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GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply B-200187
Refer to:

February 20, 1981

Mr. S. Leigh Curry, Jr.
Acting General Counsel
Department of Housing and
Urban Development
Washington, D.C. 20410

Dear Mr. Curry:

of clients

This is in reply to a letter from the Deputy General Counsel, Department of Housing and Urban Development (HUD) requesting (the opinion of the General Accounting Office (GAO) relating to the rights of HUD auditors to review case files ~~and/or obtain the names and addresses of clients~~ serviced under HUD grants] by legal associations] also funded by the Legal Services Corporation (LSC), 42 U.S.C. § 2996.

The letter discloses that [three organizations,] the Evergreen Legal Services, Snohomish County, Washington; Northwestern Legal Services, Erie, Pennsylvania; and Legal Assistance of Ramsey County, St. Paul, Minnesota; which are in part funded by the LSC and which have also received HUD Community Development Block grants for housing counseling services have refused to permit HUD access to the case files in connection with HUD audits of the grants. The Legal Services Corporation ^{1/} and the legal associations involved, believe that to permit HUD to examine the files which contain information identifying the clients would violate the ethical obligation of an attorney to preserve the confidences and secrets of his clients. HUD, on the other hand, questions whether the attorney-client privilege could be properly asserted in this instance where

1/ The LSC has the responsibility to "insure that all attorneys, while engaged in legal assistance activities supported in whole or in part by the Corporation, refrain from * * * any * * * activity prohibited by the Canons of Ethics and Code of Professional Responsibility of the American Bar Association * * *." 42 U.S.C. § 2996f(a)(10) (1970).



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B-200187

"housing counseling services" are concerned. HUD also cites the need to have access to those files in order to fully audit the grants by contacting the clients and verifying information. Consequently, HUD has suspended the funding of these organizations until such audits have been conducted.)

HUD indicates that "in light of the specific federal statutory provisions applicable to audits of Legal Services Corporation by the GAO and the specific attorney-client privilege included in the [LSC Act] in connection with such audits," HUD should be guided by the standards followed by the GAO in connection with such audits in implementing the audit requirements of Circular A-102 for HUD grantees.

The (Legal Services Corporation Act, 42 U.S.C. § 2996 (1970), set up the Legal Services Corporation to provide financial support to legal services programs around the country. [The Act provides for the auditing of the Corporation by the GAO with complete access to the records and books of the Corporation.] 42 U.S.C. § 2996(h)(b). However, 42 U.S.C. § 2996(h) also provides:

"(d) Attorney-client privilege

"Notwithstanding the provisions of this section or section 2996(g) of this title, (neither the Corporation nor the Comptroller General shall have access to any reports or records subject to the attorney-client privilege.)"

In addition to the funding provided by the LSC, many of the legal associations also receive grants from various other Federal agencies. In this instance, the associations received HUD grants to fund housing counseling services. [In connection with the grants, contracts were signed 2/ containing

2/ Evergreen Legal Services signed the grant document permitting HUD access to all records. Legal Assistance of Ramsey County also signed the grant documents but included a letter noting the potential problems arising from the provision and an attorney's ethical obligation. Northwestern Legal Services did not return the grant documents.

B-200187

assurances permitting HUD complete access to the grantees' books and records as required by OMB Circular A-102, Uniform Administrative Requirements for Grants in Aid to State and Local Governments. Circular A-102 provides in pertinent part (Attachment C):

"6. The head of the Federal grantor agency and the Comptroller General of the United States, or any of their duly authorized representatives, shall have excess to any pertinent books, documents, papers, and records of grantees and subgrantees to make audits, examinations, excerpts, and transcripts.

"7. Unless otherwise required by law, no Federal grantor agency shall place restrictions on grantees that will limit public access to the records of grantees that are pertinent to a grant except when the agency can demonstrate that such records must be kept confidential and would have been excepted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. § 552) if the records had belonged to the grantor agency."

Canon 4 of the Code of Professional Responsibility requires a lawyer to preserve the confidences and secrets of a client. This responsibility is further described in Disciplinary Rule 4-101 which states:

"(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

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

B-200187

"(1) Reveal a confidence or secret
of his client. 3/

The American Bar Association (ABA) has issued several advisory opinions pertaining to the extent a legal services office may allow its activities to be examined and administered without violating the rule requiring the preservation by lawyers of the confidences and secrets of a client. A recent ABA opinion, Informal Opinion 1394 (1977), not only summarized the previous opinions but also answered the specific question of whether the legal services attorneys would violate the Code of Professional Responsibility by opening its files for full inspection by HEW (now HHS).

"In Informal Opinion 1081 (1968), this Committee concluded that a legal service agency could properly furnish information to auditors and accountants to the extent necessary for determining the types of cases handled, the results obtained, and whether income eligibility requirements are being met, if care were taken not to divulge information that would identify particular clients. In Informal Opinion 1137 (1970), we recognized that a staff attorney for a legal aid society could properly reveal to a lawyer-audit committee of the sponsoring bar association financial information obtained from clients to the extent necessary to determine eligibility for the society's services, if the client were made to understand that in accepting the services he was agreeing to such disclosures. In Formal Opinion 324 (1970), we recognized that a governing board of a legal aid or legal

3/ Pennsylvania, the location of the Northwestern Legal Services, has amended DR 4-101(B) (1979) to read: "Except when permitted under DR 4-101(C), a lawyer shall not knowingly reveal a confidence or secret of his client, including his identity." 42 Pa. C.S.A (1980).

B-200187

services agency can properly employ reasonable procedures to review the actions of the agency's personnel to determine whether the board's policies are being followed, and in doing so may ask the agency's staff lawyers to furnish certain information pertaining to clients, and that a lawyer does not necessarily breach Canon 4 by divulging such information. In Formal Opinion 334 (1974), we reaffirmed our belief that staff lawyers for legal service agencies should not disclose confidences and secrets of a client without the understanding consent of the client, and that, in disclosing to the agencies' policy-making boards information about clients and cases, the lawyers should follow procedures to preserve the clients' anonymity.

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

[The record indicates that the conflict between maintaining client confidentiality pursuant to the ethical obligation of attorneys and demands for information and file access by funding agencies to monitor the funds is not unique to HUD sponsored programs. The Department of Health and Human Services (HHS), formerly HEW, recognized the problem in connection with its grants and advised monitoring agencies to use the least intrusive means possible to obtain the necessary information.] The explanation accompanying HHS' regulations, 45 Federal Register 21143, March 31, 1980, states:

"We considered imposing a special confidentiality requirement for legal services providers, but decided to rely on the general confidentiality and disclosure provisions.

in section 1321.19. We expect that state and area agencies will work out with legal services providers arrangements that meet both the providers' need to meet their ethical obligations and the agencies' monitoring requirements. For example, a procedure that has worked well is the use of an independent auditor, hired by the provider, and approved by the monitoring agencies."

[We at GAO, in conducting audits of the LSC, have recognized the ethical obligation of attorneys to preserve the secrets and confidences of its clients, and therefore, have accepted the restriction as expressed in the ABA's ethical committee's opinions that information be divulged without identifying the names of the clients. We have, when necessary, worked out arrangements with the LSC to obtain necessary monitoring information without any client-identifying material. In some instances, this consists of obtaining copies of the records with names deleted. However, the particular arrangements are dependent upon the scope and purpose of the specific audit being conducted.]

From the description of the purposes and extent of the housing counseling services grant as contained in the grant documents, it is clear that the dichotomy between housing counseling services as opposed to legal services is not readily apparent. We cannot conclude that in context of rendering housing counseling services, an attorney-client relationship would not be created, and thus the files may possibly contain information the confidentiality of which the attorney is under an ethical obligation to protect. In this regard the legal services associations provide their counseling services to potential and actual homebuyers and renters of HUD-insured and HUD-assisted housing. Conceivably advice given to these individuals could be inimical to HUD's interest as insurer or assister of housing.]

Thus, [it is our opinion that the legal services associations' attorneys are under an ethical obligation to protect client files that may contain confidential information. This obligation should in our view be respected while the Government should, of course make every reasonable effort to assure

B-200187

itself that its grant funds are properly spent. We suggest that HUD arrange with the legal service associations to obtain necessary information without the client-identifying material. The LSC has proposed several alternatives to resolve the problem of maintaining confidentiality yet supplying information necessary for the audits. Among these are:

1. Creation of a numbering system whereby clients' numbered records would correspond with the attorneys appointment books. The auditors could then select any legal services staff attorney who would take the records and respond to the auditors' questions regarding dates in the files and appointment books, with the exception of the clients name and exact address.
2. Auditor access to copies of records involving confidential material after such records have identifying material deleted.
3. Use of an independent auditor as has been used in connection with HEW grants.

In addition, some clients may be willing to waive their right to confidentiality.

We do not recommend any particular method because, as noted earlier, the arrangements are dependent upon the scope and extent of the audit being conducted.

Sincerely yours,



Milton J. Socolar
General Counsel