

July 30, 2001

Sent via facsimile at (606) 546-5117,
with hard copy to follow in U.S. mail

John Rosenberg, Executive Director &
Larry York, Directing Attorney
Appalachian Research &
Defense Fund of Kentucky
120 North Front Avenue
Prestonsburg , Kentucky 41653

Dear Messrs. Rosenberg & York:

I am writing in response to your recent inquiry regarding the propriety of your program releasing information obtained from a client for purposes of eligibility screening, when the client's case was ultimately handled by a private attorney through your program's Private Attorney Involvement program, mandated by 45 C.F.R. 1614. You indicated that your program received a subpoena to produce a file and to testify from notes in a case which your program contracted to a private attorney and which is now closed. You further indicated that your program does not have notes taken by the contract attorney once he/she accepted the case, but that it has information obtained from the client for purposes of eligibility screening (e.g. financial information and other data related to the cause of action).

It is the opinion of the Office of Legal Affairs that it would be inappropriate for your program to release this client information absent the client's consent, or absent a situation involving oversight by the Legal Services Corporation ("LSC"). Section 1611.7(c) of the LSC Regulations provides that "Information furnished to a recipient [of LSC funds] by a client to establish financial eligibility *shall not* be disclosed to any person who is not employed by the recipient in a manner that permits identification of the client, without express written consent from the client," except that recipients shall provide such information to LSC under limited circumstances for purposes of oversight and compliance. 45 C.F.R. 1611.7(c). [Emphasis added.] Additionally, several opinions issued by the American Bar Association ("ABA") Committee on Ethics and Professional Responsibility have held that financial eligibility information furnished by a client in order to obtain free legal services is protected by the attorney-client privilege. ABA Committee on Ethics and Professional Responsibility, Informal Opinion 1287 (1974), and Formal Opinion 334 (1974). Finally, Section 1009(d) of the Legal Services Corporation Act As Amended 1977, provides that "[n]either [LSC] nor the Comptroller General [of the United States] shall have access to any reports or records subject to the

attorney-client privilege,” suggesting that Congress has determined that the confidences of legal services clients are entitled to the same protection as those of private lawyers’ clients. The Legal Services Corporation Act As Amended 1977 §1009(d), 42 U.S.C. 2996 (1977). Our opinion on this issue is unchanged by the fact that the relevant case was handled by a private attorney, as the screening information was collected pursuant to the requirements of LSC’s Regulation on Private Attorney Involvement, codified at 45 C.F.R. 1614.

Notwithstanding our opinion on this issue, we recognize that the confines of attorney-client privilege are routinely defined by state law, and we will defer to the appropriate state authorities in their interpretation of Kentucky rules of professional conduct on the bounds of attorney-client privilege.

In the event that your file has been subpoenaed for the purpose of challenging the client’s financial eligibility for free legal services, it should be noted that multiple courts have held that the issue of a legal services client’s eligibility is not a proper matter for judicial determination, as the agency administering the services has sole authority over eligibility determinations. *See DeMichele v. Waltham Division of the District Court Department*, 629 N.E.2d 982 (1994)(holding that determination of whether LSC recipient was misapplying funds by representing a civil litigant who was allegedly not indigent was not for judge in underlying litigation, but instead for organization administering services); *Outlaw v. Douglas*, 378 So.2d 892 (1979)(holding that petitioner’s eligibility to receive free legal services is an administrative decision to be made by the agency rendering services, consistent with established guidelines, and is not within the purview of the trial court.) *See also*, *Florida ex rel. T.J.M. v. Carlton*, No. 75-245 (Fla. Dist. Ct. App., June 1975); *Brednenner v. Brednenner*, (Penn. C.P. Luzerne Co., June 10, 1975); *Budget Finance Plan, Inc. v. Staley*, Civil No. GS 19245-65 (D.C. Ct. Gen. Sess., June 9, 1966); 9 Clearinghouse Review 277 (August 1975); and 9 Clearinghouse Review 209 (July 1975).

I hope that this information adequately addresses your inquiry. If you have any questions or need additional information, please feel free to contact me at (202)336-8871.

Sincerely,

Dawn M. Browning
Assistant General Counsel

Victor M. Fortuno
General Counsel

