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ETHICAL OBLIGATIONS OF LAWYERS WHOSE EMPLOYERS RECEIVE FUNDS FROM THE LEGAL SERVICES CORPORATION TO THEIR EXISTING AND FUTURE CLIENTS WHEN SUCH FUNDING IS REDUCED AND WHEN REMAINING FUNDING IS SUBJECT TO RESTRICTIVE CONDITIONS

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Summary of the Opinion

Legislative proposals currently pending in Congress are expected to significantly reduce funding for the Legal Services Corporation. The legislation will also restrict whom an LSC funded lawyer may represent, the subject matter of such representation and the manner in which such representation may be pursued. Finally, in the case of contested matters, the legislation mandates disclosures the client is required to make. All of this presents serious ethical questions for the lawyers who work for agencies that receive this funding.

Duties to Existing Clients

The Obligation to Prepare: In order to prepare for the impending funding cuts and restrictions, LSC funded lawyers must give notice to their clients, establish a system of priorities for the retention of cases, and seek alternative funding and representation for their current clients. In setting the priorities for retention of existing cases, a legal services lawyer may not solely consider whether cases conflict with the funding restrictions. Legal services lawyers must explore the limits of continuing representation (e.g., the permissibility of co-counsel arrangements) as well as all avenues for obtaining replacement counsel for existing clients. In arranging for substitute counsel, both the legal services lawyer and the new counsel must work to ensure that the new counsel has or can acquire the needed expertise in the matter being referred.

When An Existing Client's Representation Violates the Restrictions: Some legal services lawyers will be confronted with high priority representations that conflict with funding restrictions, and must choose between their obligations to ineligible clients and their obligations to eligible clients who will not be served if LSC funding is lost. Where retaining an ineligible client or representation would deprive the office of a substantial amount of funding, a legal services lawyer may, but is not required to, withdraw from the prohibited representation under Model Rule 1.16(b)(5).

Once a Lawyer Has Opted to Accept LSC Funding: legal services lawyers should advise all of their clients of the restrictions contained in the new funding legislation. A legal services lawyer may ask an existing client to agree prospectively to abide by the funding restrictions on what matters the lawyer may handle and what means may be used, as long as the lawyer does not believe that such restrictions will adversely affect the representation. However, a legal services lawyer may not ask a client to consent to limitations on the scope of representation that would in her judgment effectively preclude her from providing competent representation. A fortiori, a legal services lawyer cannot ask an existing client to agree to the future termination of her representation in the event that client becomes ineligible because, for example, of a change in immigration status or incarceration. If such a change in eligibility occurs, however, the lawyer may withdraw under Rule 1.16(b)(5) after balancing the interests of that client against the interests of those existing clients who will not be served if funding is lost.

Duties to Future Clients

Accepting New Matters: A legal services lawyer may not accept new clients except in cases of extreme need if staff reductions have caused an unacceptable increase in the lawyer's work load. A legal services lawyer is not obligated to find alternative counsel for a potential client who has been turned away.

Screening of New Clients: Before accepting a new client a legal services lawyer subject to LSC funding restrictions must inform the client about all of the restrictions that apply because that lawyer is funded by the LSC, must inform the client that such restrictions would not apply if the lawyer were not funded by the LSC, and must carefully screen the client to ensure that the representation will not endanger funding. A legal services lawyer must inform her new clients that they must maintain their eligibility (i.e., avoid incarceration and maintain an acceptable immigration status) in order to continue the representation. With regard to the restrictions on what matters may be pursued and what means may be used, the lawyer may ask a new client to consent to those restrictions if the lawyer believes that the representation would not be adversely affected by the limitation.

Mandated Pre-Litigation Disclosures

The required disclosure of (a) the client's identity, and (b) certain other facts relating to the representation, conflicts with the lawyer's obligations under Model Rule 1.6, which prohibits revelation of any information relating to the representation without the client's consent.

Disclosure of the Client's Identity: With regard to a client accepted before January 1, 1996, who seeks or has received a Court's permission to proceed anonymously, the legal services lawyer must inform the client of the new disclosure requirement, that the lawyer's acceptance of LSC funding may make it more difficult for the client to proceed anonymously, that the client may refuse to reveal his or her identity or to seek the injunction required to protect anonymity, and whether the lawyer will be able to continue the representation if the client refuses to be governed by the LSC funding restrictions. A legal services lawyer cannot ask an existing client to consent to the imposition of the new standard under the funding legislation if that limitation would adversely affect the representation.

With regard to new clients who wish to proceed anonymously, a legal services lawyer must inform the client that it may be easier to proceed anonymously without an LSC-funded lawyer and ensure that the client understands the standard a Court or an agency will apply in deciding whether to permit the anonymity. The lawyer may not ask the client to agree to continue the representation after denial of a motion to proceed anonymously if the lawyer believes that the representation would be adversely affected.

Required Statement of the Factual Basis of the Case: A legal services lawyer may ask a new or existing client to consent to the preparation and disclosure of the required statement if the lawyer believes that there will be no adverse affect on the representation because of the requirement. If an existing client refuses, the lawyer may withdraw under Model Rule 1.16(b)(5) after balancing that client's interest against the interest of those who will not be served if funding is lost. In all cases, the lawyer should inform the client that the statement could be regarded as a waiver of client-lawyer privilege, and should take all steps reasonably necessary to protect the client from any adverse effects that could result from the preparation of the statement.

Conclusion

The responsibility for insuring that indigent clients are provided with appropriate and competent representation falls upon the entire legal community. Every member of the bar must work to provide needed legal services to those whose representation will be prohibited or curtailed by the new funding legislation.

Legislative proposals currently pending in the United States House of Representatives and United States Senate seek to reduce funding to the Legal Services Corporation ("LSC") for the 1996 fiscal year, which began October 1, 1995, by at least 25% from the previous year, and to limit the services that LSC funded lawyers may provide. [FN1] Such decreased funding will require many legal services offices to severely reduce their staff and support services. [FN2] In addition, in contrast to earlier proposals to limit LSC funding, this legislation would subject the receipt of funds from the Legal Services Corporation to a broad range of new restrictions on whom an LSC grantee may represent, the subject matter of such representation, and the manner in which such representation may be pursued, and would require disclosures that conflict with the lawyer's duty of confidentiality. Perhaps most importantly, it appears that these restrictions would apply to all matters handled by an organization receiving LSC funds, even if non-LSC funds would be available to support prohibited representations.

It appears virtually certain that the new LSC funding legislation will include significant funding reductions and some, if not all, of the practice restrictions contained in the proposed legislation. The inevitability of these changes has prompted members of the legal services community to request that the Committee provide guidance regarding legal services lawyers' obligations under the new funding regime.

While recognizing that no one can predict the final form of the legislation, the Committee believes that it is important to begin preparing immediately for the monumental changes in legal services funding for the indigent that seem inevitable at this point. [FN3] Because of the great likelihood that the proposed changes will be enacted, because the legislation is drafted to be effective upon enactment, and perhaps to have retroactive effect, [FN4] and because we have been requested to do so, we take the unusual step of opining upon the effect of legislation which is not yet enacted. We have therefore prepared this opinion to summarize the proposed legislation (Section I), address how legal services lawyers may fulfill their ethical obligations with regard to existing clients (Section II) and future clients (Section III), and address the particular issues raised by the mandatory disclosure provisions of the proposed legislation (Section IV).

I. The Proposed Legislation

Relevant provisions of the pending bill passed by the House of Representatives (H.R. 2076) and the Conference Committee Report provide a basis for understanding the potential problems a legal services office will face if it or similar legislation is enacted into law. First, a lawyer receiving funds from the Legal Services Corporation could be prohibited from representing a local, state or federal prisoner, an individual inspired to seek legal representation as a result of in-person unsolicited advice that such individual should obtain counsel or take legal action, a defendant in a public housing eviction proceeding (if the basis of the eviction is a charge that the individual was involved in the illegal sale or distribution of a controlled substance), and any alien, unless such alien is present in the United States and is legally entitled to maintain residence here under one of six statutory provisions.

A lawyer receiving funds from the Legal Services Corporation could also be prohibited from pursuing the following matters on behalf of any client: any representation with respect to abortion; representation challenging the LSC, its conduct or oversight proceedings, or that of any LSC grantee; representation with regard to matters pending before any legislative body; representation that attempts to affect legislative, judicial, or elective districts at any level of government, including apportionment and the timing or manner of the taking of a census; representation with regard to administrative policy at any level of government; representation that attempts to influence any decision by a local, state, or federal agency except representation regarding a particular application, claim or case that does not attempt to affect agency policy; any representation that could reasonably be expected to result in a fee for legal services; or representation involving efforts to reform a state or federal welfare system, except where an individual is seeking specific relief from a welfare agency that does not involve an effort to amend or otherwise challenge existing law.

Finally, a lawyer receiving funds from the Legal Services Corporation could be prohibited from filing a class action, or training or encouraging people to advocate particular public policies or to engage in political activities. This latter provision specifically prohibits LSC-sponsored dissemination of information about such policies or activities.

II. Ethical Issues Regarding Existing Clients

The likely result of the proposed funding reductions is that some legal services offices will be forced to merge or close, and others will need to reduce their legal staff, thereby reducing the number of cases the office will be able to carry if its lawyers are to continue to provide competent representation. It is also likely that many of the restrictive conditions contained in the new legislation will apply to existing cases as well as future representations. What are the obligations to existing clients of legal services lawyers potentially facing a significant loss of funding and staff as well as significant practice restrictions?

The obligations these lawyers owe to their existing clients can be divided into three categories: (1) the duty to prepare and plan for the reduction of services; (2) the duty to provide for clients whose current representations will be prohibited; and (3) the duty to ensure that legal services lawyers fulfill their ethical obligations to remaining clients.

A. The Obligation to Prepare and Plan

In ABA Formal Opinion 347 (1981), this Committee examined the ethical obligations of legal services lawyers facing significant reductions in funding. The opinion emphasized the lawyers' obligations, under the Model Code of Professional Responsibility to prepare adequately (DR 6-101(A)(2)) and to provide competent representation (DR 6-101(A)(1) and (3)).

These same obligations are found in the Model Rules of Professional Conduct (1983, as amended), particularly in Model Rule 1.1, which requires a lawyer to devote the legal knowledge, skill, thoroughness and preparation reasonably necessary for every representation she undertakes. A lawyer's obligation not to take on matters for which she does not have the time necessary to provide adequate representation is also derived from the requirement in Model Rule 1.3 that a lawyer act with reasonable diligence and promptness in representing a client.

As the Committee observed in Formal Opinion 347, these obligations generally do not require a lawyer to speculate upon future events that may interfere with the representation. Indeed, were legal services lawyers to institute service restrictions whenever they anticipated a possible loss of funding, they would forever be preparing for the worst, with no time to perform legal services. Nonetheless, as we stated in Formal Opinion 347:

> When it becomes apparent that clients currently represented cannot be represented throughout the duration of their legal matters, steps must be taken to prepare for that circumstance.

That opinion outlined three steps legal services lawyers must take in order to adequately prepare for a significant reduction in the availability of legal services:

(1) Notice of the risk of disrupted services must immediately be given to existing clients.

(2) A stringent system of priorities must be established for handling pending matters and accepting new clients.

(3) Every reasonable effort should be made to arrange alternate funding, or, failing that, for substitution of lawyers to handle pending matters.

We believe the same steps are mandated under the Model Rules of Professional Conduct. Therefore, this Opinion should be read in conjunction with Formal Opinion 347. Our intention here is to expand upon, not to supersede, our discussion of the requirements set forth in our earlier opinion.

(1) Notice to Clients of Impending Changes

The Model Rules, like the Model Code, require a legal services lawyer to give all clients adequate notice of the impending changes described above and how they may affect the clients' representations. Model Rule 1.4(a) requires a lawyer to keep a client reasonably informed about the status of a matter. The Committee believes this Rule requires that a lawyer give clients advance notice of likely developments that may significantly affect the lawyer's ability to continue the representation. Likewise, the lawyer's obligation under Model Rule 1.4(b), to explain a matter to the extent reasonably necessary to enable a client to make informed decisions regarding the representation, necessitates giving a client advance notice of imminent funding changes and how the legal services office intends to respond. This is true whether the lawyer anticipates being able to continue the representation, or whether he anticipates having to limit the scope of the representation, to refer the matter to alternative counsel, or to withdraw.

The Committee understands that the practical result of such notice may be a flood of telephone calls and visits from concerned clients who want further information about their representations. The duty under Rule 1.4(a) to comply with a client's reasonable requests for information will obligate legal services lawyers to attempt to respond as well as they can. Although this may temporarily increase the work load of the lawyers, that inconvenience is not an adequate basis for failing to notify clients of likely events which will affect their representation. As an administrative matter, legal services lawyers may wish to temporarily assign the duty of returning client telephone calls to nonlawyers, who can explain the situation to callers and thus reduce the lawyers' burden.

(2) Setting Priorities

Funding reductions may necessitate withdrawal from a large number of pending matters. As stated in Formal Opinion 347, lawyers in each legal services office will need to structure their own priorities for the retention of active matters. [FN5] In doing so, legal services lawyers should consider the availability of alternative representation, any material adversity that will befall particular clients who are not served, and the particular problems faced by indigent people generally in each locality.

One cautionary note on the setting of priorities must be sounded. Although conflict with the proposed funding restrictions may be an adequate reason for refusing new clients (see Section III-C infra), it is not sufficient justification for abandoning existing matters. The lawyer owes her primary obligation to existing clients (see ABA Formal Opinion 347 (1981)) and has an obligation to use independent professional judgment in considering alternatives or foreclosing courses of action that reasonably should be available to a client (see Comment to Model Rule 1.7). The obligation to maintain professional independence means that legal services lawyers cannot decide which clients to keep and which to let go simply on the basis of whether abandoning certain cases will facilitate future funding. Although staff reductions may force legal services lawyers to withdraw from many matters in order to comply with their obligation to provide competent representation, abandoning matters solely because they are prohibited under the new funding restrictions could raise ethical questions. The only ethical justification for withdrawing from representing existing clients who are ineligible under the new funding restrictions is that the loss of funding which would result from retention of ineligible

clients would make the legal services lawyer unable to fulfill her ethical obligations to other existing clients. See discussion under Section II.B.

(3) Obtaining Alternate Funding and/or Representation

Finding competent substitute representation is the easiest way to resolve the conflicts that will arise between the new funding restrictions and existing representations, since withdrawal from a matter is always permitted if it can be accomplished without material adverse effect on the interests of the client. Model Rule 1.16(b). As we stated in Formal Opinion 347, the obligation to provide legal services for those who cannot afford it is the responsibility of every lawyer. Thus, members of the private bar may properly be requested, and should be expected, to take on cases for which legal services lawyers cannot continue representation.

In order to accomplish substitution of counsel without adversely affecting the client's interests, new counsel must be able to handle the matter competently. It may be difficult to find competent replacement counsel for some matters that are within the particular expertise of legal services lawyers, such as landlord-tenant disputes and some types of prisoner litigation. As an ethical matter, both the legal services lawyer and the new counsel should work to ensure that the new counsel has or will develop the necessary expertise. See Comment to Model Rule 1.1. In some instances, legal services lawyers may need to provide training to the private bar in handling specific types of matters, or remain available for consultation on particular cases to the extent permitted under the funding restrictions.

A particularly difficult situation arises in the context of existing class actions, in which class certification is based in part upon evidence that counsel for the class will fairly and adequately represent the class. See, e.g., Fed.R.Civ.P. 23(a). If a legal services lawyer must find substitute counsel for a class, rules of procedure will require notification to the court of the change in counsel, and because of the adequacy of counsel issue, may precipitate reconsideration of class certification. In some cases, adequate substitute counsel may simply not be available. [FN6] Where substitute counsel for a class action that does not otherwise violate the funding restrictions cannot be found, the legal services lawyer must consider whether the interests of the clients could be served by seeking decertification and proceeding with the action on behalf of one or more individual clients. Finally, as in all representations in court, the lawyer must secure leave of the court in order to withdraw. The Committee expresses no opinion on what happens if such leave is sought and not received.

The Committee also believes that legal services lawyers have an ethical obligation to explore the boundaries of continuing representation of existing clients under the new funding scheme. For instance, a lawyer subject to LSC practice restrictions may be able to maintain a representation as long as private co-counsel handles those aspects of the case that would violate the restrictions. [FN7] Legal services lawyers may also have an ethical obligation when apparently faced with a requirement that they drop an existing representation to determine whether there is a basis for securing a different interpretation of restrictive legislative language. This could be attempted in the context of a lawyer's motion to withdraw, for example, by the lawyer advising the Court of the basis for the withdrawal and inquiring whether the Court agrees.

Similarly, legal services lawyers have an obligation to explore all possible avenues for obtaining alternative representation for their existing clients. This could include petitioning the local bar association and courts to assume some of the responsibility for finding representation for former legal services clients. Finally, if there is a mechanism available for obtaining court-appointed counsel for existing clients, as a last resort it should be fully utilized. If there is no such mechanism in existence, legal services lawyers could petition the local court to create one.

We emphasize the admonition of Formal Opinion 347 that preparatory steps are not optional. Appropriate preparation and notice to clients is necessary to protect the clients interests, and is possibly a prerequisite to withdrawal.

As we concluded in Formal Opinion 347, ethical obligations would not require legal services lawyers to maintain representation when they were no longer being paid, but would mandate that the lawyers exercise prudence in minimizing the number and effect of such withdrawals.

B. The Duty to Assist Clients Whose Representations are Prohibited by the Acceptance of LSC Funding

Existing clients will be affected by both the funding reductions and practice restrictions contained in the proposed legislation. In this section we offer guidance for the legal services lawyer who is faced with an increased caseload after staff reductions, or who has determined that a particular ongoing representation is forbidden under the new funding rules.

The Effect of Staff Reductions

Model Rule 1.16(a) requires that a lawyer withdraw from representation of a client if the representation will result in a violation of the Rules of Professional Conduct or other law. This provision will require the remaining program legal services lawyers to withdraw from some matters if funding and staff reductions greatly increase these lawyers' workloads, since maintaining an unmanageable case load violates the lawyer's duty under Model Rule 1.1 to provide competent representation. This situation was also addressed in Formal Opinion 347:

> With respect to existing clients of the legal services office, the committee is of the opinion that only those matters that can be handled consistent with each lawyer's duty of competent, non-neglectful representation should be continued. When faced with a work load that makes it impossible for the remaining lawyers to represent existing clients competently, legal services lawyers should withdraw from a sufficient number of matters to permit proper handling of the remaining matters.

Nevertheless we do not believe that a lawyer's representation of existing clients who become ineligible or whose representations are prohibited under the new LSC Funding legislation may be terminated solely because such representations would violate the funding restrictions. Some legal services organizations will be financially able to decline LSC funding and still retain their current clients; a separate organization may be created for the purpose of continuing to represent LSC ineligible clients; and it is always possible that alternative replacement funding may be found. Thus, it would be incorrect to conclude that discontinuing representation of current clients is the only solution to the restrictions in every case.

The Effect of Proposed Practice Restrictions

A legal services organization that genuinely develops and adheres to a system of priorities in retaining existing clients (see Section II.A.(2) of this opinion) may be faced with the undesirable choice between continuing representations that rate highly in that system of priorities, and accepting or applying for needed funds from the Legal Services Corporation. Finding alternate representation and withdrawing from the matter will be possible in some cases, but perhaps not in all. What are a lawyer's obligations in such a situation?

Where, despite every effort to obtain substitute representation, a legal services lawyer is confronted with high priority cases that violate new funding restrictions, the legal services lawyer must balance her obligations to the formerly eligible clients with her obligations to eligible existing clients who will be hurt if funding is lost. [FN8] In the most extreme case, where the LSC is the sole source of the organization's funding, a loss of LSC funding might preclude representation of any clients, including those clients whose cases would not violate the funding restrictions. In such a circumstance, the

lawyer's withdrawal from ineligible matters would be mandatory, since it would otherwise be impossible for the lawyer to fulfill her obligations to any of her clients, thus resulting in a violation of Model Rule 1.1. [FN9]

The more difficult decisions will arise in those circumstances where the legal services office does not rely exclusively upon LSC funding. The Model Rules provide little guidance in the situation where a lawyer must choose between two or more existing representations. Nevertheless, the Committee believes that the loss of funding that would result from maintaining an ineligible representation may permit withdrawal under 1.16(b)(5), on grounds that the representation would result in an unreasonable financial burden on the lawyer.

We note that withdrawal under 1.16(b)(5) is permissive, not mandatory. Thus, where loss of LSC funding would not result in the closing of the office or the need to withdraw from all pending matters, each legal services office will have to make its own determination as to whether the greater good is served by foregoing LSC funding and maintaining restricted representations—undoubtedly at the cost of some services—or by withdrawing from prohibited matters and preserving those aspects of the practice that comply with the restrictions.

C. Legal Services Lawyers' Obligations to Remaining Clients After Acceptance of LSC Funding and Accompanying Practice Restrictions

As outlined above, the proposed legislation would restrict who may be a client, the subject matter of the representation, and the methods that may be used in pursuing the representation. This portion of our opinion will address the lawyer's obligations to existing clients after the decision is made to accept LSC funding and abide by the accompanying restrictions.

1. Restrictions on Who May Be a Client

A lawyer in a legal services office that has chosen to accept LSC funding and abide by the accompanying restrictions must communicate the new restrictions to every client, regardless of whether the client's situation appears to implicate them. Model Rule 1.4 requires such notice; this mechanism is also important because an LSC-funded lawyer has an obligation to protect that funding for the benefit of all of her clients, and thus to investigate whether any matter in her care would jeopardize that funding.

Moreover, the lawyer must notify clients that circumstances such as incarceration or a change in immigration status will likely make them ineligible for further legal services, and thus result in a termination of legal services. The lawyer should also request that clients keep her apprised of any changes that might affect their eligibility. In order to protect necessary funding, it may be advisable to provide the client with written notice of the eligibility requirements and have the client acknowledge in writing that she understands them, does not currently believe that the representation would violate any of them, and will keep the lawyer apprised of any changes.

Although it is permissible for a lawyer to ask a potential client to consent to termination of representation or proceeding pro se if she becomes ineligible under the funding restrictions (see discussion in Section III-C, infra), a lawyer cannot ask an existing client to agree to this new limitation on the representation if it would adversely affect the representation. [FN10] See Model Rule 1.7(b)(1). Should a previously eligible client whose representation began before January 1, 1996, and who remains eligible as of January 1, 1996, become ineligible later in the representation, the legal services lawyer will have to weigh the importance and urgency of that representation, the likelihood of obtaining and possible prejudice from a substitution of counsel, and the interests of other clients who would go unrepresented if LSC funding is lost. (See Section II-B(2), supra).

2. Restrictions on the Scope of the Representation

Difficult ethical issues may arise with regard to existing clients whose current representation is permitted, but whose cases may require future action that would violate the LSC practice restrictions. [FN11] The likelihood of such future conflict may be difficult to predict, particularly with regard to the restrictions on methods that may be used. Yet it seems quite possible that a matter and client satisfying the funding statute at the inception of the representation could later run afoul of the various conditions. May a legal services lawyer ethically continue a representation where there is a chance that LSC funding restrictions will in the future preclude advisable or necessary action?

We believe this situation is governed by Model Rules 1.2, 1.7(b) and 2.1, all of which in different ways preclude a lawyer from undertaking a representation if the lawyer's other obligations are likely to materially restrict avenues of relief that would otherwise be available to the client. While these rules generally allow for an otherwise prohibited representation where a client consents after consultation, a lawyer may not even ask for consent unless the lawyer reasonably believes that the representation will not be adversely affected. For example, under Rule 1.2 a lawyer may not ask a client to agree to limitations on the scope of representation that would effectively preclude the lawyer from providing competent representation.

In cases where it may fairly be anticipated that the funding restrictions will sooner or later be implicated, and if other competent services are available to the client, the lawyer should advise the client that she would be better off with another lawyer, rather than seek the client's consent to continue. Where substitute counsel cannot be found, the lawyer must determine whether withdrawal may be appropriate in accordance with the considerations outlined in Section II-B of this opinion.

Where a legal services lawyer believes that there is only a small chance that practice restrictions will adversely affect a representation in the future, the lawyer may ask the client to agree prospectively to restrictions on the scope of the representation. In doing so, the lawyer must inform the client of all of the practical implications of such an agreement and counsel the client about her options (which may be few). The lawyer must also inform the client of the option to refuse consent, and of any consequences that would follow from such a refusal. In order to fully advise the client as to the consequences of her decision, the lawyer must have already performed the balancing of interests described above, so that the lawyer will be able to inform the client whether the lawyer would need to withdraw from the matter if, at some future date, the lawyer cannot continue to provide competent representation without endangering the funding that supports other clients.

If a lawyer decides to seek consent, she must make every effort to ensure that the client fully understands the meaning and future implications of the lawyer's practice restrictions. Because legal services clients tend not to be experienced or sophisticated in legal matters, a lawyer should take particular care in seeking consent to assure that such clients:

> have a full understanding of what they are being asked to consent to and further that whether their consent is a completely voluntary matter with them, a consent which they can deny without a sense of guilt or embarrassment.

ABA Informal Opinion 1287 (1974). Moreover, as emphasized in ABA Formal Opinion 95-393, lawyers for the elderly or otherwise mentally infirm should be especially mindful of their duties under Model Rule 1.14 concerning communication with clients under a disability.

The Committee believes that a legal services lawyer who accepts LSC funding should inform all clients of the accompanying practice restrictions and obtain their written agreement to abide by those restrictions, even if it does not

appear likely that a particular representation will run afoul of those restrictions. This is because the requirement under Model Rule 1.2 that a lawyer obtain a client's consent before limiting the scope of representation is not conditioned upon the lawyer's believing that such a limitation will materially or adversely affect the representation: consent is a prerequisite to any limitation upon the scope of the representation.

A lawyer must abide by a client's refusal to consent to limitations on the representation. And, because any situation in which client consent was properly sought in the first place is unlikely to pose an immediate conflict with the LSC funding restrictions, the lawyer does not have sufficient justification to withdraw from an otherwise permissible existing representation solely because a client refuses consent. The lawyer must continue the representation for as long as, and to the extent that, it is possible to do so without violating the funding restrictions.

In such cases, it is advisable to attempt to secure substitute representation or co-counsel. Private lawyers may be willing to serve as substitute counsel or co-counsel on an emergency basis in situations where they are not willing to accept complete responsibility for a matter. Legal services lawyers should also explore the availability of court appointment of substitute counsel when an existing representation becomes impossible to sustain.

III. Impact of Legislation on Ethical Duties of Legal Services Lawyers to Future Clients

A. Declining New Representations Due to Increased Workload

Reduced LSC funding will undoubtedly force some legal services organizations to make staffing cutbacks. Because departing lawyers will almost certainly not take clients with them, responsibility for those cases “devolves upon the office as a whole, rather than upon [the] lawyer who leaves.” See ABA Formal Opinion 347 (1981). Increased workloads of the remaining lawyers present ethical problems as to future and potential clients, as well as existing clients.

A lawyer's obligations to provide competent and diligent representation under Model Rules 1.1 and 1.3 imposes a duty to monitor workload, a duty that requires declining new clients if taking them on would create a “concomitant greater overload of work.” See ABA Formal Opinion 347 (1981). Only in “extreme cases” should the legal services lawyer, confronted with increased responsibilities as a result of funding and staff reductions, take on new matters. Id.

If a lawyer appropriately declines to represent a new client, the Model Rules do not impose any duty on the lawyer to locate alternative representation. Nevertheless, nothing prohibits legal services lawyers from making efforts to identify competent counsel for prospective clients whom they reject on the basis of these ethical considerations.

B. Scope of Representation Restrictions for Future Clients

Because practice restrictions will almost certainly accompany future LSC funding, legal services lawyers will have to implement screening devices for new representations to ensure that violations of the restrictions will not occur. Such precautions should operate both at the inception of the representation and during the life of the matter.

As discussed above, Model Rules 1.2 and 1.7 permit a lawyer to accept a representation that might conflict with practice restrictions by limiting the scope of that representation with client consent. For example, a potential conflict with practice restrictions might be avoided by executing an agreement with the client stipulating that the lawyer will withdraw from the matter if the client becomes ineligible (such as through incarceration), and that the lawyer will not pursue certain legal options, such as counter-claims that arise under fee-generating statutes. To ensure that no future

conflicts arise, the lawyer should see to it that an agreement limiting the scope of the representation is signed with each new client, even if the possibility of a statutory violation seems remote at best.

The agreement should explicitly identify those legal options, such as claims seeking reform of federal welfare statutes or claims arising under fee-generating statutes, which the lawyer will not pursue, and must clearly spell out any changes that would affect the client's eligibility for services. Such a limitation is similar to other status regulations, such as income level requirements, that legal services organizations currently have in force. If the client refuses to consent to such a scope limitation, the lawyer may decline the representation.

The possibility of a scope restriction agreement does not end the ethical inquiry, however, because a representation that is initially permitted under the funding restrictions may, at some later point, require action that would violate those restrictions. As we stated above, Model Rules 1.2 and 1.7 forbid a lawyer from seeking a client's consent (a) to a conflict that will adversely affect the client or (b) to a representation so limited that it effectively precludes competent representation.

A legal services lawyer should balance these competing interests in determining whether to ask a potential new client to consent to scope restrictions. If the legal services lawyer determines that foregoing specific legal options would seriously compromise his duties to the client, she should not ask the client to accept such a restriction, but should decline the representation pursuant to Rule 1.16(a)(1). We reiterate that where there is some likelihood that the legal services lawyer may have to withdraw from a matter or forego an available strategy in the future, it is advisable to arrange for "back-up" counsel from the beginning, and to keep that lawyer apprised of the progress of the matter.

IV. Mandated Pre-Litigation Disclosures

In addition to the restrictions discussed above, the proposed funding legislation would impose new administrative burdens that could impinge on the legal services lawyers' duty to protect client confidences. The proposed provision would prohibit a legal services lawyer from filing a complaint or otherwise pursuing litigation, or engaging in pre-complaint settlement negotiations with a prospective defendant, unless a) the plaintiff is identified by name in any complaint filed; and (b) a written statement is prepared and signed by the plaintiff that enumerates the particular facts known to the plaintiff on which the complaint is based. This mandated written statement is to be kept on file by the legal services office for review by any agency that may audit the activities of the LSC. In addition, of course, adversary parties may obtain access to the statement through ordinary discovery after litigation has begun. A court is authorized to enjoin the disclosure of the client's identity only if the client can establish at a hearing that an injunction is reasonably necessary to prevent probable, serious harm to such client.

The required disclosure of a) the client's identity, and b) other facts relating to the representation, can conflict with the lawyer's obligations under Model Rule 1.6, which prohibits revelation of any information relating to the representation without the client's consent, except in narrow circumstances. A legal services lawyer may be able to comply with the disclosure requirement without violating Model Rule 1.6 by asking for the client's consent to reveal the required information. Before doing so, she must fully disclose and discuss the consequences of compliance with her client. As elsewhere in this opinion, we find that a lawyer's obligations to future clients and existing clients are not identical.

A. Disclosing the Identity of the Client

1. Existing Clients

The requirement that lawyers receiving LSC funds reveal their clients' identities may be applied to matters where an existing client is proceeding with pre-complaint negotiations, has decided to petition a court to proceed anonymously, or where permission to proceed anonymously has already been granted. This will raise some difficult ethical issues.

The lawyer must, of course, consult with existing clients concerning the new disclosure requirements, the fact that it may now be more difficult for the client to proceed anonymously with an LSC-funded lawyer, the client's right to refuse either to reveal his identity or to seek the required injunction, and the consequences of each available course of action to the client. In order to provide effective consultation, the lawyer must be able to tell the client whether the lawyer will be able to continue the representation and forego LSC funding, or whether the lawyer will have to withdraw from the representation because of her obligations to other clients to maintain the funding. As always, a lawyer cannot ask a client to consent to a limitation imposed by the lawyer's obligations to a third party if the lawyer believes that the client's representation would be adversely affected. See Model Rule 1.7(b).

2. Future Clients

The proposed legislation may erect a higher standard for proceeding anonymously than is generally applied. If the legal services lawyer believes this to be true, the lawyer must advise a prospective new client that he may more easily proceed anonymously if represented by a non-LSC-funded lawyer.

The required disclosure of the client's identity could materially limit the client's representation under Model Rule 1.7(b). Therefore, the lawyer may not ask for the client's consent to proceed with the litigation in the event that permission to proceed anonymously is denied, if the lawyer believes that to do so would adversely affect the client's representation. The lawyer who has decided to accept LSC funding and abide by the accompanying disclosure requirement should instead decline the representation.

If a prospective client makes an informed decision to accept representation and continue with litigation even if disclosure is required, revelation of the client's name in a complaint is permissible. This position is consistent with ABA Informal Opinion 1137 (1970), in which the Committee concluded that a lawyer for a legal aid society may reveal the current financial status of a client to a lawyer-audit committee of a local bar association if a knowing waiver is obtained from the client. Although not mandated by the Model Rules, the Committee strongly suggests that any consent obtained from the client be set forth in writing.

B. Disclosing the Facts Underlying a Complaint

Under Model Rule 1.6, a lawyer may make factual disclosures if they are “impliedly authorized in order to carry out the representation.” The statement of facts required by the proposed legislation is information relating to the representation, and its release is not “impliedly authorized” simply by a client's decision to engage in litigation. Therefore, a legal services lawyer may not make such a statement available to federal auditors without the client's express consent. LSC-funded lawyers must use the same caution in deciding whether to seek consent as discussed above with regard to disclosure of the client's identity. As stated above, the ethical issues are more serious for existing than for potential clients.

In addition, the duty under Model Rule 1.1 to provide competent representation requires that the lawyer make every reasonable effort to protect the interests of his client including:

(1) preparing the statement with the client to assure that the information provided is not beyond the scope of what is required by the proposed legislation;

(2) including a paragraph in the statement to the effect that the statement is being given pursuant to a statutory requirement and that nothing contained therein should be construed as a waiver of the attorney-client privilege; [FN12] and

(3) including a paragraph in the statement to the effect that the information contained therein is true and correct to the best of the client's knowledge as of the date thereof.

A Final Word

Daunting ethical challenges face the legal services community in preparing for whatever legislation may be enacted. This opinion demonstrates the enormous ethical burden placed on lawyers in the legal services community, both in the short term and as they continue to represent indigent clients under the restrictions that are enacted. They will have to proceed with great care and caution as they negotiate an ethical and legal minefield.

The responsibility for delivering legal services to indigent clients, however, lies not only with legal services lawyers but with the legal profession as a whole. As the Committee observed in ABA Formal Opinion 347 (1981):

[I]f [the] traditional principles of our profession are to be accepted as more than hollow rhetoric, lawyers in every jurisdiction acting through the organized bar should take all necessary actions to prevent the abandonment of indigent clients.

Unfortunately, in contrast to the situation that confronted the legal profession in connection with previous attempts to limit Legal Services funding, the profession cannot absolve itself of responsibility simply by writing a check to the local legal services office. Under the proposed funding legislation, agencies or individuals accepting any funding at all from the Legal Services Corporation will be absolutely prohibited from representing certain clients or pursuing certain matters no matter what other sources of funding may exist. In this context, then, until these restrictions are reversed and full funding is restored, it will fall upon the entire legal community to do the best we can to provide appropriate and competent legal representation for indigent persons who will no longer be able to avail themselves of this source of legal assistance.

The responsibility being thrust upon the legal profession is enormous and clearly more than the profession can fulfill, but it is one that under the present circumstances we must embrace. Legal services organizations not funded by the Legal Services Corporation must be supported where they exist, and established where they do not. Our courts must stand ready to assign substitute counsel to the thousands of indigent clients who may find themselves without a lawyer. And lawyers throughout the nation must be prepared to give meaning to the principles of Model Rule 6.1 and perform extraordinary pro bono service in providing for those who are ineligible, those whose cases or strategies are prohibited, and those for whom reductions in funding will eliminate the availability of legal services they so desperately need. In the end the only real solution is for this country to recognize the need to fully fund lawyers for the poor, free from restrictions that hamper their ability to serve their clients. Until that occurs, however, there is much that we can and should do to ameliorate a very difficult situation.

[FN1]. H.R. 2076, 104th Cong., 1st Sess. (October 11, 1995); S. 1221, 104th Cong., 1st Sess. (September 11, 1995).

[FN2]. The current Congressional efforts to direct funds away from the Legal Services Corporation are not novel. In 1981, pending federal legislation expected to reduce funding for the LSC spurred this Committee to address the ethical obligations of legal services lawyers to their clients in the face of drastically reduced funding. The resulting opinion, ABA

Formal Opinion 347 (1981), addressed those ethical problems which arise when a legal services office must close down completely or reduce its staffing or support services to such a level that the remaining staff lawyers cannot handle all pending legal matters.

[FN3]. This Committee cannot express an opinion about the retroactivity or scope of the proposed legislation; we have framed this opinion in terms of the "worst case" scenario in order to provide the most complete guidance that is possible at this stage.

[FN4]. Thus, legal service lawyers currently representing clients or handling matters that would be prohibited under the proposed legislation may be ineligible for Legal Services Corporation funds if they are still handling those matters or representing those clients when the legislation is scheduled to take effect or after a short phase-in period has elapsed.

[FN5]. The Model Rules govern the professional responsibilities of lawyers, not legal organizations. The Committee is aware that most legal services lawyers practice in the context of an organization where they are required to follow the policies and dictates of a Board or other governing body. Some of the steps laid out in this opinion—particularly the setting of priorities for the retention of existing cases and the decision of whether or not to accept LSC funding—will be performed by the Board, with or without consultation with the staff lawyers. In the final analysis, however, a legal services lawyer is ethically responsible for her own decisions and actions.

[FN6]. See Nina Bernstein, 2,000 Inmates Near a Cutoff of Legal Aid, N.Y. TIMES, November 25, 1995, § 1, at 8 (New Hampshire Legal Assistance will be forced to abandon prisoners' rights class action if LSC funding restrictions pass; no substitute counsel yet found).

[FN7]. Although participation of co-counsel generally suggests joint responsibility for the matter as a whole despite a division in duties, it may be permissible to structure an arrangement whereby each lawyer is solely responsible for a particular claim or defense. There is some precedent for such an arrangement in insurance litigation, where, in some jurisdictions, an insurer may provide a defense for claims against an insured which are arguably covered, but require the insured to hire private counsel for joined claims which fall outside the policy. See 14 Couch, INSURANCE 2d (Rev. ed. 1982 & Supp.1995) §§ 51:47, 51:153, and accompanying annotations.

[FN8]. As stated in footnote 5, supra, the Committee recognizes that this decision may well be made by the organization as a whole, not by individual lawyers.

[FN9]. Although a lawyer's obligation to remain professionally independent forbids a lawyer to drop an existing client merely because a funding source does not like that client, a lawyer's obligation to provide competent representation may require a lawyer to drop the same client if the retention of the matter would prevent the lawyer from serving other existing clients. The end result for the client would be the same, but the ethical implications would not. The ethical issue is not whether the lawyer decides to withdraw from some matters, but what considerations—convenience or duty to other existing clients—motivate the lawyer's decisions.

[FN10]. Such a restriction may not adversely affect the representation in the circumstance where the change in eligibility also forecloses the legal relief that is the goal of the representation: e.g., a client's action for physical custody of her child may become moot as a result of incarceration, so the lawyer's inability to represent the client during her incarceration will not adversely affect that representation.

[FN11]. For example, the client's immigration status could change, the client might find it beneficial to file a counterclaim arising under a fee-generating statute, or the lawyer may determine that it is in the client's best interest to change the client's claim into a class action.

[FN12]. In this regard, a lawyer is obligated by Rule 1.4 to explain to the client that, notwithstanding such statement, a court may conclude that the client has waived the attorney-client privilege if the court views the signed statement as having been voluntarily made. See 1 MCCORMICK ON EVIDENCE, § 93, at 342 (4th ed., 1992). The client should be made to understand the implications of such a waiver, and the lawyer may wish to obtain the client's written consent to making such a statement should the client decide to proceed with the case.
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