Restrictions by Funders and the Ethical Practice of Law

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LEGAL aid lawyers who accept Legal Services Corporation ("LSC") funding, and abide by its restrictions, may be acting unethically. According to Stephen Gillers, "it can't be so." The recent funding restrictions limit whom legal aid attorneys may represent, the matters upon which they provide representation, and the scope of that representation. Some legal aid attorneys say that the most recent set of restrictions imposed by Congress on entities funded by the LSC put legal aid staff attorneys in a position where they may be practicing unethically.

This Article considers whether attorneys of programs that receive restricted funds may comply with the restrictions while ethically practicing law. Part I discusses the restrictions imposed by legal service funders. Specifically, it details Congress's restrictions on LSC-funded entities, prior LSC restrictions, state government restrictions on state-funded civil legal assistance, and restrictions on certain cases and matters. Part II analyzes the ethical issues relating to four categories of current restrictions: (1) funding restrictions on who may be represented or the cases that may be brought using funds from the funder; (2) limitations on the type of services that may be provided to otherwise permissible clients or cases; (3) requirements that attorneys withdraw from cases or matters in which they are already providing representation; and (4) requirements that information protected from disclosure by ethical rules or the attorney-client privilege be released to parties outside of the program, including government auditors and monitors. The Article also discusses a 1996 opinion of the American Bar Association Committee on Ethics and Professional Responsibility (the "Committee") regarding the ethical obligations of lawyers whose

2. See infra Part I.A (discussing the LSC restrictions in detail).
3. See Pearce et al., supra note 1, at 371-87 (panel discussion comments of Stephen Ellmann); id. at 368-71 (panel discussion comments of Emily J. Sack). The Committee on Civil Rights and the Committee on Professional Responsibility of the Association of the Bar of the City of New York asserted in a recent article that the 1996 restrictions "conflict with the basic ethical precepts requiring an attorney to act in the client's best interest, to represent the client zealously and to exercise independent judgment." Committees on Civil Rights and Prof'l Responsibility, A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers, 53 Record of the Ass'n of the Bar of the City of New York 13, 55 (1998).
employers receive funds from the LSC for their existing and future clients, when LSC funding is reduced, and when remaining funding is subject to restrictive conditions. The Article concludes that, because future unjustified restrictions may force attorneys into ethical dilemmas that can only be resolved through resignation, current restrictions must be removed, and no further restrictions should be imposed.

I. Restrictions Imposed by Funders

A. Congressional Restrictions on LSC-Funded Entities

Entities funded by LSC have suffered considerable cutbacks from federal LSC sources and have faced an array of unprecedented restrictions in the last several years. Since 1995, federal funding for legal services was cut by 25% from $415 million in fiscal year 1995 to $283 million in fiscal year 1997 and fiscal year 1998. In addition, 12.9% of the recipient staff resigned and 12.7% of local legal services offices closed from 1995 to 1996. State and national institutions that made up the legal services support and infrastructure lost all of their LSC funds, as well.

No longer can LSC-funded recipients receive funds from non-LSC sources to undertake activities that are restricted by the use of LSC funds. Under the new legislation, all of a recipient’s funds, regardless

8. Although it is not the subject of this Article, it is necessary to point out that those who care about equal justice for the poor must take whatever steps are possible to remove restrictions on which clients can be served and what legal services can be provided. Perhaps the most pernicious is the restriction on the use of non-LSC funds by LSC-funded recipients, which dries up funding sources that have in the past and would have in the future provided resources to serve the critical legal problems of low-income clients. In addition, the restrictions on class actions, claiming attorneys’ fees, and welfare reform limit what can be done for clients, putting those served by LSC recipients at a disadvantage not faced by adverse parties. On the merits, restrictions on advocacy are unnecessary to address perceived problems, are unjustified, and deny low-income persons equal access to our system of justice. The principles of equal justice do not distinguish between one group of clients and another, between the deserving and the undeserving poor, whether they be welfare recipients, aliens, prisoners, or persons charged with drug offenses who reside in a public housing project. Nor should low-income persons be foreclosed from bringing class actions to vindicate their rights, claiming attorneys’ fees that are available by law, or seeking necessary relief that is only available from legislative or administrative bodies. It has been this author's experience as one of the chief lobbyists for preserving an effective, professional LSC that current arguments about the ethical impact of restrictions have little appeal to either supporters or critics of civil legal assistance and are not likely to persuade anyone to oppose restrictions. Unfortunately, the task of removing existing restrictions and preventing future restrictions requires a long-term effort at education and persuasion and the development of a much more widespread base of public sup-
of the source, will be restricted. These "entity" restrictions are unique and unprecedented.

With a few narrow exceptions, recipients are precluded from advocacy and representation before legislative bodies and in administrative rulemaking proceedings. In addition, they cannot initiate or engage in any new class actions. They were also required to discontinue work on pending class actions by August 1, 1996. Recipients cannot claim, collect, or retain attorneys' fees from adverse parties on cases initiated after April 25, 1996, even if the fees are otherwise permitted by statute. Moreover, recipients cannot challenge state or federal welfare reform laws or formally adopted regulations.

The type of cases permitted is limited further. Recipients are prohibited from representing persons in redistricting cases, from participating in any litigation with regard to abortion, from representing certain aliens, from participating in litigation on behalf of a person incarcerated in a federal, state, or local prison, including pre-trial detainees, and from representing persons charged with or convicted of drug crimes in public housing evictions when the evictions are based on alleged threats to health or safety of public housing residents or employees. In addition, LSC-funded recipients must name potential client plaintiffs and obtain a written statement of facts before they can engage in pre-complaint settlement negotiations or file suit on the client's behalf. Recipients may neither conduct training programs to advocate particular public policies or political activities nor conduct

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training on prohibited cases or advocacy activities, such as lobbying, rulemaking, and collecting attorneys’ fees.\(^\text{21}\)

In the fiscal year 1998 appropriations bill, Congress added three new provisions.\(^\text{22}\) The first provision provided LSC with new authority to foreclose recipients from future grants if they substantially violated the Legal Services Corporation Act or appropriation provisions, or if they sued LSC because of the restrictions.\(^\text{23}\) The second provision eliminated procedural rights to a hearing before an independent hearing officer when LSC sought to terminate or deny refunding.\(^\text{24}\) The third provision required LSC recipients who initiate a case to disclose to the LSC and the general public the names and addresses of all parties, the cause of action, and the case number and address of the court in which the case was filed.\(^\text{25}\)

These restrictions will remain in effect for fiscal year 1999\(^\text{26}\) and, because of the outcome of the 1998 congressional elections, will likely remain in effect for the next two years.\(^\text{27}\) The leadership in the House and several key leaders in the Senate remain unequivocally opposed to a federal legal services program.\(^\text{28}\) The “moderate” forces that sup-


\(^{23}\) See id., § 504(a)(8), 111 Stat. at 2511.

\(^{24}\) See id., § 501(b), 111 Stat. at 2510 (stating that sections 1007(a)(9) and 1011 of the LSC Act “shall not apply to the provision, denial, suspension, or termination of any financial assistance using funds appropriated in this Act”).


\(^{27}\) The 1998 elections did not affect the number of Congressmembers who support and oppose legal services.

\(^{28}\) See Houseman, Address, supra note 7, at 298-301. There were considerable differences among opponents on how to kill LSC. In September 1995, the House Judiciary Committee reported out the Legal Aid Act of 1995, H.R. 2277, 104th Cong. (1995), which would have radically altered the current federally funded legal services program by eliminating the Legal Services Corporation and by sending funds to the states for allocation under the rubric of “block grants.” Over a four-year period, block grant funds could be used for only a limited range of services and causes of action, subject to severe restrictions, and state legal services funds were subject to the same restrictions as those that applied to the federal funds. The House leadership, however, wanted to end legal services within two years and decided to let reauthorization for the Legal Services Corporation languish. See Legal Services Legislative Update, PAG Update (Project Advisory Group, Nat'l Orgs. of Legal Servs. Programs, Wash., D.C.), Nov. 1, 1995, at 1, 1. The original House appropriation for fiscal year 1997 included only $141 million for LSC, putting it on a “glide path to elimination.” House Appropriations Subcommittee Holds Hearings on FY 1997 Funding for LSC, PAG Update (Project Advisory Group, Nat'l Orgs. of Legal Servs. Programs, Wash., D.C.), April 17, 1996, at 1, 1. The full House, however, subsequently raised the LSC funding to $250 million. See 142 Cong. Rec. H7853 (daily ed. Sept. 25, 1997). Similar proposals came from the House Appropriations Committee for fiscal year 1998 and fiscal year 1999 and were again changed on the House floor. See 144 Cong. Rec. H6973 (daily ed. Aug. 3, 1998); 143 Cong. Rec. H7853 (daily ed. Sept. 25, 1997).
port the restrictions (though many favor increased funding) continue to play a pivotal role. While the Administration is seeking and will continue to seek modest increases in funding, it has not sought significant changes in the types of recipients that can be funded or the removal of the restrictions on recipients of those funds.29

B. Prior LSC Restrictions

The federal legal services program has been restricted since its inception in 1965, but the early restrictions were imposed by the administrative agency overseeing the program and not by Congress.30 Congress did, however, attempt to impose some restrictions. For example, in 1967, the Senate considered legislation that would have prevented the legal services recipient from filing suit against state and federal governmental entities.31 In addition, Congress attempted on several occasions to provide governors the power to veto grants to entities that engaged in activities that displeased the governor.32

1. Legal Services Corporation Act

Congress successfully imposed restrictions on funding through the Legal Services Corporation Act of 1974 ("LSA Act").33 The creation of the LSC, however, was not an easy legislative accomplishment34—it took four years of hard work.35 President Nixon vetoed the first LSC bill principally because of his disagreement with the lack of restrictions on certain activities.36 He forced the withdrawal of the second congressional attempt after it passed both Houses of Congress and was under consideration in the conference committee.37 Finally, on the third attempt, Congress enacted the Legal Services Corporation Act of 1974.38 The legislation was reauthorized in 1977,39 but has not

32. See id. at 9-10.
34. See Dooley & Houseman, supra note 31, ch. 1, at 9-18.
35. See id.
36. See id., ch. 1, at 15-16.
37. See id., ch. 1, at 16.
been reauthorized since. In fact, the LSC exists because it continues to receive appropriations from Congress.

The pre-1996 statutory structure contained procedural requirements, partial and total restrictions on certain activities, and provisions for reporting and record keeping. Class action suits, including appeals or participation as amicus curiae, were permitted only if they were approved by the director and were consistent with policies set by the recipient's board. Recipients were also required to establish guidelines for review of appeals "to insure the efficient utilization of resources and to avoid frivolous appeals." In addition, the LSC Act gave the LSC broad authority to require reports on recipient activities, prescribe the keeping of records—including access by LSC to such records—and to require financial audits, with the important qualification that neither the LSC nor the Comptroller General may access reports or records that are covered by the attorney-client privilege.

Several activities were regulated strictly. Recipient staff could not engage in representation before legislative bodies or administrative rulemaking unless it was necessary to protect clients' legal rights and responsibilities or unless they were requested to do so by a government agency, legislative body, committee, or a member thereof. Although self-help lobbying was permitted with LSC funds, the Government Account Office ruled, however, that grassroots lobbying was prohibited under the LSC Act. Fee-generating cases could only be undertaken pursuant to LSC guidelines, although there was an express exception allowing the use of LSC funds if the client sought statutory benefits.

Finally, the LSC Act prohibited representation of financially ineligible clients and precluded recipients from providing representation to eligible clients in criminal matters, certain habeas corpus proceed-

41. The LSC Act does not have a sunset provision, thus the Act remains in effect. See Dooley & Houseman, supra note 31, ch. 3, at 3. Spending was authorized, however, for fiscal years 1978-80. See 42 U.S.C. § 2996i(a) (1994).
42. See 42 U.S.C. § 2996e(d)(5).
43. Id. § 2996f(a)(7).
44. See id. § 2996g(a).
45. See id. § 2996g(b).
46. See id. § 2996h(c)(1).
47. See id. § 2996h(d).
48. See id. § 2996f(a)(5).
49. See id. § 2996f(a)(5)(B)(ii).
51. See 42 U.S.C. § 2996f(b)(1).
52. See id. § 2996f(a)(2)(A).
53. See id. § 2996f(b)(2).
ings involving criminal defendants, certain abortion cases, school desegregation cases, selective service and military cases, and cases involving political activity, including advocacy for or opposition against any ballot measure, initiative, or referendum. The Act imposed a number of other restrictions that do not relate directly to representation of clients. The Act restricted, however, recipients from assisting clients by a prohibition of organizing client groups and of conducting training programs to advocate public policies or encourage political activities, labor or anti-labor activities, boycotts, picketing, strikes, and demonstrations.

Congress also restricted the activities of recipient employees. They could not engage in or encourage others to engage in any public demonstration, picketing, boycott, or strike while participating in work related to the representation of clients. Staff attorneys could not run for partisan elected office, even on their own time, and other employees could not engage in any political activities during regular working hours or while representing clients. Recipients could not engage in any voter registration activity or provide voters with transportation to the polls.

The Office of General Counsel of the LSC has amplified these provisions in a series of LSC regulations and proposed rules. Generally, the LSC has interpreted these restrictions narrowly to preserve the LSC-funded recipients' ability to provide high quality and ethical representation to eligible clients. Even so, some of the restrictions in the LSC Act regarding representational activities—particularly representation before legislative and rulemaking bodies—have disadvantaged some clients represented by LSC recipients.

54. See id. § 2996f(b)(3).
55. See id. § 2996f(b)(8).
56. See id. § 2996f(b)(9).
57. See id. § 2996f(b)(10).
58. See id. §§ 2996e(d)(4), 2996f(b)(4).
59. See id. § 2996f(b)(7).
60. See id. § 2996f(b)(6).
61. See id. § 2996e(b)(5).
62. See id. § 2996e(e)(2).
63. See id. § 2996e(e)(1).
64. See id. § 2996f(a)(6).
66. See, e.g., 45 C.F.R. § 1608 (1994) (proposing regulations relating to prohibited political activities); 45 C.F.R. § 1632 (1989) (proposing a prohibition on involvement in the redistricting process). LSC General Counsel Opinions are not catalogued nor published, but they are available from the Office of General Counsel at LSC. Opinions are issued to individuals or to the entities that represent them.

In addition to those in the LSC Act, Congress has also imposed a set of restrictions through appropriations legislation affecting the funding of LSC. Appropriation restrictions imposed in 1979 and that continued through May 1997, only restricted the use of LSC funds, but not the use of non-LSC funds. For programs with few non-LSC funds or with only restricted non-LSC funds, these provisions affected who could be represented, what types of cases could be brought, and what could be done for eligible clients in permissible cases. Beginning in 1980, there were restrictions on representing certain aliens. The first provision prohibited representation of aliens known to be illegally in the United States. This was replaced in 1983 by a much more detailed prohibition that set out various categories of aliens that could not be represented with LSC funds. Since 1985, recipients

68. See 45 C.F.R. § 1610.3.
70. See Dooley & Houseman, supra note 31, ch. 3, at 9.
71. See An Act Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1984, and for Other Purposes, Pub. L. No. 98-166, tit. II, 97 Stat. 1071, 1090 (1983); Tit. VIII, 96 Stat. at 1874. Public Law 97-377, for example, provided that none of the funds appropriated in this Act for the Legal Services Corporation shall be expended to provide legal assistance for or on behalf of any alien unless the alien is a resident of the United States and is—

(1) an alien lawfully admitted for permanent residence as an immigrant as defined by sections 101(a)(15) and 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15), (20));
(2) an alien who is either married to a United States citizen or is a parent or an unmarried child under the age of twenty-one years of such a citizen and who has filed an application for adjustment of status to permanent resident under the Immigration and Nationality Act, and such application has not been rejected;
(3) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157, relating to refugee admissions) or who has been granted asylum by the Attorney General under such Act; or
(4) an alien who is lawfully present in the United States as a result of the Attorney General’s withholding of deportation pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h)).

Tit. VIII, 96 Stat. at 1874. Public Law 97-377 further provided:

[a]n alien who is lawfully present in the United States as a result of being granted conditional entry pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)) before April 1, 1980, because of persecution or fear of persecution on account of race, religion, or political opinion or because of being uprooted by catastrophic natural calamity shall be deemed, for purposes of section 1007(b)(11) of the Legal Services Corporation Act, to be an alien described in subparagraph (C) of such section.

Id., 96 Stat. at 1874-75.
RESTRICTIONS BY FUNDERS

were also prohibited from using LSC funds to litigate any abortion issues.\footnote{22}

Dissatisfied with the provisions in the LSC Act regarding lobbying and rulemaking, Congress imposed much more stringent requirements that prohibited grassroots lobbying and that limited direct lobbying or a direct "communication" to a federal, state, or local official on a "specific and distinct matter" if the communication was intended to make the official aware of the issue.\footnote{23} Additionally, the communication had to be approved by the project director in accordance with policy set by the board and only after exhausting all other avenues of relief.\footnote{24} The provisions also limited representation within administrative agencies: "[L]egal assistance is provided by an employee of a recipient to an eligible client on a particular application, claim, or case, which directly involves the client's legal rights or responsibilities."\footnote{25} There was, however, a broad exception that permitted communications that responded to requests from federal, state, or local officials.\footnote{26} Finally, Congress created requirements that the recipient was compelled to fulfill before recipients could initiate a class action using LSC funds.\footnote{27} Class actions could only be brought "for the primary benefit of individuals who are eligible for legal assistance"\footnote{28} and had to be approved by the project director in accordance with policies of the local recipient board. Moreover, the project director also had to determine that the target of the class action was not likely to change the practice or policy, that the practice or policy continued to adversely affect clients, that the recipient gave notice of its intention to file a

\footnote{22}{See 42 U.S.C. § 2996f(b)(8) (1994).}


\footnote{24}{The procedural requirements were that: (A) the project director of a recipient has expressly approved in writing the undertaking of such communication to be made on behalf of a client or class of clients in accordance with policy established by the governing body of the recipient; and (B) the project director of a recipient has determined prior to the undertaking of such communication, that—(i) the client and each client is in need of relief which can be provided by the legislative body involved; (ii) appropriate judicial and administrative relief have been exhausted; and (iii) documentation has been secured from each eligible client that includes a statement of the specific legal interests of the client, except that such communication may not be the result of participation in a coordinated effort to provide such communications under this proviso; and (C) the project director of a recipient maintains documentation of the expenses and time spent under this proviso as part of the records of the recipient; or (D) the project director of a recipient has approved the submission of a communication to a legislator requesting introduction of a private relief bill.}

\footnote{25}{Id., 104 Stat. at 2149.}

\footnote{26}{See id., 104 Stat. at 2150.}

\footnote{27}{See id., 104 Stat. at 2148-50.}

\footnote{28}{Id., 104 Stat. at 2149.}
class action, and that alternative dispute resolution efforts have failed or would be adverse to the clients' interests.\(^\text{79}\)

C. *State-Created Restrictions*

The federal government is not the only source of funding restrictions. Many state funding initiatives have also imposed restrictions similar to those of federal funding sources. Some state programs that derive revenue from Interest on Lawyers Trust Accounts ("IOLTA") have imposed restrictions on the use of those funds. For example, Texas IOLTA funds cannot be used for class action suits, for lawsuits against governmental entities—except to secure government benefits—or for lobbying for or against any candidate or issue.\(^\text{80}\) The Texas IOLTA also imposed a fee-generating case provision similar to the LSC restriction.\(^\text{81}\)

More recent state legislation has imposed additional restrictions. For example, the recent legislation in Texas to raise filing fees to support civil legal services includes the Texas IOLTA restrictions, but also prohibits: (1) abortion-related litigation; (2) lawsuits against a political party or candidate; (3) lawsuits against an officeholder for action taken in the individual's official capacity; (4) representation of any individual during a time when that individual is confined to a local, state, or federal jail or prison; (5) legal services to any individual who is not legally in the country, unless necessary to protect the physical safety of the individual; and (6) filing claims for actual or punitive damages in lawsuits to compel the payment of government benefits to which the claimant is entitled.\(^\text{82}\) In addition, any attorneys’ fees awarded to the recipient of filing fee funds must be turned over to the Texas comptroller if any attorney for any party in the case was paid with funds from a grant under the filing fee law.\(^\text{83}\)

Another example of state legislation is the recently enacted restrictions on Washington State general revenue funds for civil legal representation, which prohibit: (1) lobbying, including direct and grassroots lobbying, rule-making, setting standards or rates, referenda, initiatives, constitutional amendments, or similar procedures, and self-help lobbying; (2) class action lawsuits; (3) participating in or identifying the program with political activities, including activities directed toward political parties, candidates for office, ballot measures, voter registration, or transportation; (4) representation of undocumented aliens; (5) fee-generating cases, except when the private bar has re-

\(^{79}\) See id.


\(^{81}\) IOLTA funds may not be used in matters that might reasonably be expected to result in a fee award from public funds or the opposing party unless the adequate legal services were not otherwise available to the person. See id.

\(^{82}\) See id. § 51.903(c)–(d).

\(^{83}\) See id. § 51.903(g).
jected the case or is not generally available to handle a particular case type; (6) organizing associations, unions, or federations; (7) picketing, demonstrations, strikes, or boycotts; (8) engaging in certain solicitation; and (8) conducting training programs to advocate particular public policies, encourage political activities, or attempt to influence the legislative process or rulemaking.84

Most state bar foundations or governmental entities that fund civil legal assistance activities require the recipient to conduct an audit of the funds and to provide access to its records as well as other case-specific information, including, for example, client eligibility information. In some states, there is an explicit exception that protects confidential or privileged information.85 In states without explicit exceptions, recipients have often worked out informal practices to protect such information.

D. Funding for Specific Activities

Finally, funding restrictions are not the only means utilized by state and federal governments to limit civil legal assistance. Funders have also limited the types of cases or matters that may be funded with government resources. For example, the Washington State general revenue statute limits legal services funding to eleven matters—less than those that are funded by civil legal assistance programs.86 The proposed Legal Aid Act of 1995, adopted by the House Judiciary Committee in September 1995, limits LSC funding to fifteen case or matter types.87 This block grant legislation also required a state that received block grant legal aid funds to distribute those funds, includ-

85. For example, Washington’s general revenue statute provides that access to information does not cover “confidential information protected by the United States Constitution, the state Constitution, the attorney-client privilege, and applicable rules of attorney conduct.” Id. § 43.08.260(7)(a)(ii)(b)(i).
86. Wash. Rev. Code Ann. § 43.08.260 provides:

Any money appropriated by the legislature from the public safety and education account pursuant to RCW 43.08.250 or from any other state fund or account for civil representation of indigent persons shall be used solely for the purpose of contracting with qualified legal aid programs for legal representation of indigent persons in matters relating to: (a) Domestic relations and family law matters, (b) public assistance and health care, (c) housing and utilities, (d) social security, (e) mortgage foreclosures, (f) home protection bankruptcies, (g) consumer fraud and unfair sales practices, (h) rights of residents of long-term care facilities, (i) wills, estates, and living wills, (j) elder abuse, and (k) guardianship.
87. Id. § 43.08.260.

Section 2(4) of the Legal Aid Act of 1995 provides:

(A) The term “qualified cause of action” means only a civil cause of action which results only from—

(i) landlord and tenant disputes, including an eviction from housing except an eviction where the prima facie case for the eviction is based on criminal conduct;

(ii) foreclosure of a debt on a qualified client’s residence;
ing IOLTA funds, only for the fifteen case or matter categories, and subjected the state to all of the restrictions imposed on the federal block grant funds, even if the recipient did not receive any of the federal block grant funds.  

II. ETHICAL ISSUES RAISED BY FUNDING RESTRICTIONS

Recent legislation has restricted the cases, clients, and types of services that federally funded legal service providers may handle. This part discusses the ethical issues raised by such restrictions.

A. Restrictions on Representation and Case Categories

Many of the restrictions described above do not pose any significant ethical issues for legal aid attorneys because the program may determine that they cannot represent the client or undertake the case before a client is accepted or a complaint is filed.  

The ethical rules allow lawyers to make these evaluations at the outset of the lawyer-client relationship. Model Rule 1.2(c) provides that the attorney may limit the goals of representation, subject to the informed consent of the client. The official comment to the rule points out that:

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which

(iii) the filing of a petition under chapter 7 or 12 of title 11, United States Code, or under chapter 13 of such title unless a petition of eviction has preceded the filing of such petition;

(iv) enforcement of a debt;

(v) an application for a statutory benefit;

(vi) appeal of a denial of a statutory benefit on a statutory ground;

(vii) child custody and support;

(viii) action to quiet title;

(ix) activities involving spousal or child abuse on behalf of the abused party;

(x) an insurance claim;

(xi) competency hearing;

(xii) probate;

(xiii) divorce or separation;

(xiv) employment matters; or

(xv) consumer fraud.

Additional causes of action qualify as a qualified cause of action if they arise out of the same transaction as a cause of action described in this subparagraph unless such additional causes of action are described in clause (i) of subparagraph (B).

(B) Such term does not include—

(i) a class action under Federal, State, or local law; or

(ii) any challenge to the constitutionality of any statute.


88. See id. § 3(f).

89. This should be distinguished from withdrawing after a case has been undertaken because of a change in the law or a change in the circumstances of the client.

90. See Model Rules of Professional Conduct Rule 1.2(c) (1998).
the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles.91

A civil legal assistance attorney can conform to prospective restrictions on representing undocumented or other categories of aliens, prisoners, or those who are financially ineligible when deciding whom to represent. Similarly, such attorneys can usually determine that the case is a restricted type that they cannot pursue, such as abortion, school desegregation, selective services, habeas corpus actions involving prisoners seeking review of their conviction or the basis for their confinement, redistricting, drug-related public housing evictions, and criminal cases. It is sometimes more difficult to comply with the restrictions on fee-generating cases, but virtually all such restrictions permit representation if the private bar is not available or does not generally take a particular case type.92 The problem with funding that limits representation to certain cases or matters is in determining whether the client's problem fits within the case type for which representation is permitted.93

The prohibition against initiating or participating in a class action lawsuit may be characterized as a case-type prohibition. In some circumstances, however, attorneys cannot determine whether a class action is appropriate until after the client is accepted for service on a permitted case type. Similarly, welfare cases may arise in which a reasonable determination can be made at the outset that the case does not involve a prohibited welfare reform challenge, and a few where it is clear at the outset that a welfare reform law will have to be challenged. Attorneys in some welfare cases, however, will not be able to determine before the client is accepted whether they will need to challenge a welfare law. Unless a recipient refuses to take any welfare cases, it is likely to confront situations in welfare cases where it cannot determine until after the client and case are accepted what action should be pursued on the client's behalf. A more complex framework is needed to analyze these and other situations.

B. Limitations on the Type of Services that May Be Provided to Otherwise Permissible Clients or Cases

The most recent restrictions imposed by Congress on what LSC-funded recipients can do for an eligible client on a permissible case raises issues that have never been faced by most LSC-funded civil

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91. Id. Rule 1.2 cmt. 4.
92. For the LSC regulation on fee-generating cases and the exceptions for representation that are permitted, see 45 C.F.R. § 1609 (1998).
93. For example, does refinancing a home or a family farm fall within the Washington State list of "home protection bankruptcies" or "mortgage foreclosures" or the Legal Aid Act's list of "foreclosure of a debt on a client's residence"?
legal assistance recipients. The 1996 restrictions are unique in two respects.

First, they prohibit a recipient from using its non-LSC funds to engage in class actions and certain welfare reform activities or to claim, collect, or retain attorneys' fees. Until 1983, restrictions on LSC funds did not restrict what a recipient could do for a client within the judicial or administrative adjudicatory system. Since 1983, there have been restrictions on using LSC funds for some class actions, rulemaking, and direct and grassroots lobbying. Many recipients could, however, use non-LSC funds to engage in those activities and thus could, if the recipient chose, bring class actions and undertake representation before rulemaking or legislative bodies. This was not the case for all recipients because certain restrictions were imposed on the use of non-LSC funds. For example, some restrictions prohibited the filing of certain class actions, rulemaking, or lobbying.

Second, the pre-1996 restrictions on the use of LSC funds for class actions, rulemaking, and legislative representation were not absolute. They permitted representation in most circumstances. For example, the restriction on class actions was directed at suits against government defendants and not private defendants, and was primarily procedural. It required that the project director approve the suit according to policies established by the board, that the action primarily benefit eligible clients, and that the recipient provide notice to the government and attempt to resolve the matter without litigation. Similarly, recipients could use LSC funds to engage in rulemaking if they were representing "an eligible client on a particular application, claim or case, which directly involve[d] the client's legal rights or responsibilities." In addition, recipients could use LSC funds to communicate directly to an elected official "on a specific and distinct matter where the purpose of such communication was to bring the

94. See supra notes 13-14 and accompanying text.
95. See supra Part I.B.1.
96. See supra notes 70-79 and accompanying text.
97. See infra note 172 and accompanying text.
98. See supra note 9 and accompanying text.
99. See supra notes 9-19 and accompanying text.
100. See supra notes 9-19 and accompanying text.
matter to the official's attention" after certain procedural steps were followed.\textsuperscript{104} Moreover, recipients could use LSC funds to respond to a request from a federal, state, or local official.\textsuperscript{105}

The 1996 restrictions differ in several respects from the 1984-1995 restrictions. The restrictions on attorneys' fees, class actions, and welfare reform challenges apply to all funds of a recipient and have no substantive or procedural exceptions.\textsuperscript{106} The restrictions on rulemaking and lobbying are not absolute. Recipients can use non-LSC funds to comment in public rulemaking proceedings, which are virtually all rulemaking proceedings.\textsuperscript{107} Recipients can also use non-LSC funds to respond to a written request for information or testimony from a government agency, legislative body or committee, or a member of such agency, body or committee, if the response is made only to the parties that made the request and the recipient does not arrange for the request to be made.\textsuperscript{108} If a recipient does not have unrestricted non-LSC funds or does not have the contacts to receive written requests, however, then it may not be able to undertake representation in rulemaking or before legislative bodies.

Importantly, LSC recipients may refer restricted cases to other civil legal assistance providers or to pro bono attorneys who undertake the restricted work. In sixteen states and in another twenty-six major urban areas, unrestricted civil legal assistance programs that perform undertake restricted work exist.\textsuperscript{109} There are also many efforts to assure the availability of pro bono law firms and attorneys that handle restricted cases.\textsuperscript{110} Moreover, recipients may transfer non-LSC funds to another entity or attorney to enable them to undertake restricted cases.\textsuperscript{111} Recipients may also create an affiliated organization to which non-LSC funds can be transferred if the affiliated organization is a legally separate entity, operates with a separate director, uses some separate staff, operates out of independent office space, uses

\begin{enumerate}
\item \textsuperscript{104} Id., 104 Stat. at 2149-50.
\item \textsuperscript{105} See id., 104 Stat. at 2149.
\item \textsuperscript{107} See id. § 504(e), 110 Stat. at 1321-57.
\item \textsuperscript{108} See id., 110 Stat. at 1321-57.
\item \textsuperscript{109} See Houselman, \textit{Address, supra} note 7, at 287. These include Ann Arbor, Boston, Charlottesville (Virginia), Chicago, Grand Rapids, Los Angeles, Miami, Minneapolis, New York, Philadelphia, Portland (Oregon), Saginaw, St. Louis, San Francisco, Toledo, and Washington, D.C.
\item \textsuperscript{110} For example, the National Legal Aid and Defender Association ("NLADA"), the trade association that represents civil and defender legal aid organizations in the United States, and the ABA Section on Litigation operate a national Litigation Assistance Partnership Project that matches law firms to legal services programs who need pro bono assistance and cannot find such in their local service area. See National Legal Aid & Defender Ass'n, \textit{NLADA Special Projects} (last visited Jan. 13, 1999) <http://www.nalada.org/speepr.htm>. In addition, the Law Firm Pro Bono Project of the Pro Bono Institute also assists legal services programs to find pro bono assistance.
\item \textsuperscript{111} See 45 C.F.R. § 1610 (1998).
\end{enumerate}
separate equipment, maintains its own accounting and timekeeping records, and distinguishes itself from the LSC-funded recipient through signs and other forms of identification.\footnote{112}{See id. § 1610.8.}

In considering the ethical issues raised by these new restrictions, the cases of an LSC-funded civil legal assistance recipient can be broken down into three categories: (1) cases where there are no restrictions on the provision of services; (2) cases where recipients can provide competent service to clients but cannot do everything that is possible in an unrestricted environment; and (3) cases where the recipient believes it cannot provide competent representation.

1. Cases Where There Are No Restrictions on Client Services

The vast majority of cases brought by LSC-funded recipients fall within this category.\footnote{113}{For example, the 1995 case closure data from LSC indicate that only 0.6% of cases involved prisoners and 1.17% involved immigration issues, two categories directly affected by the 1996 restrictions on representation of prisoners and certain aliens. See Legal Servs. Corp., The Legal Services Corporation Restricted Cases Tracking Log (1996) (on file with author). Of the 1,657,795 cases closed in 1995, less than 200 involved class actions according to the reports of recipients made to the author in an informal survey conducted in 1996. See id. In fact, as noted elsewhere, there were only 630 open class action cases in June 1996, and many of these were cases filed years before and open because of the active monitoring of decrees. See id.}

Representation is permitted in virtually all housing evictions and on most housing cases; consumer debt, fraud, warranty, and utility cases; family law matters such as child support, domestic violence, custody, visitation, and paternity establishment; foster care, termination of parental rights, and child welfare matters; elderly and disability advocacy; migrant and Native American matters; employment discrimination, wage claims and unemployment insurance, and income maintenance cases including food stamps, Temporary Aid to Needy Families ("TANF"), Supplemental Security Income, Social Security, and Veterans Benefits; and most other work.\footnote{114}{See supra note 87.} The restrictions prohibit only litigation initiated on behalf of prisoners and certain aliens, and cases challenging welfare reform policy or involving redistricting, abortion, or a few drug-related public housing evictions.\footnote{115}{See supra notes 13-19 and accompanying text.} In addition, many aliens can be represented—including lawful permanent resident aliens and any alien who is either married to a U.S. citizen, the parent of a U.S. citizen, or an unmarried child under the age of twenty-one of a U.S. citizen—if the alien has filed an application for adjustment of status to permanent residency and such application has not been denied.\footnote{116}{See 45 C.F.R. § 1626.5. In addition, LSC-funded recipients may also represent lawful temporary resident aliens under the special agricultural worker program; aliens granted asylum; aliens granted refugee status; aliens granted conditional entrant sta-}
Moreover, LSC-funded recipients may undertake economic development work, group representation, and other transactional activities. They may also represent clients before administrative agencies in administrative processes that adjudicate the rights of clients receiving public benefits from programs such as TANF, Food Stamps, General Assistance, Social Security, Supplemental Security Income, Veterans Benefits, Unemployment Insurance, Medicaid, and Medicare. Recipients may challenge agency policies and procedures in court and represent clients regarding TANF, General Assistance, Supplemental Security Income, and others to obtain individual relief from the application of a welfare law. Under some circumstances, recipients may challenge a welfare agency policy on the ground it violates state or federal law.

LSC-funded recipients may sue governmental entities. Recipients may directly bring suits representing individual clients or utilize the procedures for judicial review of agency decisions. Except in the case of welfare reform litigation, recipients may seek injunctive and declaratory relief and may sue to overturn state laws on the ground that they violate federal law or the Constitution, overturn state agency policies on the ground that they violate state or federal law, or overturn local policies on state or federal statutory or constitutional grounds.

Recipients may also lobby to change agency practices. Recipients can advocate with administrative officials and represent clients to change the practices of institutions and agencies so that they are more responsive to the needs of the poor if such advocacy and representation is not part of a rulemaking proceeding. For example, recipients may seek to improve access to services for disabled persons or persons residing in isolated rural areas or institutions. Recipients can work on school reform or advocate to ensure that a job-training program provides effective training to participants. Recipients can participate in efforts to enforce laws, such as cooperative efforts to enforce local housing codes, the Community Reinvestment Act, fair housing laws, civil rights laws, and other laws enacted to protect individuals, if they do not engage in lobbying or rulemaking.

Finally, LSC recipients may undertake community legal education ("CLE") programs. Recipients may run CLE programs in various community settings such as community centers, nursing homes, housing projects, welfare offices, hospitals and the like, if the trainers or presenters do not affirmatively inquire into whether particular participants have specific problems on which they need assistance and if they advise those particular participants to seek such assistance from the recipient or another recipient. Recipients may establish intake at

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117. See id. § 1639.
118. See supra note 10 and accompanying text.
courts, government agencies, and community centers. Recipients can also train clients to handle their own cases pro se and train lay advocates to assist them.

2. Cases Where Recipients Can Provide Competent Service but Cannot Do All that Would Be Possible

In ongoing representation of eligible clients in generally permissible cases, attorneys may face situations in which they want to proceed in one fashion but cannot because of the new restrictions. These issues may be illustrated through several examples. First, the case may be one in which statutory fees may be awarded to the prevailing party and the recipient would normally seek its fees, but cannot do so because of the prohibition on claiming attorneys' fees. In some cases, the threat of fees forces the defendant to accept a settlement favorable to the client. The defendant has less incentive to bargain and settle with a restricted legal services plaintiff because that plaintiff cannot collect fees. The client represented by an LSC recipient and the recipient's attorney are disadvantaged in these circumstances, although it is possible to undertake the representation in a competent manner.\(^1\)

A similar situation arises when a recipient represents an individual client in an action against a defendant who has injured the individual client and others similarly situated. The attorney may believe that a class action would be the best approach to resolve the recurring problems with the defendant. Often, such situations arise when government agencies take actions that affect many individuals who receive statutory benefits under policies or practices that may be inconsistent with statutory law or the Constitution. Similarly, there are numerous consumer claims, such as policy-based consumer law violations by a mortgage company, where class actions are critical to proceed in an efficient manner. The attorney working for an LSC-funded entity may, however, only represent the individual and cannot bring a class action. An individual case may successfully help the indi-

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\(^1\) The Professional Responsibility Counsel of the Washington State Bar Association issued an informal letter opinion advising Washington attorneys funded by LSC that they may condition representation of the client on waiver or relinquishment of State or Federal claims for attorney's fees if, and only if, in the reasonable opinion of the attorney, such a waiver or relinquishment will not effectively preclude the lawyer from providing competent representation, the attorney has consulted with the client about the limitations of representation and has obtained written consent to that representation. If the opinion of the attorney is to the contrary or consent is not obtained, [the Northwest Justice Project] must decline representation of the client.

vindicated client, but it cannot resolve the systemic issue unless the case is appealed and establishes a precedent that the agency follows.

3. Cases in Which the Recipient Believes that It Cannot Provide Competent Representation

Finally, there are cases in which, either at the outset or after representation has commenced, the recipient believes that it can neither provide competent representation nor raise the legal issues that an effective lawyer would raise. The best examples arise in the context of the welfare reform prohibition. Section 504(a)(16) of the 1996 Appropriations Act prohibits funding to the LSC in order to provide financial assistance to any person or entity

that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.121

Similarly, the LSC’s regulations track the statutory language in the case of welfare reform, and they provide as follows:

Recipients may represent an individual eligible client who is seeking specific relief from a welfare agency, if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.122

LSC defined the phrase “existing law” to include “regulations issued pursuant [to statutory laws or ordinances] that have been formally promulgated pursuant to public notice and comment procedures.”123

Thus, under the LSC regulatory framework, recipients may represent individuals adversely affected by a welfare agency decision and seek relief from the decision, but may not raise a legal issue that has the effect of challenging a regulation that was formally promulgated pursuant to public notice and comment procedures. Two examples illustrate the problem: Social Security Insurance (“SSI”) representation and TANF representation.

121. § 504(a)(16), 110 Stat. 1321-55 to -56.
122. 45 C.F.R. § 1639.4.
123. Id. § 1639.2(b).
a. Social Security Insurance Representation

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA") tightened the SSI disability standard for children. The PRA changed the fourth part of a multi-part test. It eliminated the prior individualized functional assessment test and replaced it with a test that makes children eligible upon a showing of "marked and severe functional limitations." The other three parts were not amended in the legislation. The Social Security Administration ("SSA") has recently promulgated rules for determining SSI childhood disability that eliminate any functional limitations test and narrowly construe the new statutory test.

Recipient staff who represent eligible children who face termination of their SSI benefits or new applicants who apply for SSI benefits because of childhood disabilities, could argue in the administrative hearing that the SSI determination was incorrect under the regulatory criteria. This is permissible representation under the statutory prohibition and the regulation.

If the client were found ineligible under the test and yet was severely disabled, it might be necessary for recipient staff to challenge the SSA regulation that interpreted the statutory criteria as inconsistent with the statute. Under the welfare reform prohibition, however, this latter advocacy is precluded.

b. Temporary Aid to Needy Families Representation

Most LSC recipients represent clients in cases involving TANF block grants. According to the most recent data from Case Service Reports filed with LSC, these cases make up 3.5% of the overall cases from LSC-funded recipients. Under the welfare reform prohibition, LSC recipients may represent TANF applicants or recipients to obtain individual relief from the application of a state or federal welfare reform law in the administrative fair hearing process and may seek judicial review of an adverse decision only if the recipient does not challenge existing statutory law or formal regulations.

125. Id. § 1382(c)(a)(3)(c)(i).
127. See Letter from Jonathan M. Stein, General Counsel, and Richard Weishaupt, Project Head, Health and Human Services Union, Community Legal Services, to John J. Callahan, Acting Commissioner, Social Security Administration (Apr. 2, 1997) (on file with author). Stein and Weishaupt are perhaps the most knowledgeable advocates on the children's disability program. They successfully argued Sullivan v. Zebley, 493 U.S. 521 (1990), which held that certain regulations of the Department of Health and Human Services exceeded Congress's delegated statutory authority, see id. at 541.
For example, assume that a TANF client with a child under six years of age requested legal assistance to prevent termination of TANF benefits because the client failed to report for a community services job assignment. The client could not locate childcare near her home or worksite after checking with four providers and did not have any friends or relatives who could provide childcare. Also, assume that the welfare agency has a policy that requires TANF participants to seek out eight childcare providers in order to prove that they have sought child care. The policy is not found in a regulation or state law, but in the caseworker instructions issued by the welfare agency. The recipient could argue that the policy should not be applied to the client because she was unable to find childcare near her home or the job site. In addition, the recipient could challenge the policy on the basis that it violates the provisions of the PRA that prohibit states from terminating assistance based on an individual's refusal to work "if the individual is a single custodial parent caring for a child who has not attained six years of age, and the individual proves that the individual has a demonstrated inability (as determined by the State) to obtain needed child care." 130 If the state policy were embodied in a regulation that was formally adopted pursuant to notice and comment, however, the recipient could not assert in the hearing or in judicial review of the agency decision that the regulation was illegal because it violated the federal law.

III. Discussion of Ethical Issues Relating to the Scope of Representation

The 1996 restrictions may unacceptably interfere in the attorney-client relationship and thereby violate the commands of Model Rule 5.4(c). 131 In addition, the restrictions raise the question whether the recipient may limit the scope of representation so as not to engage in unethical conduct.

A. Third-Party Interference

Model Rule 5.4(c) provides that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." 132 In addition, Model Rule 1.8(f) provides that another person may compensate a lawyer for representing a client only if "(1) the client consents after consultation;

132. Id.
(and) (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."

There is a long history of prior rules that amplify the basic principles that underlie Model Rule 5.4(c). Disciplinary Rule 5-107(B) of the Model Code of Professional Responsibility provides that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."Canon 35 of the ABA Canons of Professional Ethics, the predecessor to the Model Code, was quite similar in effect. The first paragraph of Canon 35 of the ABA Canons of Professional Ethics reads:

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client.

Canon 5 provides that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." While the phrase "Independent Professional Judgment" is not specifically defined in the Code of Professional Responsibility, a reading of Ethical Considerations 5-1 through 5-24 will establish the spirit with which the lawyer's duty should be carried out. Subordination of the lawyer's interests is implicit, as is the correlative promotion of the client's legitimate objectives. Ethical Consideration 5-24 explicitly discusses the responsibility of a legal aid lawyer as follows:

Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. . . . Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

133. Id. Rule 1.8(f)(1)-(2). In addition, client confidentiality must be preserved. See id. Rule 1.8(f)(3).
135. Id. Canon 35.
136. Id. Canon 5.
137. Id.
138. See id.
139. Id. EC 5-24.
Section five of the Code's Ethical Considerations further discusses the lawyer's duties in the face of potential interference by third parties. Ethical Consideration twenty-one states that:

The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer.140

It may be possible to read Rule 5.4(c) and its predecessors as rendering unethical the employment of an attorney for a civil legal assistance program that is subject to restrictions on what can be done for clients.141 Model Rule 5.4(c), DR 5-107(B), and the Ethical Considerations are, however, better interpreted as being directed at third-party interference once representation has begun.142 The comment to Model Rule 1.2 declares that "[r]epresentation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. . . . The terms upon which representation is undertaken may exclude specific objectives or means."143 Thus, under Rule 5.4(c) and its predecessors, it is not unethical for a civil legal assistance program or its attorneys to practice law under restrictions imposed prior to the commencement of representation by a funding source.

This conclusion is consistent with the opinions issued by the Committee. Formal Opinion 334144 is the most significant ethical opinion issued by the ABA regarding civil legal assistance programs for the poor. In this and earlier opinions,145 the Committee distinguished between interfering in individual cases and broad policies that limited or restricted certain representational activities.146 The opinion explicitly stated that the directors of a legal aid organization must not interfere with representation once it has begun, and that the board should create guidelines to determine which cases should be accepted and which

140. Id. EC 5-21 (citation omitted).
141. See Committees on Civil Rights and Prof'l Responsibility, supra note 3, at 54-55; Pearce et al., supra note 1, at 371-87 (panel discussion comments of Stephen Ellmann).
142. See Pearce et al., supra note 1, at 381 (panel discussion comments of Stephen Ellmann).
145. See id.
146. The general holding provides:

We hold that the activities on behalf of the clients of the staff of lawyers of a legal services office may be limited or restricted only to the extent necessary to allocate fairly and reasonably the resources of the office and establish proper priorities in the interest of making maximum legal services available to the indigent, and then only to an extent and in a manner consistent with the requirements of the Code of Professional Responsibility.

Id.
should be declined, rather than evaluate such issues on a case-by-case basis. In addition, the opinion stated that the limitations should be made known to the staff and the public.

Formal Opinion 334 does not explicitly address whether Congress may impose restrictions on the scope of client representation, such as class actions or representation before legislative bodies, without placing the program or its attorneys in an ethical dilemma. The Committee focused on the allocation of resources with the objective of maximizing available legal services. Presumably, Congress or the LSC could make the same decision as a local recipient board—that resources should be spent on advice, individual representation, and participation in administrative adjudications, and not on class actions, lobbying, or rulemaking proceedings. There is, however, a difference between a local board allocating resources on the basis of priorities and Congress making a decision that federal and private funds cannot be used for class actions or lobbying.

The Committee also suggested that the motive of those imposing limits must not be improper and cited EC 5-1 as the standard by which to determine motive. Ethical Consideration 5-1 states that neither the lawyer's desires, the interests of other clients, nor the interests of third parties should "dilute" the lawyer's duty of loyalty to the client. It is, however, very difficult to prove motive. Here, Congress suggested that the restrictions are necessary in order to conserve scarce legal services resources for basic day-to-day legal representation.

In Formal Opinion 343, the Committee went further. It removed any distinction between remedies and subject matter priorities. The opinion dealt with the conduct of a military legal assistance officer who was subject to a number of restrictions on his or her conduct. Among the number of questions asked and answered by the Committee was the following:

[Question:] May legal assistance cases be taken on a "limited handling" basis, such as no court appearances or no appeals or no class actions?

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147. See id.
148. See id.
149. See id.
151. See, e.g., 141 Cong. Rec. S14,586-609 (daily ed. Sept. 29, 1995) (statement of Sen. Domenici) ("[Legal Services] ought to be for the individual poor people who have a need for a lawyer.")
153. See id.
RESTRICTIONS BY FUNDEES

[Answer:] If the client is fully informed at the outset, such limited services may be provided in keeping with policies established by the appropriate authority.\footnote{154}

Thus, the Committee supported the limitation of the scope of representation to avoid unethical conduct.

Finally, the Restatement of the Law Governing Lawyers supports the conclusion that funding entities may limit the scope of representation that can be provided.\footnote{155} Indeed, it seems to permit direction by a third party once representation has begun. Section 215(2) of the first Proposed Final Draft of the Restatement of the Law Governing Lawyers provides that:

A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202 [which deals with consent to conflicts of interest].\footnote{156}

Thus, although the Model Rules and the Model Code state that third parties shall not interfere with the representation of clients, the amplification of those rules in the Committee's opinions and the Restatement show that third party limitations are acceptable if the client consents.

B. Scope of Representation

The more substantial ethical question raised by some of the 1996 restrictions, such as the welfare reform and class action prohibitions, is whether the civil legal assistance recipient funded by LSC could take on certain cases by limiting the scope of representation so that the recipient did not engage in unethical conduct.

\footnote{154} \textit{Id.} \footnote{155} \textit{See} Restatement (Third) of the Law Governing Lawyers § 215 (Proposed Final Draft No. 1, 1996). \footnote{156} \textit{Id.} § 215(2). Stephen Ellmann pointed out in his analysis that the American Law Institute has just published a revised version of section 215 and its accompanying commentary. \textit{See} Pearce et al., \textit{supra} note 1, at 379-81 (panel discussion comments of Stephen Ellmann). The revised draft does not change the text of section 215 itself, but does extensively revise the accompanying commentary. For example, the commentary observes that law other than the law of lawyering may govern attorney-client relationships in this context, and thus may permit what the law of lawyering would forbid. \textit{See} Restatement (Third) of the Law Governing Lawyers § 215 cmt. a (Proposed Final Draft No. 2, 1998). The final comment describes a range of "legal service and similarly funded representation[s]," and ends with the observation that:

Regardless of the method of appointment, the form of compensation or the nature of the paying organizations (for example, whether governmental or private or whether non-profit or for-profit), the lawyer's representation of and relationship with the individual client must proceed as provided for in this Section [215].

\textit{Id.} cmt. g.
1. The Model Rules

The Model Rules provide guidelines regarding the quality and scope of representation.

a. Competent Representation

Rule 1.1 of the Model Rules of Professional Conduct requires lawyers to "provide competent representation" to their clients.\(^{157}\) If a lawyer knowingly fails to raise a sound legal issue when representing a client, such as arguing that a regulation violated a higher statute, the lawyer would probably be in violation of Rule 1.1 and EC 6-1, both of which require lawyers competently to represent their clients.\(^{158}\) In addition, if a client's objectives may only be achieved by bringing a class action, and the recipient were prohibited from doing so, arguably the lawyer would not be providing competent representation.

b. Scope of Representation

Rule 1.2 of the Model Rules of Professional Conduct, which is in effect in most states in some form, provides, in relevant part, that a "lawyer may limit the objectives of the representation if the client consents after consultation."\(^{159}\) On its face, this rule appears to permit a recipient to limit the scope of representation with an eligible client that precludes the recipient from challenging a welfare reform law or formal regulation, or from bringing a class action. Of course, the client must consent to the limitation, and if the client does not consent, then the recipient could not represent the client.

In addition, commentary to Model Rule 1.2(c) suggests some limits on the ability to limit the scope of representation.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.\(^{160}\)

There is, however, no explicit guideline in the Model Rules or the commentary on what those limits are or when such limits would be unethical.

Formal Opinion 96-399\(^{161}\) referenced this issue on January 18, 1996, when the ABA Standing Committee on Ethics and Professional Responsibility interpreted Model Rule 1.2 in light of Model Rules 1.7(b)

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\(^{159}\) Model Rules of Professional Conduct Rule 1.2(c).

\(^{160}\) Id. Rule 1.2 cmt. 5.

and 2.1 in an opinion that addressed LSC funding restrictions, including the welfare reform prohibition. It examined the situation where a case and client satisfy the funding statute at the start of the representation, but not later in the representation. The Committee asked whether the lawyer might ethically continue representation if there is a chance that future restrictions may "preclude advisable or necessary action." The Committee reasoned that the lawyer may not ask for the potential client's consent unless the lawyer reasonably believes that the possibility of the future restriction would adversely effect the client's interests. The Committee concluded that if the restriction can "fairly be anticipated" and that if other competent services are available to the client, then the lawyer should advise the client to seek other competent services. Thus, only a vague framework exists for determining when the limits are unethical.

2. Application to the Welfare Reform Prohibition

Under the Committee's analysis, when a case or matter covered by the welfare reform prohibition may require a legal challenge to a formal regulation, the recipient must discuss this possibility with the client. Further, the recipient may only proceed if the client knowingly consents to the limited representation. If the recipient reasonably believes that the client's representation may be adversely affected if undertaken by the recipient, the recipient must decline representation and refer the case to another competent lawyer to undertake the representation. If there are no other lawyers available, as is the case in some service areas, then either the client would go without representation or the client would have to consent to inadequate representation, an intolerable situation.

This analysis makes a number of assumptions about whether effective representation may be provided even if the recipient could not challenge a regulation as invalid under higher statutory or constitutional law. As a practical matter, it is possible to limit representation in welfare matters to administrative proceedings that normally may not consider the validity of a regulation in light of statutes and the Constitution. Once the administrative proceeding is completed and the client has not prevailed, the recipient must refer the case to another attorney or decline further representation before proceeding further with the client's case.

In addition, it may be possible to stay within the framework of the welfare reform prohibition as it is interpreted by the LSC because the LSC regulation permits representation to enforce a higher law. As

162. Id.
163. Id.
164. See id.
the Supplementary Information (preamble) to the LSC regulation indicates,

when representing an eligible client seeking individual relief from the actions of an agency taken under a welfare reform law or regulation, a recipient may challenge an agency policy on the basis that it violates an agency regulation or State or Federal law or challenge the application of an agency’s regulation, or the law on which it is based, to the individual seeking relief.\(^{165}\)

Moreover, Formal Opinion 96-399 was written prior to the implementation of the 1996 and 1997 appropriations restrictions and prior to the LSC interpretations of the scope of those restrictions. In fact, as discussed below, the opinion made a number of assumptions about the appropriations restrictions that were incorrect. One such inaccurate assumption, for example, was that the welfare reform prohibition would cover most of the welfare cases brought by legal services recipients.\(^{166}\)

Finally, most representation will not involve a challenge on statutory or constitutional grounds to a welfare reform law because most of the laws enacted by states do not raise colorable constitutional issues, and the laws will be within the state’s discretion to enact under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.\(^{167}\) Federal laws and regulations no longer provide a framework for the laws enacted by states to implement the TANF Block Grant, and states are no longer required to establish legal entitlements to assistance if eligibility and other criteria are met.\(^{168}\) In these cases, there should be no problem in proceeding with the representation, and there may be no need to qualify the representation in a retainer agreement or letter of engagement.

3. Application to Class Actions

The prohibition of the initiation or participation in a class action lawsuit may prevent the recipient from providing competent representation. A distinction must be made between representation of individuals and representation of a class. Class actions are brought on behalf of a class of clients primarily because it is more efficient to resolve the issue for the class than to bring a series of individual cases one at a time, and because they often lead to remedial orders that address the systemic problems underlying the legal issue. Class actions are rarely

\(^{165}\) 45 C.F.R. § 1639.1–6 (1998).
\(^{166}\) See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399.
necessary to effectively represent an individual client, although there are circumstances where it may be necessary to do so. The pertinent ethical issue arises when a class action is necessary to effectively assert and protect an individual client's rights.

Formal Opinion 334 accepted this distinction and held, in the context of whether the board of a legal services program could prohibit class actions, that any limitation upon the class filing ability of a lawyer who represents a client for whom class relief is essential is unethical.

It will be a very rare situation, however, where a recipient must file a class action to remedy an individual's legal rights and cannot limit its scope of representation to individual non-class actions at the time that representation is begun. When a situation arises that does require the filing of a class action in order to competently represent an individual client, then the recipient must forego representation and refer the case to another lawyer or, if no lawyer is available, provide no representation or proceed with client consent to limited representation.

4. Application to Lobbying or Rulemaking

A further set of ethical issues may arise under the prohibitions on lobbying and rulemaking in the 1996 provisions because they cover all of an LSC-funded recipient's funds. It seems appropriate, however, for a civil legal assistance recipient to limit the scope of representation to preclude lobbying or participation in rulemaking.

The clearest statement supporting the assertion that a lawyer is required to pursue representation in a legislative or administrative rulemaking forum is in the old Canons of Ethics.

A lawyer openly and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged . . . to use means other than those addressed to the reason and understanding to influence action.

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171. According to the information provided by the LSC recipients in response to an LSC request for information on pending class actions, at the time that LSC recipients were forced to withdraw from pending class actions, over 155 of the 286 recipients were not providing representation in a class action suit. See Legal Services Corp., Legal Services Corporation Restricted Cases Tracking Log passim (1996) (on file with author).
172. Note that the current prohibition does permit recipients to use non-LSC funds to respond to written requests of officials and to comment on proposed rules in public rulemaking proceedings. See 45 C.F.R. § 1612.6 (1997).
There are no other explicit rules or any relevant opinions of the Committee under Canon 26.

The Model Rules of Professional Conduct discuss lobbying and administrative rulemaking in Rule 3.9. The Rule states that the lawyer in a legislative or administrative tribunal must tell the tribunal that the lawyer is before it in a representative capacity, and that the lawyer must follow Model Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5. 174

None of the provisions explicitly mandates that a lawyer must provide representation before a legislative arena or in an agency rulemaking if the client’s interests require it. Indeed, many lawyers do not provide such assistance, and many legal aid agencies and LSC recipients do not provide such representation to their clients. On the other hand, if the professional judgment of the attorney is that an individual client’s interests would be protected or enhanced by approaching a legislative body or agency policymaking authority, the ethical provisions provide some basis for an argument that such assistance must be provided to the client, unless such assistance is precluded by prior notice to the client limiting the scope of representation. As noted above, the commentary to the Model Rules suggests that there are limitations on the scope of representation provided to some clients that are consistent with the Model Rules, but there is no explicit guideline on what those limits are or when such limits would be unethical. 175 The ABA Committee on Ethics and Professional Responsibility has addressed the question in Formal Opinions 324 176 and 334. 177 In Formal Opinion 334, the Committee explicitly discussed representation before legislative bodies and clarified its earlier Informal Opinion 1252, which included administrative rulemaking, as well. It found that the proviso (former DR 2-103(D)(1)) does not prohibit broad limitations by the governing body of a legal services unit that restrict the services an attorney may perform for potential clients. 178 The opinion qualified this general statement. First, the board must affirmatively create restrictions; without such action, there are no restrictions. 179 Second, the limitations must be made known to the lawyer prior to the acceptance of particular clients, and should be made known to the public and staff. 180 Third, nothing may interfere with representation once it begins. 181

175. See supra notes 90-93 and accompanying text.
178. See id.
179. See id.
180. See id.
181. See id.
The opinion addressed other concerns as well. It queried whether limitations on legal service providers are improper because indigents lack the resources necessary to engage the services of the private, for-profit bar. The opinion observed that the Model Code of Professional Responsibility did not ban those limitations. The opinion concluded that because legal services resources will always be limited, fair and reasonable prioritizations that maximize available legal services are not improper. Finally, the opinion states that legal service limitations that are inconsistent with EC 5-1 are always improper, and that whether EC 5-1 has been violated must be considered on a case-by-case basis.

This opinion does not explicitly address whether Congress may impose similar restrictions on legislative representation without placing the recipient or its attorneys in an ethical bind. As noted previously, there is a difference between a local board allocating resources according to priorities, and Congress or the LSC prohibiting use of federal funds and non-LSC funds for lobbying or administrative policy representation. Presumably, Congress or the LSC could make the same decision as a local recipient board—that resources should be spent on advice and adjudications rather than on legislative or rulemaking proceedings.

IV. Other Ethical Issues

The ethical issues discussed above have been the primary focus of those analyzing the situation that face civil legal assistance recipients that are funded by LSC. Civil legal assistance recipients confront, however, additional ethical issues regarding withdrawal from ongoing representation and protection of client confidentiality.

A. Withdrawal Issues

Until the 1996 restrictions, withdrawal from ongoing representation primarily occurred when an existing client was no longer financially eligible. LSC regulations required the recipient to withdraw from such representation consistent with the attorney's professional responsibilities or to transfer the funding of such representation to a non-LSC source because the financial eligibility requirements only applied to LSC funds. In addition, as a result of the restrictions on alien representation with LSC funds imposed in the 1980s, LSC-funded civil legal assistance recipients withdrew from ongoing representation when the new restrictions came into effect or when the client's immi-

182. See id.
183. See id.
184. See id.
185. See supra note 52 and accompanying text.
gration circumstances changed and he or she was no longer within the permissible categories for LSC representation. Recipients had to seek to withdraw from the case, transfer the funding to non-LSC funds, or permit the attorneys handling the case to continue such representation, but without compensation from the recipient because the restrictions in the 1980s and early 1990s applied only to LSC funds.

Few problems arose under these withdrawal procedures.

The 1996 restrictions presented much more difficult withdrawal problems for LSC-funded recipients than the prior requirements involving LSC representation for clients who became financially ineligible or whose alien status changed. The first cluster of problems involved withdrawal from prohibited case categories. Under the 1996 appropriations provisions, Congress provided a transition period for withdrawal from pending cases and matters involving class actions, litigation on behalf of prisoners, and representation of categories of aliens. Recipients had until August 1, 1996 to dispose of pending cases in these three areas.

According to the LSC reports to Congress regarding these three categories of cases, LSC recipients were participating in 630 class actions, 428 cases involving litigation on behalf of prisoners, and 2993 cases or matters in which the client was an alien in one of the prohibited categories. LSC reported that all but eleven of these cases had been resolved or transferred to other counsel as of August 23, 1996.

It later reported that by the end of the year, all cases and matters had been transferred or resolved, save one. There was considerable controversy around several class actions where judges refused to permit legal services attorneys to withdraw or the recipient had difficulty

187. See supra notes 115-16 and accompanying text.
188. See supra note 68 and accompanying text.
189. This conclusion is based on the author's experience providing representation to LSC recipients as General Counsel to the National Legal Aid and Defender Association and the Project Advisory Group from December 1981 until the present. Between 1976 and 1981, the author was a senior officer at LSC and was routinely briefed about recipient compliance issues.
190. See Houseman, Address, supra note 7, at 297.
192. See id. § 508(c), 110 Stat. at 1321-58 (requiring the LSC to report to Congress every 60 days on the status of such cases and matters).
193. See Houseman, Address, supra note 7, at 297.
194. See Letter from Alexander D. Forger, President of LSC, to the Honorable Judd Gregg, the Honorable Ernest F. Hollings, the Honorable Harold Rogers, and the Honorable Alan B. Mollohan 2 (Aug. 23, 1996) (on file with author). These were the chairs and ranking members of the relevant appropriation subcommittees of the House and Senate.
195. See Letter from Alexander D. Forger, President of LSC, to the Honorable Judd Gregg, the Honorable Ernest F. Hollings, the Honorable Harold Rogers, and the Honorable Alan B. Mollohan 1 (Dec. 21, 1996) (on file with author).
in finding alternative counsel.\textsuperscript{196} One case resulted in a state court opinion that the class action restriction was unconstitutional.\textsuperscript{197}

In addition to the transition cases, there were other cases or matters that became prohibited after April 26, 1996, when the restrictions went into effect without a transition period. In theory, LSC-funded recipients had to withdraw from cases that involved prohibited welfare reform and from certain drug-related public housing eviction cases upon the date of enactment. In fact, there were few cases that fell within these categories, in part because LSC strictly interpreted these prohibitions in conformity with the statutory language.\textsuperscript{198} Moreover, LSC-funded recipients immediately had to cease representation before legislative bodies and in administrative rulemaking proceedings. Expected cases were those where they could carry on these activities within the provisions permitting the use of non-LSC funds to comment in public rulemaking or to respond to written requests from legislative or other officials were excepted.\textsuperscript{199} Here, too, recipients reported little difficulty in withdrawing from these matters.


197. On December 24, 1996, a New York state trial judge issued an opinion which denied a motion to withdraw as counsel for a certified plaintiff class filed by Valerie Bogart, a staff attorney with Legal Services for the Elderly ("LSE"), a component of Legal Services of New York City. Ms. Bogart had been lead counsel to the plaintiff class in \textit{Varshavsky v. Perales}, 608 N.Y.S.2d 184 (App. Div. 1994), a state court class action that successfully enjoined the New York State Department of Social Services' abolition of its In-Home Administrative Hearing Process, thereby reinstating the process of provision of hearings to elderly homebound persons who were too disabled to travel to hearings at the welfare department. \textit{See id.} at 185. Since the issuance of the preliminary injunction and its affirmance on appeal, Ms. Bogart and her co-counsel had been engaged in monitoring the Department's compliance with the order. Because LSC was not a party to this case, the opinion had no legal effect on the appropriation provisions or the LSC regulations discussed in the court's opinion. In addition, it should be noted that neither LSC nor the Justice Department filed briefs in the case nor did any party present legal arguments contrary to those submitted by Ms. Bogart's attorney. Finally, the court's analysis of the scope of the "safe harbor provisions" of the final class action regulation is, in material respects, incorrect. Under 45 C.F.R. § 1617.2(b)(2), recipients may represent individual clients to obtain the benefit of relief order by a court in a class action and can engage in some non-adversarial activities. \textit{See 45 C.F.R.} § 1617.2(b)(2) (1998). Because the LSC concluded that Ms. Bogart's activities fell within the "safe harbor provision," the judge's opinion was advisory.

198. The LSC has interpreted the statutory provisions on drug-related evictions to apply only to a tenant when that tenant has (1) been convicted, or has been charged by a prosecuting authority, with the illegal sale or distribution of a controlled substance, and (2) the eviction proceeding is brought because the illegal drug activity of that tenant threatens the health or safety of another tenant residing in the public housing project or an employee of the agency. \textit{See 45 C.F.R.} § 1633.3.

199. \textit{See id.} § 1612.6.
In contrast to the one-time withdrawal problems that have been resolved, there are ongoing issues of withdrawal, particularly in cases involving prisoners, aliens and, to a lesser extent, cases in which it may be necessary to challenge a welfare reform law. The most common problem involves the fact that the status of “clients” can easily change from a non-prisoner to a prisoner and from an alien whose representation is permitted to an alien whose representation is not permitted. In addition, in a few welfare cases, recipients who originally believed they could provide effective representation determine afterward that they can not do so without violating the welfare reform prohibition. Although representation could previously have been shifted to non-LSC funds for alien and other types of cases, recipients can no longer shift to non-LSC funds to carry on the representation because of the “entity” restrictions. Generally, the LSC regulations require recipients who are facing status changes to take steps to discontinue representation “consistent with applicable rules of professional responsibility.”

Model Rule 1.16 mandates withdrawal where representation has commenced and “the representation will result in violation of the rules of professional conduct or other law . . .” Presumably, it would be a violation of “other law” to continue representation in cases where federal law prohibits the representation. There are no ABA opinions that directly address this issue, although there are a few state bar opinions that have concluded that federal law prohibiting certain representation is considered “other law” under the ethical rules. In addition, the Model Rule provides for voluntary with-
drawal when "other good cause for withdrawal exists." Prohibitions of federal law on what types of cases may be represented appear to provide "good cause" for withdrawal.

Nevertheless, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Thus, mandatory and voluntary withdrawal is subject to approval by a court or administrative tribunal before which the case is pending. In such circumstances, the recipient must bring the matter before the court or tribunal and seek withdrawal. If the recipient is ordered to remain in the case, the recipient must do so, but the recipient must also seek alternative counsel and take all other steps necessary to withdraw in order to comply with the LSC regulatory requirements.

There has not yet been a confrontation between the LSC and its recipients over withdrawal in ongoing matters when the client's status changes or when effective representation of a client requires that the recipient take action that would be prohibited under the new restrictions. If a confrontation arises, however, its resolution may depend on the facts of the case. The LSC might pressure the recipient to withdraw or provide the recipient with sufficient flexibility so that representation may continue. For example, aliens who are no longer present in the United States (as required by the appropriation provisions) but who otherwise fit within the permissible categories for representation, may be treated differently than aliens whose status changes and who are no longer within the permissible categories.

B. Issues Involving Confidentiality

A significant set of ethical issues posed by the restrictions involves the lawyer's duty to preserve confidences and secrets as well as information subject to the attorney-client privilege.

1. The Ethical Framework

Model Rule 1.6 prohibits a lawyer from revealing "information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized to carry out the representation, and except as stated in paragraph (b)." Paragraph (b) of Rule 1.16 contains the exceptions permitting disclosure.

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207. Model Rules of Professional Conduct Rule 1.16(b)(6).
208. Id. Rule 1.16(c).
209. LSC has not determined the scope of the statutory and regulatory requirement that aliens must "present in the United States" in order to be represented. 45 C.F.R. § 1626.5 (1998). LSC is likely to soon begin, however, a new rulemaking procedure soon to determine how that phrase should be interpreted. See 63 Fed. Reg. 60,026, 60,026-27 (Nov. 6, 1998).
to prevent a client from committing a criminal act, or to defend the lawyer when in dispute with the client or in other matters concerning the lawyer's representation.\footnote{211}{See id. Rule 1.16(b).} The Committee and several state bar committees have held that client identities and addresses are a secret or confidence protected by ethical rules against disclosing client confidences.\footnote{212}{See, e.g., ABA Comm. on Professional Ethics, Informal Op. 1081 (1969) (finding that attorneys should not divulge information that would identify the client); Arizona State Bar, Op. No. 81-4 (1981) (authorizing legal services to release information upon the request of the governing board, but barred release of client secrets without consent); Committee on Legal Ethics, D.C. Bar, Op. No. 124 (1983) (holding that an attorney must protect the identity of clients, unless ordered to disclose the identity by a court order); Kentucky Bar Ass'n, Op. E-253 (1981) (allowing disclosure of information only if the client has authorized the release, there is no expectation of confidentiality on the part of the client, or the information is in the public record because of the attorney's representation of the client); Mississippi State Bar, Op. No. 101 (1985) (stating that attorneys need not disclose client information as required by federally funded corporations).} In 1969, the question of revealing client identity arose in the context of a General Accounting Office ("GAO") audit of a neighborhood legal services office.\footnote{213}{See ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 1081 (1969).} The GAO requested to audit case files to determine the types of cases the office handled, the results the office obtained, and whether the clients met income eligibility requirements.\footnote{214}{See id.} The Committee concluded that review of the intake and case disposition forms by the GAO for that purpose would not violate the ethics rules if no information would be divulged that identified the client.\footnote{215}{See id.}

The ABA directly addressed the issue again in June 1974.\footnote{216}{See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1287 (1974).} This case arose in the context of a non-profit research group that sought to obtain data on clients from an organization known as Legal Services Offices.\footnote{217}{See id.} The Committee concluded that:

\begin{quote}
the names, addresses and telephone numbers of clients of a Legal Services Office are secret within the meaning of DR 4-101(A) . . . . According to the Committee, it would be in violation of DR 4-101(B) for the Legal Services Office either to grant access to the records to the outside research group to select the random sampling of clients or to release the names, addresses, and phone numbers so that the outside research group could seek consent to interview the clients.\footnote{218}{Id.}
\end{quote}

Thus, the ABA clearly found that revealing the identities of legal services clients was unethical.

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211. See id. Rule 1.16(b).
212. See, e.g., ABA Comm. on Professional Ethics, Informal Op. 1081 (1969) (finding that attorneys should not divulge information that would identify the client); Arizona State Bar, Op. No. 81-4 (1981) (authorizing legal services to release information upon the request of the governing board, but barred release of client secrets without consent); Committee on Legal Ethics, D.C. Bar, Op. No. 124 (1983) (holding that an attorney must protect the identity of clients, unless ordered to disclose the identity by a court order); Kentucky Bar Ass'n, Op. E-253 (1981) (allowing disclosure of information only if the client has authorized the release, there is no expectation of confidentiality on the part of the client, or the information is in the public record because of the attorney's representation of the client); Mississippi State Bar, Op. No. 101 (1985) (stating that attorneys need not disclose client information as required by federally funded corporations).
214. See id.
215. See id.
217. See id.
218. Id.
The issue was indirectly considered again in Informal Opinion 1394. This opinion concerned requirements of a contract between a statewide agency and the local legal services offices; the contract specified records the local office had to keep and make available to state agency monitors. The Committee cited Informal Opinion 1081 with approval and concluded that DR 4-101 prevented inspectors from examining files relating to client matters when they contain confidences and secrets, and when the client has not knowingly waived confidentiality. "We perceive nothing in the Code that makes the professional obligations inapplicable to a lawyer employed by a legal services agency wholly or partly supported by public funds or that excludes a non-fee-paying client from the protection or benefit of those professional obligations."

In Formal Opinion 334, the Committee considered questions arising from legal services audits. It held that the board of directors of a legal services office could require staff attorneys to provide information that was reasonably necessary to determine if the board's policies were being carried out. But the opinion issued a caveat: "Procedures to preserve the anonymity of the client approved in Informal Opinions 1081 and 1287 should be followed."

Finally, the Committee again dealt with questions about legal services audits, and decided in Informal Opinion 1443 that audit by independent accountants of receipts and disbursements of client trust funds was proper. Nevertheless, the opinion held that the Code's prohibition of client secrets still applied, and that legal services lawyers still had an obligation to preserve client anonymity. There is no reason to suppose that Model Rule 1.6 relaxes that protection in any way. Model Rule 1.6 is more stringent than the prior Code provisions. It abandoned DR 4-101(A)'s definition of "secret," and draws within its protections all information communicated to a lawyer by or about a client that is not specifically excepted. Rule 1.6 prohibits

220. See id.
223. Id.
225. See id.
226. Id.
228. See id.
lawyers from revealing information "relating to representation of a client." The term "relates" is broad, and has been defined as "to show or establish a logical or causal connection between." Virtually all information that clients give to an attorney, including names and addresses, has "connection, relation, or reference" to representation. In Formal Opinion 96-399, the Committee specifically held that Model Rule 1.6 prohibits revealing client identity and information relating to representation without the client's consent, unless disclosure is implicitly authorized in order to carry out the representation.

Model Rule 1.6 differs from previous ethical rules by foregoing an exception when law requires disclosure. Many states have restored the "required by law" exception, and the commentary to the Model Rules notes that "a lawyer may be obligated or permitted by other provisions of law to give information about a client." Whether another provision of law supersedes Model Rule 1.6 is a matter of interpretation beyond the scope of the Rules, but a "presumption should exist against such a supersession." Moreover, section 115 of the Restatement of the Law Governing Lawyers provides that a "lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure."

2. Client Identity and Statements of Facts

As noted above, the 1996 restrictions required recipients to identify potential client-plaintiffs by name and to obtain a written statement of facts from any client-plaintiff before the attorney may engage in pre-complaint settlement negotiations or file suit on the client's behalf. This requirement could have posed ethical dilemmas for recipients and attorneys under Model Rule 1.6 if it had been interpreted to: (1) apply to existing cases as opposed to new cases; (2) exceed existing standards for proceeding anonymously; or (3) disclose facts that went beyond the factual disclosures that were included in any complaint that was filed.

235. Id.
Formal Opinion 96-399 raised these issues. The LSC, however, interpreted the requirement to apply only to new cases. In addition, the LSC interpreted the client identity provisions consistent with existing standards for proceeding anonymously. This obviated recommendations made in the opinion regarding advice to clients to proceed without representation by a legal services lawyer, to decline representation, or to seek consent for disclosure of a client's name. Finally, the requirement for a written statement of facts was interpreted to require little more than a signed, written statement of the facts necessary to file a complaint. Therefore, it did not necessarily require the inclusion of information that went beyond the factual disclosures that are implicitly authorized to carry out the representation. Experience with the regulation has not produced situations where recipients were required to violate ethical requirements to comply with the provisions of section 1636.

3. Case Disclosure Requirements

The 1998 provisions require LSC recipients in cases the recipients initiate to disclose to the LSC and the general public the names and addresses of all parties, the cause of action, the case number, and address of the court in which the case was filed. Attorneys who disclose this information may face ethical dilemmas if they disclose to third parties client identities that are not otherwise disclosed in the normal course of representation, or if they disclose client identities or addresses in cases where such information is not disclosed in court papers, such as domestic violence cases. The LSC's interpretation of the disclosure requirement took great care to provide a framework for compliance with the requirement in a manner that did not require disclosure of client confidences and would not subject the client to physical harm. Under the LSC interpretation, the requirement only applies to new cases after January 1, 1998 that were filed "on behalf of a client of [a] recipient." If recipients represent a defendant, they did not have to disclose the names and addresses of their clients. Moreover, if the case or matter were filed in an administrative adjudicatory proceeding, disclosure is not required until an appeal was filed in court. In addition, recipients do not have to provide the names and addresses of plaintiffs if the information is protected by an order or rule of any court or by state or federal law or if the recipient attorney "reasonably believes that revealing such information would put the client of the recipient at risk of physical harm . . . ." This exception

239. See id. § 1644.4(a).
240. See id.
241. See id.
242. Id.
243. Id. § 1644.4(a)(1)(ii).
particularly focused on clients subject to domestic violence, but was written broadly to protect all clients who face a risk of physical harm, including family members.

One state bar ethical opinion interpreted this section to mean that the legal services recipient could provide this information without running afoul of the ethical proscriptions against disclosure of confidential information because, under the ethical rules of the state, disclosure was permissible if required by law.244 This provides little solace to the zealous advocate and the client because it does not address the fundamental concern that the statute's disclosure requirements undermine the effectiveness of other law without any apparent countervailing utility.

4. Access to Records by LSC or Other Monitors or Auditors

The new procedural and reporting requirements discussed above have received the most attention from ABA and state bar associations, but the most critical federal legislative change regarding client confidentiality in the 1996 appropriations provisions involves access by the LSC to client information contained in recipient records. LSC auditors and monitors, as well as other government auditors and monitors, were given explicit access to financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, except for reports or records subject to the attorney-client privilege.245 Prior to the 1996 provisions, LSC access to client information was protected by a provision in the LSC Act that prohibited LSC from interfering with an attorney in carrying out his or her professional responsibilities, and required LSC to "ensure that activities under . . . [the LSC Act] are carried out in a manner consistent with attorneys' professional responsibilities."246 In addition, the access-to-records provisions in the LSC Act protect against disclosure of

244. See Inquiry No. 98-25, supra note 206, at 3-4.
Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

Id. § 509(h), 110 Stat. at 1321-60.
records or reports that contain information subject to the attorney-client privilege.\textsuperscript{247}

This new access provision poses a fundamental question: whether compliance with federal law that requires access to information such as client names, retainer agreements, client trust-fund records, and eligibility records places the recipient and its attorneys in an ethical dilemma. Sometimes, as in the case of financial and timekeeping records, client names and confidential information may be safeguarded through the use of codes. Documents such as retainer agreements, client trust funds, and eligibility records, however, will almost certainly include client names and other information that is probably covered by state ethical rules on confidentiality.\textsuperscript{248} The LSC Inspector General sought this new requirement to ensure that LSC monitors, auditors, and the Comptroller General would have access to this information, and that state ethical rules could not bar them from such access.\textsuperscript{249} LSC has interpreted the new provision as an absolute access requirement without exception.\textsuperscript{250}

\textbf{a. Ethical Rules}

In states that have adopted a clear "required by law" exception, it is likely that the ethical rules will be interpreted to permit access to such records and client names without conflicting with the ethical rules.\textsuperscript{251} In states without the "required by law" exception, however, it is not clear whether the state bar ethics committee would read such an exception into the ethical rules as has been done in other contexts, or whether it would find that such information could not be disclosed under that state's ethical rules. It is not likely, however, that legal services lawyers would face ethical sanctions for disclosing information required by federal law in those states that do not explicitly or implicitly incorporate the "required by law" exception.\textsuperscript{252} Even so, the access provision does pose a fundamental conflict between the

\textsuperscript{247} See id. § 2996h(d) (providing that "neither the Corporation nor the Comptroller General shall have access to any reports or records subject to the attorney-client privilege").

\textsuperscript{248} See, e.g., Alabama Rules of Professional Conduct Rule 1.6 cmt. (1996) ("The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

\textsuperscript{249} See Letter from Edouard Quatrevaux, Legal Services Corporation Inspector General, to the Honorable Harold Rogers, Chairman, and the Honorable Alan B. Mollohan, Ranking Minority Member, Subcommittee on Commerce, Justice, State, The Judiciary and Related Agencies, Committee on Appropriations, United States House of Representatives 2-3 (Nov. 20, 1995) (on file with author).


\textsuperscript{251} See 2 Hazard & Hodes, supra note 233, § AP4:103; Inquiry No. 98-25, supra note 206, at 3-4.

\textsuperscript{252} See 2 Hazard & Hodes, supra note 233, § AP4:105.
new federal law and state ethical rules protecting confidential client information.

b. Attorney-Client Privilege

Under the LSC 1996 access-to-records provisions and the LSC Act's access-to-records provisions, information protected by the attorney-client privilege cannot be accessed by the LSC or other government monitors and auditors. These exceptions are curious because the attorney-client privilege is an evidentiary privilege that applies in judicial and other proceedings in which a lawyer appears as a witness or is otherwise required to produce information concerning a client. If the information provided to the recipient by a client would be covered by the attorney-client privilege, however, then such information cannot be revealed to LSC monitors or auditors, and LSC cannot seek and force access to such information.

There may be information in retainer agreements and client eligibility records that are covered by the attorney-client privilege, which can be protected through redaction. In legal services practice, retainer agreements and client-eligibility records often do not contain privileged information, although such records virtually always contain information protected by the broader ethical rules. The most difficult problem for LSC recipients has been whether the attorney-client privilege protects clients' names and whether the LSC may access client names without client consent.

The general rule is that client identity is not protected under the evidentiary privilege. The most commonly cited case for this proposition is United States v. Pape. The Pape case and its progeny focus, however, on the idea that the privilege protects communications made in the context of the professional relationship, not the professional relationship itself. Two intertwining principles in the Pape line of cases are: (1) that a balancing of competing interests to evaluate the coverage of the privilege is necessary, and (2) that the litigation context in which the requests for client identity and address have arisen is an essential component of that balancing consideration.

Since the privilege results in the exclusion of evidence it runs counter to the widely held view that the fullest disclosure of the facts will best lead to the truth and ultimately to the triumph of
justice. In reconciling these conflicting principles, the courts have pointed out that since the policy of full disclosure is the more fundamental one, the privilege is not to be viewed as absolute and is to be strictly limited to the purpose for which it exists.\textsuperscript{258}

In those cases, the need for a full factual disclosure to facilitate the "triumph of justice"\textsuperscript{259} (the competing interest) outweighs the client's request for confidentiality of his or her identity because the client is in an adversary position as the subject of criminal investigation or as a party in a civil lawsuit.

[T]he opposing party has a right to know with whom he is contending or who the real party in interest is, if not the nominal adversary. . . . Otherwise, it is felt, attorneys might conceal a multitude of information under the claim of privilege, without having to show that the alleged client ever, in fact, existed.\textsuperscript{260}

This rationale for the client-identity exception to the privilege is explained by Wigmore as springing from the client's own use of the public legal forum:

The identity of the attorney's client or the name of the real party in interest will seldom be a matter communicated in confidence because the procedure of litigation ordinarily presupposes a disclosure of these facts. . . . [T]he privilege cannot be used to evade a client's responsibility for the use of legal process.\textsuperscript{261}

The names and addresses of legal services clients in litigation are public records, and recipients should be able to provide these to LSC and other government monitors and auditors. This exception to the privilege may not, however, directly relate to the issue of client identity and address when legal services clients are not in litigation. As Wigmore states, "much ought to depend upon the circumstances of each case."\textsuperscript{262} In the daily legal services context, the balancing of competing interests is a very different matter and may require a different outcome from that of the Pape cases: client names should be protected by the privilege.

Two court-created exceptions to the client identity rule under the privilege illustrate how a change in the competing interests will result in courts ruling that the privilege protects client identity. Most commonly, the courts protect client identity when so much information has already been disclosed about the client that to reveal the client's name would result in disclosure of confidential communications.\textsuperscript{263} In

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{258} Id.
\item \textsuperscript{259} Id.
\item \textsuperscript{260} Id.
\item \textsuperscript{261} 8 John Henry Wigmore, Evidence § 2313 (1961) (emphasis omitted).
\item \textsuperscript{262} Id.
\item \textsuperscript{263} See Weddle, supra note 257, at 1053-54; see also NLRB v. Harvey, 349 F.2d 900, 905 (4th Cir. 1965) (acknowledging that the identity of the client should not be disclosed where disclosure would result in the disclosure of confidential communica-
\end{itemize}
\end{footnotesize}
Stolowitz v. Stolowitz,264 a case which is closer to the LSC situation, the plaintiff in a matrimonial litigation sought to discover client lists of the opposing spouse so that those clients could be contacted and interviewed about their fee arrangements with the opposing spouse.265 The clients whose identities were sought were not parties to the litigation, nor did they have a stake in its outcome. The court noted that the opposing spouse was already willing to cooperate in providing information to the plaintiff about his business interests and that the plaintiff failed to show any other special circumstances and need to know actual client identity. Without such countervailing special interests, the court held the privilege protected client lists.266

No court has squarely addressed whether client names are protected by disclosure to the LSC under the attorney-client privilege in circumstances where the names have not been disclosed publicly. It is not clear how a court would rule in any particular circumstance. The LSC will likely insist, however, that it may access client names under § 509(h) and will likely take appropriate administrative action when recipients refuse to provide such access.

5. Local Recipient Auditor Access to Records

A final confidentiality issue involves the new monitoring approach developed by the LSC. It relies on independent public accountants ("IPAs") hired by the LSC recipient to audit the recipient. Following the general procedures used by the federal government in auditing non-profit organizations that receive federal grants and contracts,267 IPAs examine a sample of the recipient’s case files of the recipient to determine whether it is in compliance. The IPA must "be provided access to all records of the recipient the IPA reasonably believes to be necessary to the performance of the audit."268 In addition, the LSC Compliance Supplement specifically requires that auditors “select a representative sample of case files” to assess compliance with most of the LSC regulations.269 Recipients may not redact information in those case files. As explained by the LSC, “[i]t is axiomatic that IPAs cannot conduct an adequate audit if unable to obtain sufficient documentation regarding compliance with the requirements to be audited.

265. See id. at 883.
266. See id. at 886.
Access to such documentation should not be impeded as it is well established that recipient IPAs in conducting audits are within the attorney-client privilege.\textsuperscript{270}

The ABA addressed the question of whether local IPAs could audit client trust fund accounts as follows:

We conclude that a legal services program may properly employ an independent accountant, chosen with reasonable care, to examine and audit the program's records of receipts and disbursements of client trust funds, if the independent account undertakes confidentiality in the handling of the information.

In reaching our opinion, we assume that neither the independent accountant nor the local program reveals to the program's funding source or other third party any information that identifies a particular client or that otherwise is a confidence or secret of a client.\textsuperscript{271}

The ABA's gloss on its Informal Opinion No. 1443 is misleading and perhaps mistaken. The Informal Opinion does not address whether the outside auditor is within the attorney-client privilege, although perhaps that conclusion is implicit. It only addresses whether a recipient would violate client confidences and secrets if it employed an IPA to examine client trust fund financial records.

During the first two years of the new monitoring and auditing scheme employed by the LSC, there has been no significant dispute between the LSC and its recipients over access to client files by IPAs.\textsuperscript{272} This issue, however, did surface in one recent special audit of a local recipient IPA by the Office of Inspector General, although, to the satisfaction of LSC and the recipient, the issue was resolved.\textsuperscript{273}

If IPAs cannot freely access client files, the entire monitoring scheme currently being used by LSC and required by section 509 of the 1996 provisions would be placed in jeopardy.\textsuperscript{274} It is unlikely that Congress will permit this congressionally mandated monitoring scheme to be impeded by recipients who refuse to give their IPAs unrestricted access to case files.\textsuperscript{275}

\textsuperscript{271} Letter from Sherman S. Welprin, Jr., Chairman, American Bar Association, to Dan J. Bradley, Legal Services Corporation (Dec. 10, 1979) (on file with author).
\textsuperscript{272} See Interview with Linda Perle, Senior Staff Attorney, Center for Law and Social Policy, in Washington, D.C. (Nov. 10, 1998). Ms. Perle tracks LSC recipients interaction with the Office of the Inspector General and provides representation to recipients who have disputes with LSC.
\textsuperscript{273} See id.
\textsuperscript{275} LSC has requested that Congress clarify this issue in the fiscal year 1999 appropriations legislation by providing for unrestricted access by IPAs to recipient case files. See Memorandum from Dom Gillivan to Jennifer Mitter (September 14, 1998) (on file with author). Congress did not act on this request in the fiscal year 1999.
C. Issues Raised by Formal Opinion 96-399

As noted previously, in early 1996, the Committee issued an advisory ethical opinion. Formal Opinion 96-399, which addressed a series of ethical issues that the Committee anticipated legal services recipients receiving funding from the Legal Services Corporation would face upon enactment of the 1996 appropriations legislation.

1. Funding Reductions and Restrictive Conditions

In preparing 96-399, the Committee assumed that (1) the funding reductions which recipients face would require them to severely reduce service to existing clients, (2) the prospective restrictive conditions would severely impede competent and high quality legal representation of significant numbers of existing and future clients, and (3) both funding reductions and restrictions would require them to withdraw from ongoing representation in a large number of cases. These may have been reasonable assumptions in 1995, but such consequences did not arise in actual practice.

a. Impact of Funding Reductions

Legal services recipients that deliver legal services directly to the poor have, on average, experienced a funding reduction of approximately 25% in 1996 and 1997. For many recipients, the reduction of that magnitude has forced them to close offices and reduce staff. For recipients that have significant non-LSC funding, however, the impact required only staff reductions. According to the available data gathered since the funding reductions were effected, LSC-funded recipients responded in a variety of ways to the funding reductions. Funding reductions adversely impacted the ongoing representation of clients in only a few cases. Most recipients limited intake of new applicants but continued representing virtually all existing clients, except for those for whom representation could no longer be pursued under the prohibitions on class actions, welfare reform cases, and representation of certain aliens and prisoners.

277. See supra notes 5-7 and accompanying text.
278. See supra notes 5-7 and accompanying text.
279. See infra note 280.
280. The author has tracked recipient and former recipient activities as part of his role in the Project for the Future of Equal Justice, a joint project of the Center for Law and Social Policy and the National Legal Aid and Defender Association. See also SPAN Detailed Information by State, 3 SPAN Update: A Guide to Legal Services Planning 29, 29-79 (1998) (listing the sources of state legal services funding).
b. Restrictive Conditions

To discuss the impact of the new restrictions on legal services representation, 96-399 assumed the "worst case" scenario. Even though 96-399 purported to forego interpreting the restrictions, its analysis and logic are premised on a number of interpretations that did not accord with the text of the proposed statutory language or its legislative history, and were inconsistent with interpretations of the restrictions that LSC adopted. As a result, 96-399 inadvertently addressed issues not in dispute and suggested solutions to problems that did not exist or were overstated.

For example, the appropriations legislation does not include a broad fee-generating case restriction even though it was cited in 96-399. While such a restriction appeared in both the House and Senate bills, it was neither included in the Conference Bill nor the Omnibus Appropriations Bill that was enacted. The fiscal year 1997 and 1998 appropriation provisions included new fee-generating case restrictions.

The author has previously estimated that more than 95% of the clients currently represented by legal services organizations can and will continue to be fully represented, and at least 90% (and probably as high as 95%) of the activity that is now permissible remains permissible under the new restrictions because the fee-generating case restriction is not included in the fiscal year 1996 appropriation restrictions and because a number of interpretations suggested by 96-399 have not been adopted. For example, most aliens represented by recipients can still be represented because they fit into one of the exceptions to the restriction on alien representation. Few recipients represent significant numbers of prisoners. There have been only a handful of public housing drug eviction cases that meet the statutory criteria.

Only a few matters require a class action in order "to assert the cli-
ent’s rights effectively.” Most income maintenance cases will not involve welfare reform, and most income maintenance cases that do will fall within the exception for “representing an individual [who] is seeking specific relief from a welfare agency that does not involve an effort to amend or otherwise challenge existing law.”

Finally, Formal Opinion 96-399 does not track the actual language of the fiscal year 1996 appropriations legislation and includes statements that are inaccurate or do not fully explain the restriction.

2. Notice Requirements and the Obligation to Prepare and Plan

The notice provisions of Formal Opinion 96-399 require legal services recipients and attorneys to provide to existing and new clients information which is not necessary because most existing and new clients will be unaffected by the restrictions.

a. Notice to All Clients of Possible Funding Reductions and Restrictions

Formal Opinion 96-399 required a legal services lawyer to give all clients adequate notice of the impending changes . . . and how they may affect the clients’ representations . . . . 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.

Model Rule 1.4 does not require that a legal services lawyer or program give notice to clients who would not be affected at all by funding

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289. For example, Formal Opinion 96-399 states that recipients cannot undertake “representation challenging the LSC, its conduct or oversight proceedings, or that of any LSC grantee.” ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399 (1996). This statement is somewhat misleading. Section 506 of Pub. L. No. 104-134 prohibits recipients from using LSC funds (but not non-LSC funds) to sue LSC. See § 506, 110 Stat. at 1321-57. Section 504(a)(5) prohibits recipients from lobbying on oversight proceedings affecting LSC, but section 504(b) permits the use on non-LSC funds to contact, communicate with and respond to a request of a state or local legislative body about oversight proceedings affecting a recipient. See § 504, 110 Stat. at 1321-53 to -57. In another example, Formal Opinion 96-399 states that recipients cannot undertake “representation with regard to administrative policy at any level of government.” ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399. Sections 504(a)(2) and (3), however, prohibit only rulemaking activity by recipients. Representation in agency hearings that adjudicate the rights of individual beneficiaries (e.g., welfare, Social Security, SSI hearings) is not prohibited and can result in challenges to agency policy on behalf of an individual client. See 45 C.F.R. § 1612.5(a).

reductions or by potential restrictions on the scope of practice. Moreover, imposing such a requirement would burden legal services unnecessarily and confuse clients about what will and will not happen to their pending cases and ongoing representation. At most, the notice requirements should only apply to those clients who would likely be affected.

In addition, the opinion’s advice that addressed which staff members should return telephone calls from affected clients is not helpful. This is a matter best left to the legal services recipient to determine and does not appear related to the notice that may be required by Rule 1.4.

b. Obtaining Alternative Funding and Representation

The opinion discusses the need for LSC recipients to obtain alternative funding and representation, but exaggerates the problems that legal services faced in finding alternative counsel because of its inaccurate assumptions. This is not to say that some recipients did not face problems in finding alternative counsel. For example, in note 6, the opinion referenced a newspaper article describing representation by New Hampshire Legal Assistance of the 2000 inmates in the prisoner class action but failed to mention that New Hampshire Legal Assistance gave up its LSC funds and continued its representation in the case.

The opinion also suggests that there may be an ethical obligation “to determine whether there is a basis for securing a different interpretation of restrictive legislative language” when seeking to withdraw from representation. It is not clear on what basis such an ethical requirement arises, although it may be argued that it is appropriate to seek a narrower construction so that withdrawal is not necessary.

291. Rule 1.4 of the Model Rules of Professional Conduct provides:
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

292. Throughout, Formal Opinion 96-399 makes practice suggestions which do not seem to be required by ethical rules, even though they may constitute thoughtful advice and good recipient practices. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399. For example, the opinion suggests which staff members should return phone calls and recommends implementation of screening procedures for new representation to ensure that violation of law will not occur. See id. Such practical advice is best left to the LSC recipient to determine.

293. Compare id. (describing the representation), with Telephone Interview with Robert Gross, Director, New Hampshire Legal Assistance (January 10, 1996) (revealing that New Hampshire Legal Assistance gave up its LSC funding).


295. See Pearce et al., supra note 1, at 391 (panel discussion comments of Stephen Gillers).
Formal Opinion 96-399 does not, however, consider the practical problems that varying court interpretations of a restriction would pose for both the recipients and the LSC. While this sentence was included to encourage narrow interpretations of the restrictions, nevertheless, under the LSC Act, the responsibility for interpreting the restrictions initially rests with LSC and not individual lawyers or various courts that may be faced with motions to withdraw because of the new restrictions.

3. Duties to Clients Whose Representation Will Be Prohibited by Acceptance of LSC Funding

The opinion suggests that “each legal services office will have to make its own determination” about foregoing LSC funding or withdrawing from prohibited matters. In actual practice, the legal services recipient, through its board and management, not each legal services office, will have to make this decision.

There is a more basic issue on withdrawal under Model Rule 1.16 that was not addressed by the opinion. The discussion of withdrawal, including note 10, concludes that withdrawal may be necessary for clients who become ineligible or in cases that become restricted to serve other existing clients, but Formal Opinion 96-399 does so without mentioning the provision in Rule 1.16 that states withdrawal may be mandatory when “required by law.” As argued above, the requirements imposed by federal law are included in the Rule’s mandatory withdrawal provisions when “required by law.” If continued representation in a case requires the attorney to violate the restrictions in an appropriations act, then withdrawal is “required by law.”

296. Courts are specifically prohibited from questioning whether representation by LSC recipients is authorized in a case or matter before the court, and places the responsibility on LSC for interpreting the LSC Act when adverse parties challenge the representation. See 42 U.S.C. § 2996e(b)(1)(B) (1994).

297. There have been two major court challenges to the LSC restrictions. To date, the results have been generally unsuccessful. See Velazquez v. Legal Servs. Corp., 985 F. Supp. 323, 344 (E.D.N.Y. 1997) (denying plaintiffs’ preliminary injunction motion), aff’d in part, rev’d in part, 164 F.3d 757, 773 (2d Cir. 1999) (holding that § 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 was unconstitutional, and affirning on all other points of law the district court’s denial of the plaintiff’s preliminary injunction motion); Legal Aid Soc’y v. Legal Servs. Corp., 981 F. Supp. 1288, 1301 (D. Haw. 1997) (rejecting a constitutional challenge to LSC funding restrictions), aff’d in part, vacated in part, 145 F.3d 1017, 1031 (9th Cir.) (affirming the district court’s First Amendment holding, but reversing the district court’s holding that the LSC restrictions did not violate the Due Process and Equal Protection Clause rights of indigents), cert. denied, 119 S. Ct. 539 (1998).


299. See supra note 205-09 and accompanying text.
4. Obligations to Remaining Clients If the Recipient Decides to Remain a LSC Recipient

The most serious concerns with Formal Opinion 96-399 lie with the analysis and notice requirements regarding duties to existing clients.

a. Notice About Changes in Eligibility

Formal Opinion 96-399 requires that a legal services 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.\(^\text{300}\)

This notice requirement does not appear to be necessary to address the problems raised by the restrictions on eligibility based on alienage or incarceration, nor does it appear that such a notice requirement flows from the text or commentary to Rule 1.4.

This notice requirement is unjustified and unnecessary because of additional congressionally mandated eligibility requirements that will affect a few of recipients’ clients. Such a requirement will, however, have a potentially negative impact on the attorney-client relationship. A written notice advising that eligibility for continued representation requires them to stay out of jail would insult many clients. Only a few clients will be affected by changes in eligibility arising from long-term incarceration or changes in alien status.\(^\text{301}\) According to information available to the author, who advises LSC recipients about compliance with LSC regulations, far fewer clients have been affected by changes in circumstances than those whose financial eligibility changes during the course of legal services representation and to whom no notice has been or currently is required.

LSC-funded recipients have always faced financial eligibility restrictions and, since 1983, have faced additional restrictions on representing aliens. The procedures set out by LSC in regulations regarding financial eligibility and those regarding changes in alien status have worked well in the past.\(^\text{302}\) They require the recipient to operate consistent with attorney’s ethical responsibilities. LSC has adopted similar procedures to address changes in eligibility due to incarceration or changes in alien status.\(^\text{303}\)

\(^{300}\) ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399.

\(^{301}\) See 45 C.F.R. § 1637.3-.4 (1998).

\(^{302}\) See 45 C.F.R. § 1611.9 (1998) (financial eligibility); id. § 1626.7 (changes in alien status).

\(^{303}\) See id. § 1637.4; id. § 1626.9.
b. Limitations on the Scope of Representation

(1) Notice of Practice Restrictions and Written Agreement to Abide for All Clients

The opinion states 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."304 Notice has never been required for current eligibility restrictions, and there is no justification that such a notice should be required for new restrictions. This notice and consent requirement would be imposed on recipients and attorneys with respect to all clients, even if there were no realistic possibility that the representation would be affected in any way by possible restrictions on the scope of practice. Model Rule 1.2, limiting the scope of representation "if the client consents after consultation," however, does not suggest that lawyers must obtain consent from a client when there is no practical likelihood that the restrictions on representation will affect that particular client. In fact, no prior ABA opinion has suggested that such notice and written consent was necessary for clients who were not likely to be affected by restrictions on eligibility for services.

(2) Client Consent to Limitations

The discussion in Formal Opinion 96-399 that requires client consent to limitations on the scope of representation appears to create a three-tiered system. First, "where it may fairly be anticipated that the funding restrictions will sooner or later be implicated," the opinion requires that the legal services lawyer either advise the client to seek another lawyer or consider withdrawing from further representation.305 Second, when "there is only a small chance that practice restrictions will adversely affect a representation in the future," the opinion requires that the legal services lawyer seek consent prospectively on the scope of the representation.306 Finally, the opinion requires 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."307

The requirement to obtain written agreement and consent for all applicants for service will impose a significant and unnecessary administrative burden on legal services recipients. Moreover, requiring a

305. Id.
306. Id.
307. Id.
lengthy recitation of what the recipient cannot do has a potentially negative and damaging effect on the attorney-client relationship. As argued above, the current rules regarding limitations on the scope of representation are entirely adequate to address the problems that will arise from the addition of the new limitations on eligibility.

The opinion could also be read to impose greater burdens on a legal services lawyer than on other members of the bar. Surely the Committee did not mean to suggest that all lawyers at the time of engagement will be required to inform potential clients of all possible issues which might subsequently require the lawyer to withdraw as counsel, including the inability of the client to pay attorneys’ fees, the possibility that a currently unknown conflict of interest may arise, or the lack of full candor or disclosure by the client.

Thus, ethical rules do not require legal services lawyers to seek client consent to the restrictions, except in the circumstance when the restrictions may reasonably be expected to affect representation. Similarly unnecessary is the requirement that legal services lawyers inform all clients of the practice restrictions and obtain written agreements from all clients to abide by those restrictions.

5. Obligation to Non-clients

The opinion implies and specifies an ethical obligation to non-clients.\(^{308}\) For example, Formal Opinion 96-399 discusses setting priorities for serving existing clients and then suggests that there is an ethical obligation to consider “material adversity that will befall particular clients who are not served, and the particular problems faced by indigent people generally in each locality.”\(^{309}\) Similarly, the opinion suggests that in deciding whether to continue to represent existing clients, who become ineligible after beginning representation, the lawyer should take into account “the interests of other clients who would go unrepresented if LSC funding is lost.”\(^{310}\) Likewise, Formal Opinion 96-399 suggests that only in “extreme cases” should a legal services lawyer facing increased workload from existing cases take on new cases or matters.\(^{311}\)

While it is appropriate for the LSC and the ABA to suggest that the priority-setting processes used by legal services recipients should take into account the needs of future or potential clients or that recipients should consider the possible impact of decisions to refuse LSC funding,\(^{312}\) there is no ethical responsibility to potential clients that requires certain actions or procedures to be undertaken by LSC

\(^{308}\) See id.

\(^{309}\) Id.

\(^{310}\) Id.

\(^{311}\) See id.

\(^{312}\) See Standards for Providers of Civil Legal Services to the Poor Standard 6.1 (1986).
recipients. With very few exceptions, ethical responsibilities flow only to existing clients. The Model Rules do not create additional ethical obligations to potential clients. The potential effect of requiring notification to all potential clients of the limitations on the scope of advocacy, even though no actual representation is undertaken, is enormous and may impact all attorneys, not just legal services lawyers. Legal services recipients and their staffs must take all appropriate steps to carry out their ethical responsibilities to actual current clients.

For example, Formal Opinion 96-399 could be read to suggest that lawyers who specialize in a single area of law or only transactional work may have a duty to inform all potential clients of each area of law or activity they do not handle. The possible breadth of such an ethical duty flowing to non-clients far exceeds the interest of potential clients whose continued representation may be prohibited by congressionally-mandated restrictions on the eligibility for services provided by recipients of LSC funds.

Conclusion

The 1996 congressional restrictions on LSC-funded recipients, as well as the restrictions being imposed at the state level, raise a number of difficult ethical issues for providers of civil legal assistance. To date, the restrictions have not been interpreted in a manner that would force attorneys working for such recipients to withdraw from cases or resign in order to act ethically. Nor may it be said that the current restrictions are unethical, because recipients and their attorneys can act ethically and comply with the restrictions. The restrictions do make it difficult for legal services attorneys to act ethically, and do force LSC recipients to refuse cases that should be taken or to withdraw from ongoing representation that is essential to vindicate the rights of low-income persons eligible for legal services. In the future, it is possible that the restrictions imposed by funders or the interpretations provided by the funding entity will so limit what attorneys can do that they will not be able to competently represent clients or preserve their confidences. Because of the danger that future restrictions will force attorneys into ethical dilemmas requiring withdrawal, and because many of the restrictions on the type of client and the scope of representation are unjustified under the principles of equal access to justice, every possible effort must be made to remove such existing restrictions and prevent future restrictions from being imposed.