While the courts rejected these blanket claims, they recognized that there *may* be specific cases in which a client name connected to a problem code would reveal privileged communications.

³ While §509(h) information must be provided regardless of rules of professional responsibility, the LSC statutes do recognize that such information may be sensitive. For this reason, §509(i) explicitly prohibits LSC from disclosing “any name or document referred to in subsection (h), except to—(1) a Federal, State, or local law enforcement official; or (2) an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation of a rule of professional conduct.” Pub.L. No. 104-134, §509(i), 110 Stat. at 1321-59.

⁴ LAB and LSNY also presented arguments regarding the applicability of rules of professional responsibility to §509(h) information, which the courts rejected and are not germane to this opinion.

⁵ LSNY’s took the position that it could provide client names that could be connected to problem codes in some cases; it chose not to do so until the issue of enforcement of the subpoena was resolved because the OIG had stated that a partial response was inadequate. John S. Keirman, Debovoise & Plimpton (on behalf of LSNY) *Response of Legal Services for New York City to Subpoena Number 2000-02* at 15 (March 30, 2000).

⁶ LAB provided the subpoenaed information after the district court decision and did not join LSNY in the appeal.

This ruling does not mean that there is no case in which disclosure of the combination of a client's name and a problem code would reveal a client's "motive" for seeking representation, within the meaning of the cases. This ruling is not intended to foreclose specific claims of privilege as to individual clients.

100 F.Supp.2d at 46 (D.C. District Court).

Courts have consistently held that the general subject matters of clients' representations are not privileged. *See, e.g., In re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir. 2000). Nor does the general purpose of a client's representation necessarily divulge a confidential professional communication, and therefore that data is not generally privileged. To be sure, there are exceptions, but as always the burden of demonstrating the applicability of the privilege lies with those asserting it. *See In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (per curiam); *cf. In re Sealed Case*, 877 F.2d 976, 979-80 (D.C. Cir. 1989). That burden requires a showing that the privilege applies to each communication for which it is asserted, *see Lindsey*, 158 F.3d at 1270-71

249 F.3d at 1082 (D.C. Circuit). The D.C. Circuit remanded the case to the district court for possible further proceedings—providing LSNY the opportunity to make a showing for individual cases that the name connected to the problem code would reveal an "indubitably confidential communication" such as a privileged confidential motive for seeking representation.⁷

CONCLUSIONS

Pursuant to §509(h), LSC may obtain from recipients client names connected with CSR problem codes or descriptions of legal services, except for specific situations in which doing so would reveal privileged information. Recipients may be able to make colorable "specific claims of privilege as to individual clients" that providing such information would breach the privilege. Similarly a recipient may be able to exclude specific names, problem codes or descriptions of legal services from otherwise permissible lists of such information in those specific situations when doing so would reveal privileged information. The same analysis applies to other §509(h) information such as financial eligibility information and eligibility records. Such information connected to a client name might rarely, if ever, "divulge a confidential professional communication," but we cannot foreclose the possibility that a recipient will make a legitimate privilege claim for such information in a specific case. As with any situation in which a recipient claims that information may be withheld from LSC, the recipient will need to cooperate with LSC procedures for evaluating its claim of privilege and for alternate means of access if

⁷ The Second Circuit reached the same conclusions in an unpublished summary order. *Bronx Legal Servs. v. Legal Servs. Corp.*, No. 02-9097, 2003 U.S. App. LEXIS 10299 (2d Cir. May 22, 2003) *cert. denied*, No. 03-288, 2003 U.S. LEXIS 8585 (Dec. 1, 2003). This case involved the same facts as *U.S. v. LSNY*. The Second Circuit affirmed summary judgment rejecting the arguments of a LSNY subgrantee, Bronx Legal Services, challenging the authority of LSC (including the OIG) and LSNY to obtain the requested client names from Bronx Legal Services. Please note that unpublished summary orders are of limited precedential value; §0.23 of the rules for the Second Circuit provides that summary orders "shall not be cited or otherwise used in unrelated cases before this or any other court."

appropriate. We wish that we could give you a more absolute answer but, like the D.C. Circuit, we cannot foreclose the possibility that situations might arise in which the privilege would apply to these types of information.

This analysis generally applies to LSC's CSR problem code numbers even unconnected to their descriptions because the numbers and descriptions are publicly available and well known within the LSC community. Even a stranger to LSC's system would not have trouble obtaining the CSR Handbook, decoding the numbers and figuring out, for example, that 36 represents a paternity case. A list of problem code numbers connected to client names is functionally equivalent to a list of problem code descriptions connected to client names. As such, if Jane Smith and "paternity" would reveal privileged information (based on the specific situation), then Jane Smith and LSC CSR number 36 would do the same (although we can evaluate any specific proposal for providing code numbers and client names in situations in which the privilege would apply).

We hope that this opinion corrects any misunderstandings regarding this issue. To respond to your specific questions, with respect to §509(h) information, LSC may generally review retainer agreements (including the client name) which set forth the matter in which representation is sought and/or the nature of representation provided. Similarly LSC may generally review client names associated with problem codes. Nonetheless, a recipient could raise a colorable specific claim of privilege as to §509(h) information in particular cases if the information requested in the format requested would reveal genuinely privileged information about that case or client. LSC would need to determine whether the asserted claim is valid and, if so, how to proceed in light of LSC's statutory obligations.