Case No. 00-5244

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, and LEONARD KOCZUR, ACTING INSPECTOR GENERAL OF THE LEGAL SERVICES CORPORATION,	)
Petitioners–Appellees,	)
v.	)
LEGAL SERVICES FOR NEW YORK CITY,	)
Respondent–Appellant.	)

Corrected Brief of Amici Curiae New York State Bar Association, et al. on behalf of Respondent-Appellant

On appeal from the United States District Court
for the District of Columbia

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Certificate as to Parties, Rulings, and Related Cases

Except for the Connecticut Bar Association, New York County Lawyers' Association, Legal Counsel for the Elderly, Inc., and Sanctuary for Families, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Respondent-Appellant Legal Services for New York City.

References to the rulings at issue appear in the Brief for Respondent-Appellant Legal Services for New York City.

Counsel for amici are aware of no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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Interests of the Amici

Amici curiae jointly file this brief to support the claim that the attorney-client privilege protects information that, if revealed, will allow the Inspector General ("IG") of the Legal Services Corporation ("LSC") to discover the names of legally indigent clients coupled with their specific motives for seeking legal assistance.[1] The amici are bar and lawyers' associations, legal services and advocacy organizations, and members of the private bar, all of which oppose the IG's position.

Amici Connecticut Bar Association; New York State Bar Association; Pennsylvania Bar Association; Virginia State Bar; State Bar of Wisconsin; Alameda County (California) Bar Association; Association of the Bar of the City of New York; Boston Bar Association; Cincinnati Bar Association; Los Angeles County Bar Association; and the New York County Lawyers' Association oppose the IG's action on the ground that the information requested by the IG is covered by the attorney-client privilege and its disclosure would defeat the purpose of the privilege. These organizations have extensive experience in identifying the scope of lawyers' duties to preserve confidences and secrets of clients and believe that the

[1] By Order entered September 21, 2000, this Court granted leave for most of the amici curiae to file a brief in this matter. Amici curiae who were not granted leave in the Court's September 21, 2000 Order file a motion simultaneously with this brief seeking leave to appear. This motion is unopposed.

IG's request for client information ignores important principles that underlie both the attorney-client privilege and the principles of legal ethics. These amici reject the IG's proposed "Chinese Wall" as an insufficient remedy, because disclosing the requested information to the IG's office would, in and of itself, violate the privilege regardless of whether the recipients of the information violate the wall.[2]

Amici AARP; Advocates for Children; Asian American Legal Defense & Education Fund; Battered Women's Rights Clinic at City University of New York School of Law; Center for Disability Advocates Rights; Clinical and Advocacy Programs at NYU School of Law; Florida Bar Foundation; Fountain House, Inc.; Gay Men's Health Crisis; Greater Upstate Law Project; The HIV Law Project, Inc.; Lambda Legal Defense & Education Fund, Inc.; Lansner & Kubitschek; Lawyers for Children, Inc.; Legal Aid Society of New York City; Legal Action Center; Legal Counsel for the Elderly, Inc.; National Employment Lawyers Association; National Legal Aid & Defender Association; New York Lawyers for the Public Interest; Northern Manhattan Improvement Corporation; NOW Legal Defense & Education Fund; Pennsylvania Trial Lawyers Association; Sanctuary for Families, Center for Battered Women's Legal Services; and the Urban Justice Center oppose

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[2] The IG has informed Legal Services for New York City that it will maintain separately within his office the list of client names from the list of client problem codes. The IG refers to this procedure as a "Chinese Wall."

the IG's action on the ground that disclosure of the requested information will undermine legal representation of clients in vulnerable circumstances. These amici know from experience that the relationship between attorney and client is grounded in a necessary expectation of confidentiality. Without confidentiality, clients will choose not to disclose critical information and may forego legal assistance altogether. These amici further recognize that disclosure of confidential information may put clients at risk of physical harm, for example where clients seek legal assistance concerning domestic violence or divorce. Disclosure also may reveal embarrassing and possibly harmful facts, for example information that a client suffers from mental illness, is considering a job discrimination suit or has drafted a will. The risk of these outcomes occurring may further deter clients from seeking needed legal assistance.

Summary of Argument

This Court should reject the IG's effort to obtain information about clients' particular legal needs from Legal Services for New York City ("LSNY"). If the district court's order stands, it will undermine the ability of lawyers to provide necessary services to their clients. Clients confide in lawyers about sensitive, personal matters in reliance upon long-established rules of law and ethics that mandate the most stringent protection for client confidences. Lawyers depend upon clients' trust to encourage clients to reveal information essential to the provision of legal assistance. If the IG succeeds in establishing a rule that would force lawyers to hand client secrets over to the government, this relationship will be seriously eroded and legal services lawyers will face a significant obstacle when attempting in the future to gain the trust of clients.

Like most other lawyers meeting new clients, legal services lawyers in New York can now rely upon the attorney-client privilege to make the following promise of confidentiality to their clients: "Unless I become a party to criminal or fraudulent conduct, and I won't let that happen, or if you use my services to engage in criminal conduct or plan to seriously injure someone, everything you tell me to enable me to give you legal advice and help remains confidential, and not even a court can require me to disclose your confidences. It will be entirely up to you

whether I ever disclose this information to anyone else."

If this Court allows the IG to enforce his subpoena, legal services lawyers will no longer be able to promise confidentiality. Instead, these lawyers will have to warn their clients that the government can demand to know their secrets. They will have to say:

> If the government asks me why you visited me and inquires about the legal problem for which you sought advice, I will have to turn over that information along with your name. If that happens, I will not have any control over who gets that information about you. Members of Congress might want the information in order to talk about you during a public debate. They have discussed and embarrassed individual clients before, and this could happen again.[3] It is also possible that other funders might seek this information about you. Many of them have to file their reports publicly, so I do not know where information about you might end up.[4]

These warnings will deter clients from consulting with legal services lawyers, and

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[3] See, e.g., 141 Cong. Rec. S14573-02, *S14593 (Sept. 29, 1995) (senator's speech criticizing a legal services office in Georgia for defending "Miss Whitehead from eviction after crack cocaine was found in her apartment").

[4] Most LSC-funded legal services programs also receive funding from federal or state agencies, Interest on Lawyers' Trust Accounts and private foundations. As with LSC, these sources regularly audit their grant recipients, seeking an array of non-privileged information. Like the IG, these other funding entities also routinely make their audit reports available to public officials and the general public. If this Court denies LSNY's assertion of privilege, it could therefore become increasingly difficult for legal services providers to protect from their various funding sources the information that a particular client has sought assistance for a particular

the lawyers will be hindered in their efforts to provide responsive legal assistance.

The IG's action is even more troubling because it is unnecessary -- LSNY has offered to provide the IG with unique client identifiers sufficient to meet the IG's claimed needs. The district court found that the use of these identifiers would enable the IG to conduct its audit as accurately as with names, stating that "[t]he use of unique client identifiers would appear to be less problematic, and even more cost-effective." United States v. Legal Servs. for New York City, 100 F. Supp. 2d 42, 47 (D.D.C. 2000).

The IG's action is also contrary to the Legal Services Corporation Act (the "Act"). The Act demands that LSC, which includes the IG, see Inspector General Act of 1978, 5 U.S.C. App. §§ 2, 3, "shall insure the maintenance of the highest quality of service and professional standards [and] the preservation of the attorney-client relationship." 42 U.S.C. § 2996f (a)(1). However, disclosure of sensitive client information to the IG will impair the ability of legal services lawyers to provide service of the highest quality as demanded by the LSC Act. Court ordered disclosure would put clients at risk in at least two ways. Clients will be at risk that this information will fall into the hands of Congress, other politicians, or the media. While the IG has stated his intent to limit access to client information, neither the

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problem.

IG nor his employees are subject to the lawyers' ethical obligations of confidentiality to their clients. Also, court ordered disclosure may impair future reliance on the attorney-client privilege by legal services clients.[5]

[5] For example, if court ordered disclosure were based on the assumption that the "Chinese Wall" proposed by the IG will prevent the linking of client names with problem codes and thus not reveal privileged information, a subsequent court might later find the attorney-client privilege waived. See United States v. Massachusetts Inst. of Tech., 129 F.3d 681 (1st Cir. 1997) (ordering government contractor to disclose privileged information because it had earlier been compelled to disclose that information to a government auditor). Although the later court would likely be incorrect in reaching such a decision given the compulsory nature of LSNY's original disclosure, this Court would be powerless to reverse that ruling or to prevent the resultant harm to LSNY's clients.

Argument

I. Forced Disclosures Linking Clients' Names with Problem Codes Has the Potential to Harm Clients and Deter Them From Seeking Legal Counsel.

In many instances, revealing that a client has sought legal assistance with respect to a particular problem will also reveal confidential information that the client has that particular problem and harm the client. For instance, a corporation contemplating bankruptcy understands that the mere rumor that it has consulted a bankruptcy specialist, even in the absence of any announcements or court filings, may have drastic effects on stock prices, access to capital, and even the ability to make routine purchases on credit. If a corporation learned that knowledge of its bankruptcy consultation could become public, it might forego seeking legal assistance that could help make easier the transition into, or avoidance of, bankruptcy.

Similarly, a corporation needing advice about responding to Securities and Exchange Commission inquiries would count on the protection of the attorney-client privilege. Public revelation of a consultation with a white-collar crime specialist might have serious effects on stock prices, employee hiring, and other important business matters even if the government's inquiry ultimately focused on another entity or never evolved into a criminal proceeding. If a corporation

believed that mere consultation with an expert in criminal securities law would be disclosed, it might hesitate to initiate the consultation.

The information the IG seeks in his subpoena is, for the legally indigent, sensitive in analogous ways. The IG has subpoenaed records from lawyers helping poor Americans with legal needs tied to the most personal aspects of their lives.

The IG's focus on obtaining problem codes,[6] linked to particular client names, will invade the privacy of many clients. Many of the problem codes are specific enough that revealing the names associated with them will also reveal the clients' motives for seeking legal help. For example, disclosure of the codes for "spouse abuse,"[7] "paternity,"[8] "divorce/separation/annulment,"[9] "neglected/abused/dependent,"[10] "Medicaid,"[11] "Medicare,"[12] "TANF/Other

[6] LSC requires grantees to assign each of the cases they handle one of a list of problem codes provided by LSC.

[7] Problem code 37.

[8] Problem code 36.

[9] Problem code 32.

[10] Problem code 42.

[11] Problem code 51.

[12] Problem code 52.

Welfare,"[13] and "job discrimination,"[14] will, in each instance reveal clients' particular motivations for seeking legal assistance. If this Court compels LSNY to disclose the names of clients who have sought help with respect to the problem codes, those clients' motivations for seeking legal assistance will be revealed to the IG, who already possesses LSNY's clients' names and will thus possess the capacity to directly link clients' names with their particular legal problems. Revealing that clients have sought legal assistance for legal needs identified by particular problem codes can, as shown below, put a client's life in danger, subject the client to discrimination, or cause him or her intense embarrassment.[15] These

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[13]Problem code 71.

[14]Problem code 21.

[15]The problem is compounded by the fact that third parties may possess information about legal services clients. Other problem codes have the potential to cause difficulty or embarrassment for clients whose acquaintances can combine their independent knowledge of the client with the fact that the client has sought legal services counsel regarding a particular problem. See Letter from Prof. Stephen Gillers, NYU School of Law, to David Udell, Brennan Center for Justice (Mar. 29, 2000). <http://www.brennancenter.org/programs/programs_pov_gillers.html>. (Documents cited in this brief which are published on the web are on file at the Brennan Center and available to the Court or any party upon request.)

For example, someone learning that a client has turned to a legal services lawyer for a problem characterized as "other family" (problem code 39) may assume -- rightly or wrongly -- that the client is seeking a restraining order or a divorce, or is involved in an abuse or neglect case. Similarly, someone learning that a client has turned to a legal services lawyer for a problem characterized as "other juvenile" (problem code 49) may suspect that the client is initiating an abuse or

consequences all serve as disincentives to clients to rely on legal services lawyers. Whenever legal services lawyers warn potential clients that the nature of their legal problems could be disclosed to the government or other auditors, some clients will reasonably choose to not confide, or to confide less candidly, in their lawyers. Without frank communication between lawyer and client, lawyers will be significantly less effective in advancing their clients' interests. Disclosure of sensitive client information through release of the names of clients who have received the following categories of legal services, among others, will have these damaging results.

A. Spousal or Partner Abuse, Divorce, Separation and Annulment

Disclosure that a client has sought information with respect to spousal or partner abuse[16] may lead an abuser to believe that the client is planning to seek a restraining order or to file criminal charges. Disclosure of either that information or the information that a client has sought legal counseling regarding a divorce, separation or annulment[17] could be extremely dangerous to clients who are victims of domestic violence, because abusers often become even more violent when they

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neglect case or involved in a delinquency proceeding.

[16]Problem code 37.

[17]Problem code 32.

learn that their victims are seeking help or are planning to leave them. See Myrna S. Raeder, People v. Simpson: Perspectives on the Implications for the Criminal Justice System, 69 S. Cal. L. Rev. 1463, 1468 n.18 (1996) (noting that one study of women murdered by their batterers found that 45 percent of the murders "were generated by the man's rage over the actual or impending estrangement from his partner"); Martin Truss, The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence, 26 St. Mary's L.J. 1149, 1172-73 (1995); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 53-60, 64-65 (1991) ("At least half of women who leave their abusers are followed and harassed by them."); New Jersey v. Hoffman, 695 A.2d 236, 247 (N.J. 1997) ("Victims [of domestic violence] are actually at their highest risk of injury when they try to leave their abusers."). Victims of domestic violence are usually very good at predicting what will spur their abuser to violence, although they sometimes overestimate the abuser's potential for violence. See Mahoney, supra, at 58 n.273. Therefore, if domestic violence victims fear that the fact of their contacting a legal services attorney for advice regarding domestic violence or divorce will be disclosed to their batterer, they may decide not to contact an attorney at all. See Office of Justice Programs, U.S. Dep't of Justice, Violence by Intimates: Analysis of Data on

Crimes by Current or Former Spouses, Boyfriends, and Girlfriends, Report No. NCJ-167237 (1998) <http://www.ojp.usdoj.gov/bjs/abstract/vi.htm> ("The most common reasons given by victims for not contacting the police [included] that they considered the incident a private or personal matter [and] they feared retaliation.").

The risk to battered partners that could result from disclosure of the fact that they have sought assistance is so great that many states have specific statutes or court rulings creating a victim/counselor privilege for domestic violence or sexual assault counselors. See, e.g., Calif. Evid. Code § 1037.2; Conn. Gen. Stat. Ann. § 52-146k; 225 Ill. Stat. Ann. § 107/75; 233 Mass. Gen. Laws Ann. § 20J; Ind. Code § 35-37-6-9; see also U.S. Dep't of Justice, Report to Congress: The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims & Their Counselors, Findings & Model Legislation 3 (1995) (listing 27 states and the District of Columbia with statutes creating a domestic violence victim-counselor privilege). Many jurisdictions have recognized that protecting the identities of victims is integral to this privilege. For example, the Iowa Attorney General specifically found that "identity information is a confidential communication" under the Iowa Domestic Abuse Act, Iowa Code, Chapter 236A, because "[t]o allow any person to inquire as to whether a person is temporarily residing or otherwise physically present or participating in victim counseling would

frustrate the legislative intent to provide a safe haven." See 1992 Iowa Op. Atty. Gen. 92-3-3, 1992 WL 470341 (1992).

In addition to the fear of retaliation from an abuser, domestic violence victims and parents considering divorce may fear that disclosure would alert their children to the abuse or the impending divorce. They may also want to save themselves the embarrassment, and possible discrimination, resulting from disclosure to neighbors, friends, employers and others. See Church to Pay $10,000 to Settle Discrimination Complaint, AP Newswires, Aug. 1, 1999 (church settled a claim by a woman that it had refused to rent an apartment to her because she was divorced). To preserve their lives, to protect their children's emotional well-being, and to avoid embarrassment and possible discrimination, clients with legal problems related to divorce or domestic violence may avoid LSC-funded attorneys if disclosure of these legal problems is required.

B. Medicaid, Public Assistance Benefits, and Food Stamps

Revelation that a client has sought advice regarding Medicaid,[18] public assistance benefits,[19] or Food Stamps,[20] can also lead to embarrassment and

[18]Problem code 51.

[19]Problem code 71.

[20]Problem code 73.

possible discrimination against the client. The importance of keeping this information confidential is clear from the many state and federal laws protecting its confidentiality. See, e.g., 42 U.S.C. § 602(a)(1)(A)(iv) (requiring states receiving federal public assistance funds to "[t]ake . . . reasonable steps . . . to restrict the use and disclosure of information about individuals and families receiving assistance under the program"); N.Y. Soc. Servs. Law § 136 (restricting disclosure of names of welfare applicants and recipients, and deeming violation of the statute by a newspaper a misdemeanor); N.Y. Soc. Servs. Law § 367-b.4 (requiring information related to Medicaid applications to be kept confidential); 18 N.Y.C.R.R. § 387.7(h) (protecting applicants' privacy and confidentiality during interviews regarding Food Stamps eligibility); 18 N.Y.C.R.R. § 357 et seq. (names of public assistance applicants/recipients and their relatives must be safeguarded and released only to authorized people). Several courts have noted that these laws are "necessary to preserve the dignity and self-respect of a recipient of public assistance." Rampe v. Giuliani, 676 N.Y.S.2d 662, 663 (App. Div. 1998) (regarding N.Y. Social Services Law § 136); New York Times v. City of New York, 673 N.Y.S.2d 569, 573 (Sup. Ct. 1998) (the purpose of N.Y. Social Services Law § 136 "is obvious: 'to save recipients [of public welfare] from embarrassment'") (citation omitted); Doe v. Greco, 405 N.Y.S.2d 801 (App. Div. 1978).

More importantly, potential employers who obtain this information may decide not to hire the client. See Julia R. Henly, Barriers to Finding and Maintaining Jobs: The Perspectives of Workers and Employers in the Low-Wage Labor Market, in Hard Labor: Women and Work in the Post-Welfare Era, 48, 60 (Joel F. Handler & Lucie White, eds., 1999) (finding that many employers believe that "individuals collecting welfare do not work, lack a strong work ethic, are lazy, and are taking advantage of the public welfare system"). With the push to get welfare recipients into the workforce by cutting off their benefits if they do not work, see 42 U.S.C. § 601(a)(2) (stating that one goal of the 1996 welfare reform was to "end the dependence of needy parents on government benefits by promoting job preparation [and] work"), revealing people's receipt of welfare benefits and thereby rendering them unemployable could have dire financial consequences for them and their families. Henly, Barriers to Finding and Maintaining Jobs, supra, at 61-62 (arguing that because welfare recipients often lack other indicators of reliability, such as someone to recommend them for the job, and because they may fall into a stigmatized racial group, "it is possible that making welfare status salient to employers . . . may have unintended consequences"). To preserve their dignity, to save their families from embarrassment, and to enhance their future job options,

clients may avoid using LSC-funded lawyers for legal problems associated with problem codes 51, 71 and 73 if disclosure of these problem codes is authorized.

C. Supplemental Security Income, Mental Health and Disability Rights

There are several problem codes which indicate that clients, or someone in their families, have mental or physical disabilities.[21] The importance of maintaining confidential the information that someone suffers from a mental disability is apparent from the many laws protecting that information. See, e.g., N.Y. Mental Hyg. Law § 33.16 (protecting the identity of residents of mental institutions); 18 N.Y.C.R.R. § 313.3 (same). The purpose of these laws is to "save [mental] patients from humiliation, embarrassment and disgrace." Munzer v. Blaisdell, 49 N.Y.S.2d 915, 916 (Sup. Ct. 1944), aff'd without op., 58 N.Y.S.2d 359 (App. Div. 1945); see also Duzon by Duzon v. State, 587 N.Y.S.2d 78, 80 (Ct. Claims 1992) (same). Disclosure of the information that someone suffers from a physical or mental disability could lead not only to embarrassment but also to discrimination. As Congress noted when it passed the Americans with Disabilities Act: "discrimination against individuals with disabilities persists in such critical areas as

[21]These include problem code 75, which applies when the client has consulted an attorney regarding Supplemental Security Income, a federal benefit available to those with severe disabilities. See 42 U.S.C. § 1381a. Problem codes 82 (mental health) and 84 (disability rights) reveal similar information.

employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a). To save themselves from embarrassment and possible discrimination, clients may avoid turning to LSC-funded lawyers for assistance falling within problem codes 75, 82 and 84 if disclosure of those problem codes is permitted.

D. Job Discrimination

Disclosure that a client is either contemplating or involved in a job discrimination action[22] can have severe consequences for the employee. If the client's fellow employees or current employer learn that the employee has either brought or contemplated bringing such an action, they may harass, demote or even fire the employee. See, e.g., Knox v. Indiana, 93 F.3d 1327, 1335 (7th Cir. 1996) (co-workers threatened employee and subjected her to "vicious gossip" after she complained to her employer about sexual harassment); Davis v. Fidelity Tech. Corp., 38 F. Supp. 2d 629, 634 (W.D. Tenn. 1998) (employee was assigned to the night shift and required to perform menial tasks after she filed a sexual harassment complaint with the EEOC), aff'd, 208 F.3d 213 (6th Cir. 2000); Yudovich v. Stone, 839 F. Supp. 382, 391-92 (E.D. Va. 1993) (employer refused to renew contracts of

[22]Problem code 21.

plaintiffs who filed a claim with the EEOC claiming discrimination based on religion and national origin). If future employers learn that the employee has brought or considered bringing such an action, they may decide not to hire him or her. See, e.g., Davis, 38 F. Supp. 2d at 634 (potential employer rejected an applicant because she had sued her previous employer for sexual harassment). To protect themselves from possible retaliation, and to safeguard their prospects for future employment, clients may avoid turning to LSC-funded lawyers for problems associated with problem code 21 if disclosure thereof is required.

E. Child Neglect, Abuse or Dependency

People learning that a parent has sought legal counsel regarding a child neglect, abuse or dependency investigation or proceeding[23] could easily assume that the parent was an abuser, with potentially dire consequences for the parent. See, e.g., Rouse v. Smith, 35 F.3d 556, 1994 WL 490162, at *3 (4th Cir. 1994) ("[A]s a man falsely accused of engaging in child sex abuse, he . . . had his name and reputation ruined based on the accusations against him . . . [and] the false charge can probably never be cleansed from the memory of the accused or of the community."). This result would be particularly unjust because there would be a better than even chance that the accusation was unfounded. Michael Compitello,

[23]Problem code 42.

Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse, 18 Pace L. Rev. 135, 146-47 (1997) (estimating that fifty to sixty percent of child abuse accusations are baseless); Kathleen A. Sullivan, The Perils of Advocacy, in Hard Labor, supra, at 197 ("The vast majority of neglect allegations are found to be unsubstantiated."); U.S. Dep't of Health & Human Services, Child Maltreatment: Reports from the States, <http://www.acf.dhhs.gov/programs/cb/ncanrpts.htm > (1997) (more than half of the investigated abuse or neglect reports nationally are unsubstantiated). To protect their reputations, clients may avoid turning to LSC-funded lawyers for legal assistance falling within problem code 42 if disclosure is required.

F. Adoption and Paternity

Disclosure of the information that a client has sought legal counsel regarding adoption[24] or paternity[25] has the potential to reveal embarrassing information about the client and his or her family. State laws protecting the confidentiality of information regarding adoption demonstrate that adoptive children, their adoptive families, and their birth parents have a strong interest in maintaining the confidentiality of information regarding adoption. See, e.g., N.Y. Dom. Rel. Law §

[24]Problem code 30.

[25]Problem code 36.

114 (adoption records shall be sealed, and if anyone permitted by court order to copy confidential adoption records violates the confidentiality of those records, he shall be held in contempt of court); Alan D. Scheinkman, Practice Commentary, N.Y. Dom. Rel. Law § 114 ("The purposes of the sealing requirement are to shield the child from possibly disturbing facts concerning the child's birth or background; to prevent the natural parents from locating the child and interfering with the relationship between the child and the adoptive parents; and to protect the privacy of the natural parents."). If any of these family members consulted a LSC-funded attorney regarding an adoption matter, disclosure of that consultation could easily lead to suspicion that the client had been adopted, that the client's child was adopted, or that the client had given a child up for adoption. All of these disclosures are contrary to the public policy that protects the confidentiality of this information.

Disclosure of a client's consultation with an attorney regarding a paternity matter also creates potential embarrassment for the client and the client's family. It could, for example, create an inference that the child was born out of wedlock. The stigma attached to such children remains so great that family court proceedings can be closed to spare them from such embarrassment. See Alan D. Scheinkman, Practice Commentary, N.Y. Dom. Rel. Law § 235. Disclosure of this information

could also create an inference that the client had fathered a child out of wedlock. The stigma attached to such behavior is apparent from the fact that jurors at federal trials at which the fact that a party has been a defendant in a paternity proceeding may be questioned whether they can put that fact aside. See Al Baker, Federal Tax Fraud Trial of 2 Brothers Opens, N.Y. Times, May 16, 2000 (quoting a potential juror as saying that his feelings towards paternity defendants are "[p]robably the same as lobbyists and lawyers: negative thoughts"). Consequently, to protect their families and their reputations, if disclosure of this information is required, clients may decline to turn to LSC-funded lawyers for assistance with problems falling within those codes.

II. Disclosure of the Information the IG Seeks Is Contrary to the Purposes of the Attorney-Client Privilege and the LSC Act.

By seeking to compel disclosure of intimate client information and disrupting the ability of legal services attorneys to counsel their clients, the IG's request undermines both the attorney-client privilege and the LSC Act. Both of these sources of law encourage the provision of legal services to eligible clients by requiring lawyers to adhere to the highest standards of loyalty when providing legal assistance to clients. By requiring legal services attorneys to subordinate their duty to their clients to the auditing interest of a funder, the IG's request for disclosure

runs flatly contrary to the principles of the attorney-client privilege and the LSC Act.

For this reason, both LSC itself and the American Bar Association ("ABA") have opposed recent attempts by the IG to persuade Congress to permit him to obtain information protected by the attorney-client privilege. LSC emphasizes that such a change in the prevailing law "would have a potentially profound chilling effect upon needy clients." Letter from Douglas Eakeley, Chairman, LSC, to Harold Rogers, U.S. House of Representatives, p. 2 (Oct. 2, 2000) <http://www.lsc.gov/FOIA/olaeo/MngHRIG.pdf>. The ABA likewise warns that "[e]nactment of the proposed legislation would say, in effect, that the government will provide a lawyer for a poor person, but that full, frank and truthful communication with the lawyer is discouraged," and that a warning by legal services lawyers to clients about the potential disclosure of confidential information "could deter a large number of clients from seeking legal assistance in the first place." Letter from L. Jonathan Ross, Chair, ABA Standing Committee on Legal Aid and Indigent Defendants, to Harold Rogers, U.S. House of Representatives (Sept. 28, 2000) <http://www.abanet.org/poladv/congletters/106th/lsc1house092800.html>. As set forth below, the results predicted by the LSC and the ABA would frustrate the goals of both the attorney-client privilege and the LSC Act.

A. By Encouraging Clients to Confide in Their Lawyers, the Attorney-Client Privilege Promotes Adherence to the Law, Enhances the Administration of and Public Trust in the Justice System, and Enables Individuals to Protect Their Rights.

As the Supreme Court has recognized for almost two centuries, the attorney-client privilege "is indispensable for the purposes of private justice." Chirac v. Reinicker, 24 U.S. 280, 294 (1826). The privilege is necessary in order to encourage clients to seek legal counsel and to encourage them to then make full disclosure to their attorneys. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Jack B. Weinstein & Margaret A. Berger, Weinstein's Fed. Evid. § 503.03[1] (2d ed. 2000). By achieving these ends, the privilege serves several important societal goals which enforcement of the IG's subpoena would frustrate.

First, the privilege promotes law-abiding behavior, because consulting with lawyers helps clients conform their actions to the law. As Elihu Root is reported to have said, "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." Lindemann Maschinenefabrik v. American Hoist & Derrick Co., 895 F.2d 1403, 1406 n.1 (Fed. Cir. 1990). By encouraging open communication between a lawyer and a client, the attorney-client privilege enables lawyers to perform this counseling role well. "To encourage full disclosure of contemplated action by clients to lawyers is to encourage more

accurate advice on the legal consequences of proposed action, and thereby to promote obedience to the law." Charles A. Miller, The Challenges to the Attorney-Client Privilege, 49 Va. L. Rev. 262, 268-69 (1963). The attorney-client privilege also promotes law-abiding behavior by channeling disputes into court and thus enabling clients to solve disputes peacefully rather than in a violent manner: "If you feel there is no place to go but the streets, you go to the streets. Legal Services provides another alternative to that route by enabling access to the conventional tribunals to resolve disputes." Jonathan A. Weiss, Should the Government Fund Legal Services?, 2 J. Inst. for the Study of Legal Ethics 401, 404 (1999).

Second, the attorney-client privilege facilitates the administration of the justice system by encouraging litigants to retain lawyers. 8 Wigmore on Evidence § 2291 (McNaughton rev. 1961) (noting that the privilege is necessary because the justice system "cannot go on without the aid of men skilled in jurisprudence, in the practice of the court") (quoting Greenough v. Gaskell, 1 Myl. & K. 98, 103 (Eng. Ch. 1833)). When litigants appear in court without lawyers, busy judges and other court personnel must take time to supply them with legal forms and to try to provide necessary information about court procedures and legal rights. See Russell Engler, And Justice for All -- Including the Unrepresented Poor, 67 Fordham L. Rev. 1987, 2020-21 (1999); Jessica Pearson, Court Services: Meeting the Needs of Twenty-

First Century Families, 33 Fam. L.Q. 617, 620 (2000); Linda Henry Elrod, Epilogue: Of Families, Federalization, and a Quest for Privacy, 33 Fam. L.Q. 843, 854 (2000) (noting that pro se cases "may take twenty times the judicial time than if lawyers were representing the parties"). When clients retain lawyers, however, the lawyers fulfill these functions, effectively reducing the burden on the courts.

The attorney-client privilege also promotes public trust in the legal system. The privilege reassures clients that their reliance upon an attorney will not harm them, and that the attorney will serve their interests, not those of their opponents: "The system becomes substantially more just when a client can rely on his attorney without question or doubt -- when he can know as well as he is likely ever to know the future that giving the truth to his attorney will not hurt him." Albert W. Alschuler, The Preservation of a Client's Confidences, 52 U. Colo. L. Rev. 349, 352 (1981). This is particularly important for low-income clients, who may well have had no prior contact with the legal system and who may view a government-funded lawyer as particularly suspect if the lawyer is unable to promise that information relayed by the client will be kept private.

The privilege is also necessary to protect clients' individual rights in the legal system. "The privilege is . . . born of the law's own complexity. The layman's course through litigation must at least be evened by the assurance that he may,

without penalty, invest his confidence and confidences in a professional counselor." In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 388 (S.D.N.Y. 1975). Even before the growth of the regulatory state in the last fifty years, Wigmore noted that the intricacy of the law had made the opportunity to confide in a lawyer a necessity for most litigants. See 8 Wigmore on Evidence, supra, § 2291. Today, as legal rules and regulations have become more pervasive, the role of the lawyer has become even more important.

In particular, many of the areas in which legal services attorneys practice are extremely complex and cannot be navigated well by pro se litigants, making it especially important for legal services clients to be able to rely on the loyalty of their lawyers. See, e.g., Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981) ("The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, . . . makes the Act 'almost unintelligible to the uninitiated.'") (citation omitted); Mont v. Heintz, 849 F.2d 704, 706 (2nd Cir. 1988) (noting that the "tangle of federal and state statutes and regulations in the welfare area now rivals the Internal Revenue Code and its attendant regulations as a model of complexity"). If indigent litigants are unable to turn to LSC-funded attorneys for fear that the attorneys will reveal their confidences, they will be left without the tools necessary to exercise their legal rights in these areas.

The importance of the attorney-client privilege, for all of these reasons, is reflected in the fact that attorneys in every state, including New York, are ethically bound to vigorously protect their clients' confidences. See, e.g., N.Y. DR 4-101(B)(1). Because disclosure of the names of legal services clients when their problem codes have already been disclosed will discourage clients from turning to legal services lawyers, such disclosure would be flatly contrary to the purposes of the attorney-client privilege. This Court should therefore reverse the district court's ruling and refuse to permit the IG to obtain the information he seeks.

B. LSC Succeeds Because Its Lawyers Promise to Preserve Privileged Communications from Clients and Potential Clients, Who Are Therefore More Likely to Resolve Disputes Pursuant to the Rule of Law.

The LSC Act maps out a framework designed to encourage indigent persons to seek out legal services lawyers to resolve disputes pursuant to the rule of law. The Act, which became law in the summer of 1974, not long after urban riots had shaken the nation, makes this point explicitly in its "Statement of Findings and Declaration of Purpose," which declares that "for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws." 42 U.S.C. § 2996 (4).

In order to build a legal services program capable of reaffirming faith in the

rule of law, the Act also states that LSC "must be kept free from the influence of . . . political pressures," id. § 2996 (5), that legal services lawyers must adhere to the professional standards governing the practice of law, and that LSC must not interfere with the work of the lawyers:

— LSC's attorneys "must" have "full freedom to protect the best interest of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics and the high standards of the legal profession." Id. § 2996 (6).

— "The Corporation shall not . . . interfere with any attorney in carrying out his professional responsibilities to his client . . . or abrogate . . . 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. § 2996 (b)(3).[26]

— "The Corporation shall insure the maintenance of the highest quality of service and professional standards [and] the preservation of the attorney-client relationships . . . ." Id. § 2996f (a)(1).

And, in a separate section entitled "Attorney-client privilege," the Act states:

[26] The FY1996 appropriations bill stated that, notwithstanding this language, LSC recipients could be required to turn over specific types of information to auditors. The specified information included client names but did not include problem codes. Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. 104-134 (H.R. 3019), § 509(h) (Apr. 26, 1996). The bill also noted that information covered by the attorney-client privilege need not be disclosed. Id. These provisions have been repeated in subsequent appropriations bills.

"Neither the Corporation nor the Comptroller General shall have access to any reports or records subject to the attorney-client privilege." Id. § 2996h (d).

That the Act so strongly emphasizes professional ethics standards, including the attorney-client privilege, as a means to encourage potential clients to seek out legal services lawyers, is further underscored by additional provisions in the Act that require legal services programs to make their offices and services accessible to potential clients. Thus, the Act instructs LSC to ensure that recipients focus on "the needs for service on the part of significant segments of the population with eligible clients with special difficulties of access to legal services." Id. § 2996f (a)(2)(C). The Act also directs LSC to study whether particular client populations have "special difficulties of access to legal services." Id. § 2996f (h). The Act even requires LSC-funded offices to provide legal services to non-English-speaking clients in the clients' principal language, where possible. Id. § 2996e (b)(6).

The unifying principle underlying these provisions, that potential legal services clients should be encouraged to confidently place their trust in the professionally secured loyalty of accessible legal services lawyers, is thus the same principle that animates the attorney-client privilege in the practice of law by all lawyers.

Amici urge the Court to recognize that the attempt of the IG to invade the

attorney-client privilege imperils the ability of LSC to perform one of its most basic and most important functions -- to assure clients and potential clients of the loyalty of their legal services lawyers. Part of the IG's mission is to "promote efficiency and effectiveness in activities administered or funded by the LSC." Statement of the LSC before the House Appropriations Comm., Subcomm. on Commerce, Justice and the Judiciary, 1999 WL 114518 (F.D.C.H.) (Mar. 3, 1999). The IG should, therefore, further, not impede, individuals' trust in lawyers. A rule that abandons this promise will discourage individuals from seeking the aid of legal services lawyers, undercut the goals of the LSC Act, and ultimately threaten the primacy of the rule of law.

Conclusion

For the preceding reasons, amici curiae respectfully request that the Court reverse the judgment of the district court ordering the enforcement of the IG's subpoena.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 (a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29 (d) and 32 (a)(7)(B). Except for the portions exempted by Federal Rule of Appellate Procedure 32 (a)(7)(B)(iii), this Brief contains 6,934 words.

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