

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

and

KIRT WEST,
INSPECTOR GENERAL OF THE
LEGAL SERVICES CORPORATION,
3333 K STREET, NW, 3RD FLOOR,
WASHINGTON, D.C. 20007

Petitioners,

v.

CALIFORNIA RURAL LEGAL
ASSISTANCE, INC.,
631 HOWARD ST., #300
SAN FRANCISCO, CA 94105

Respondent.

Misc. No. 1:07-MC-00123-EGS

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**MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PETITION FOR SUMMARY ENFORCEMENT
OF ADMINISTRATIVE SUBPOENA DUCES TECUM**

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INTRODUCTION AND SUMMARY OF ARGUMENT

California Rural Legal Assistance, Inc. (“CRLA”) is a law firm that serves the rural poor throughout the State of California. It currently employs about 50 attorneys, all of whom are licensed to practice by the State Bar of California, and thus are subject to and bound by the State’s laws and ethical rules governing legal practice and clients’ rights.

In the four decades since its founding, CRLA has received both recognition and awards for the very high quality of its work. CRLA’s most typical work on behalf of its clients, some of whom are migrant farm workers and all of whom are indigent, unsophisticated, and otherwise lack the access and resources to protect their rights, includes collection of wages owed for work performed, prevention of unlawful eviction, assistance to victims of domestic violence, and protection of educational and other basic civil rights. CRLA’s achievements range from having put an end to assignment of Spanish-speaking children to classes for the mentally retarded based on culturally biased tests given in English, to suits that have resulted in broad-based enforcement of worker health and safety protections otherwise ignored by some habitually recalcitrant employers in the California dairy industry.

Although its clientele is indigent and its services are funded by the federal Legal Services Corporation (“LSC”) and other public and private agencies rather than client fees, fundamentally CRLA and its attorneys do what other law firms and lawyers do. Where appropriate and permitted by law, they provide legal advice and representation. Their clients prevail when their cause is meritorious. In the end a judge decides whether it is or not.

Every well-run law firm in America trains its attorneys in the procedural and substantive law applicable to its clients, and in the tactics and strategies it has successfully employed in the past and is developing for the future. This is particularly important in a legal aid practice, where there is a substantial influx of new and inexperienced lawyers every year, and the law governing

its clients' rights is often changing. The attorney work product used both to strategize ongoing advocacy and to plan for anticipated issues and disputes would never be successfully subpoenaed from any private law firm absent clear proof of its active participation in a criminal conspiracy, which no one contends occurred in this case.

Yet here the LSC's Office of Inspector General ("OIG")¹ demands that CRLA surrender copies of its attorneys' work product, allegedly to aid it in an "investigation" instigated by a representative of Congress at the urging of the dairy industry, members of which are CRLA's frequent litigation adversaries. OIG also demands identifying information for at least 39,000 CRLA clients and their spouses, offering only the slenderest and most conclusory justifications and failing to explain how any of them legitimately calls for anything remotely close to such a enormous mass of information; insistent that CRLA bear the crippling financial and logistical burden of sorting through that mass, item by item, to identify and assert individualized claims of privilege, and insouciant that compliance would require CRLA to disregard state law and ethics rules protecting its clients' confidentiality and privacy.

In Part I, we show that OIG's Subpoena improperly calls for substantial amounts of material protected by the attorney work-product doctrine as defined by federal law, and for additional material shielded by California work product protections that the LSC Act requires the OIG to respect.

In Part II, we show that OIG has exceeded its subpoena powers by imposing an overwhelming and unnecessary burden. While OIG may quibble about how many client identities out of the 39,000 it has indiscriminately demanded are attorney-client privileged, there

¹Inspector General Kirt West resigned in August 2007. No permanent successor has yet been appointed.

is no dispute that *some* are (and in fact the number is substantial). But OIG has cast its dragnet for client-identifying information so broadly that the cost and operational disruption necessary for CRLA to locate and protect the items that are privileged will cripple the program. And the sweeping breadth and corresponding burden of the Subpoena are unnecessary: OIG has refused reasonably to tailor its demands to any legitimate investigatory purpose.

Finally, in Part III we show that substantial numbers of the client files at issue here are protected by state-law rights of client confidentiality and privacy. Even though OIG may be statutorily authorized to seek “client names,” it remains obligated, and has failed, to do so “in a manner consistent with attorneys’ professional responsibilities” under state law as the LSC Act requires. OIG also demands some client-identifying material that does not even fall within the specific statutory authorization regarding “client names,” and to this extent also exceeds its subpoena powers.

CRLA appreciates and for many years has willingly complied with the legal and oversight constraints imposed by its LSC funding. But this case is not about a regulator’s legitimate effort to conduct an ordinary audit or investigation. It presents an effort to assert power well beyond any statutory authorization that, whether calculated or merely careless in its scope, will overwhelm the very purpose for which the unfortunate object of its attentions was created. As shown with the very substantial evidence submitted with this brief, the Subpoena here at issue is an unjustified and entirely unnecessary invasion into fundamental client and attorney protections. If the OIG is granted on this record the unfettered power to intrude and distract that it claims here, the threat to provision of core legal services to the poor nationwide would be difficult to overstate. The subpoena should be quashed, or drastically limited as described in the Conclusion.

STATEMENT OF FACTS

A. California Rural Legal Assistance And Its Clientele.

CRLA. CRLA is a California nonprofit corporation, founded in 1966 to provide a wide range of free legal assistance and representation to low-income communities in California through two programs. Its Basic Program provides these services to a poverty population of some 555,000 people through offices located over a service area that stretches some 750 miles from the Mexican border to the northern Sacramento Valley. Its Migrant Project, the only such program in the State, serves the special needs of nearly one million migrant and seasonal workers and their families throughout California. Together these programs operate in 23 offices. Declaration of William G. Hoerger In Support of CRLA's Opposition to Petition for Summary Enforcement ("Hoerger Decl.") ¶¶13-16.

About 60% of CRLA's annual budget – which in 2006 was \$11.2 million – is funded by the Legal Services Corporation ("LSC"). The remainder of CRLA's budget is funded by grants from a number of federal and state agencies other than LSC, from private foundations, and by private donations. Hoerger Decl. These public and private grants fund specific projects and advocacy concerns, from agricultural worker health and safety to fair housing to seniors' issues. *Id.* ¶¶13-15.

The rural poor that CRLA serves. As discussed at length in the Attorney-Interveners' Opposition To Petition For Summary Enforcement Of Administrative Subpoena Duces Tecum (Atty-Intervnr. Br.") (at 2-5) and the accompanying declarations of the Interveners and William Hoerger (one of CRLA's Directors of Litigation, Advocacy and Training and a longtime legal aid lawyer), those who approach CRLA for assistance are often the neediest and most vulnerable among us. All are poor; many lack even the most basic education; a substantial number speak little or no English. They perform the most backbreaking work for the most meager wages under

the most difficult circumstances. For these individuals, the minimum wage, humane conditions (such as water and sanitary facilities in 100-degree weather) and basic workplace safety are often elusive abstractions. They are dependent on authority figures that control their circumstances for the most basic necessities, such as food and shelter for their families. That authority and control is susceptible, and all too commonly subject, to abuse. Retaliation against those who are even suspected of thinking about enforcing their rights is well known and widely feared in the communities CRLA serves. *Id.* ¶¶19-27; Declaration of Jeannie Barrett In Support of Attorney-Interveners’ Opposition To Petition For Summary Enforcement of Administrative Subpoena Duces Tecum (“Barrett Decl.”) ¶¶6, 10-14.

Space constraints preclude repeating here the many detailed incidents related in the accompanying declarations that show these widespread abuses, and the deep and pervasive anxieties they arouse. These incidents include: on-the-spot firings of personnel seen speaking with CRLA staff or government safety inspectors; self-help ejections of those believed to be considering enforcing their legal rights from work camps and rental housing, sometimes with the complicity of local law enforcement; withholding of wages, false imprisonment and physical assault as tactics of workplace discipline; sharing among employers of the names of suspected “troublemakers” so that they become unemployable throughout the region (“blackballing”); violence by an abusive spouse when another family member seeks protection from domestic violence. Hoerger Decl. ¶¶19-27; Barrett Decl. ¶¶9-13; Declaration of Teri Scarlett In Support of Attorney-Interveners’ Opposition To Petition For Summary Enforcement of Administrative Subpoena Duces Tecum (“Scarlett Decl.”) ¶¶6-9.

As a result of these common, and commonly known, patterns of conduct, those approaching CRLA for potential advice or representation often do so in confidence, at their

express and outspoken insistence. Their consultations with CRLA often remain undisclosed, for example if they are found to be ineligible for CRLA's assistance, if they succumb to fears of retaliation, or if they otherwise decline to publicly assert their rights for any number of other reasons. Hoerger Decl. ¶¶10, 20-26, 29-32 & Ex. II at 9-12; Barrett Decl. ¶¶14-20; Scarlett Decl. ¶¶6-10. The Attorney-Interveners have aptly summarized several typical types of consultations and engagements whose very existence is and remains confidential; we incorporate their summary by reference here rather than repeat it. *See* Atty-Intvnr Br. at 2-5; *See also, e.g.*, Hoerger Decl. ¶¶28-32 & Ex. A (describing CRLA's efforts to maintain confidentiality of several types of sensitive engagements).

CRLA's intake and record keeping practices. All individuals who come to CRLA seeking legal services go through an intake process in which CRLA staff determine whether CRLA can help them and, if so, whether they are eligible for CRLA's services. In many offices, information regarding each walk-in applicant is entered into a "door log" either by having the applicant sign in, or by having a CRLA staff person enter that information. CRLA intake staff interview the applicant to see if the applicant's issue is one with which CRLA can help. If it isn't, the applicant does not become a CRLA client, and is typically referred without further paperwork. Declaration of Karen Smith In Support of CRLA's Opposition to Petition for Summary Enforcement ("Smith Decl.") ¶5.

If the applicant's concerns do appear to be ones with which CRLA can help, the applicant (or, if assistance is needed, CRLA staff) fills out an intake form including personal information such as the applicant's name, address, family income and expenses, citizenship or alienage status and a brief description of their reason for seeking CRLA's services. *Id.* ¶6; Barrett Decl. ¶¶2-4 & Ex. A (intake form). CRLA's intake form states, and staff assisting with intake typically

inform applicants, that information supplied for the intake form will be kept confidential. *Id.* A CRLA advocate interviews the applicant to determine whether the applicant meets financial and immigration status eligibility requirements under governing law. *Id.* ¶7; Barrett Decl. ¶4. Often the eligibility determination is completed during that interview; sometimes additional information or documentation may be required. *Id.*

Using the information submitted in connection with the intake, CRLA creates a database file, or “record,” in its computerized case-management database, as well as an ordinary paper file, for each eligible client to whom it agrees to provide legal assistance. CRLA also opens electronic and paper records for many, but not all, applicants for legal assistance whom it declines to serve on various grounds, including lack of eligibility. Smith Decl. ¶¶8, 10, 13.

If an applicant does not meet eligibility requirements, the applicant is advised of that fact, and the paper and electronic files are closed. *Id.* ¶9. If an applicant meets eligibility requirements and CRLA agrees to provide the services requested, a case is opened in CRLA’s paper and electronic records. *Id.* ¶8. A retainer agreement may be signed anytime from the initial interview to a later date once eligibility and the nature of the services to be provided are established. *Id.* A retainer agreement is not required when a case will be completed with only brief advice. *Id.*; Barrett Decl. ¶¶6-8.

CRLA’s computerized case management database, which during the relevant time was maintained on a software system called “KEMPS,” thus contains confidential personal information about applicants for CRLA’s services who do not become clients of CRLA, as well as for persons who are accepted as clients. Smith Decl. ¶¶6-10. As discussed in more detail below, the information in the KEMPS system for applicants and clients generally includes (among other information) name, spouse’s name, address, social security number, a coding for

the type of legal matter for which assistance is being sought (one of about 60 “problem codes” developed by LSC), as well as the names of adverse parties collected for the purpose of doing conflicts checks. *Id.* ¶17. This information is kept in the system not only for applicants who become CRLA clients, but for those who do not and whose records are closed. *Id.* ¶10-12, 17.

B. OIG Begins The Current Investigation.

OIG initiates its investigation without informing CRLA of its scope or purpose. On December 14, 2005, OIG notified CRLA that it was commencing an investigation of CRLA and that OIG staff would arrive at CRLA’s Modesto office on December 20 to begin interviewing its staff. Hoerger Decl. ¶40.² Contrary to its practice in all of the many previous audits and investigations LSC and OIG had conducted, OIG refused to tell CRLA what the purpose or substance of the investigation was, other than to assure CRLA that no allegations of criminal conduct were at issue. *Id.* OIG also refused to explain the reason for the urgency of its request. *Id.* CRLA cooperated fully, and made Modesto staff available for interviews on December 20 and 21. *Id.* ¶41. In these interviews, and additional follow-up interviews in January, OIG declined to consider measures to protect employee rights or client confidences. *Id.* OIG

²The investigation would become the second sprawling and protracted OIG “investigation” of CRLA during the past 5 years. The previous one (classified as a “program integrity audit”) lasted a record 40 months from notice to closure, and produced no finding of any significant violation of federal law or regulation. Hoerger Decl. ¶34. CRLA would eventually learn that the latest investigation was prompted by a request from Rep. Devin Nunes (R-Visalia), Chair of the Congressional Dairy Caucus, making it the third investigation of CRLA (including both OIG inquiries) since 2000 prompted by members of Congress from California’s Central Valley on behalf of the dairy industry. *Id.* ¶¶33-37. This is perhaps unsurprising, as CRLA’s advocacy focusing on certain California dairies’ illegal treatment of its low-wage work force has been increasing since 2000. In the past few years, CRLA singly or with co-counsel has recovered \$1.6 million in unpaid wages for hundreds of dairy workers whose employers failed to pay minimum wage, pay overtime or premium wages, provide required rest and meal breaks, maintain time and payroll records, and/or provide legally required work equipment. Additional amounts are at issue in currently pending dairy claims and litigation. *Id.* ¶39.

attorneys also insisted on directly contacting CRLA employees who had elected to be represented by personal or union counsel during interviews in light of the unspecified purposes and targets of the inquiry. *Id.*³

From the outset, CRLA repeatedly expressed to OIG its concerns with OIG's unwillingness to identify the purpose of its investigation or to consider any measure to protect confidential client information—conduct unprecedented in many prior audits and inquiries conducted by both OIG and LSC. *See, e.g., id.* ¶¶42, 74, 79, 86 & Exs. B, C, V, X & CC. CRLA also expressed its hope that OIG and CRLA could work together, as they had in the past, to develop procedures that would allow CRLA to cooperate in the investigation while reducing risk to its clients' rights and its attorneys' duties of professional responsibility. *Id.*

OIG's March 16 administrative data and document requests. On March 16, 2006, OIG sent CRLA a letter accompanied by a "Data Request" and a "Document Request." Hoerger Decl. ¶43 & Ex. D. The Data Request asked CRLA to produce virtually all data from its KEMPS electronic case management database for all matters that were open at any time between January 1, 2003 and October 31, 2005—in excess of 39,000 client files. *Id.* Ex. D at 3-6. The separate Document Request also demanded substantial volumes of strategic planning, organizational, accounting and personnel material, as well as materials from three dozen distinct engagements. *Id.* at 7-10.

CRLA produces much of the material requested. Beginning on March 27, 2006 and continuing on a rolling basis thereafter, CRLA produced to OIG thousands of pages of hard copy documents and many megabytes of electronic data responsive to the OIG's Requests. *See*

³This tactic violated the OIG attorneys' ethical obligations in both California and the District of Columbia limiting attorneys' direct contact with represented persons. *See* Cal. R. Prof. Cond. 2-100; DC R. Prof. Cond. 4.2(a); Hoerger Decl. ¶42 & Ex. B at 2.

Hoerger Decl. ¶¶48, 56-60, 63, 66 & 72 and Exs. G, H, E, I, J, K, V, L, M, N, O, U & OO (cover letters and/or explanatory caption pages accompanying CRLA's production). In most categories, CRLA complied fully with the OIG's sweeping requests. However, CRLA withheld and/or redacted two general categories of data and documents: (1) portions of certain requested documents reflecting CRLA attorneys' thoughts and opinions about litigation and advocacy strategy protected by the work-product doctrine;⁴ and (2) client-identifying information. *See id.* ¶61 & Exs. E, I at 14-17, O & CC.⁵

With respect to client- and engagement-specific information, for the three-year period specified in OIG's Data Request, CRLA's computerized case management database contains records for approximately 39,000 individuals. Hoerger Decl. ¶54; Smith Decl. ¶16. CRLA promptly provided a great deal of its electronic information with respect to all of those engagements. Specifically, each of the following was produced in electronic form, each linked for each engagement to a unique numerical identifier (CRLA's file number): residence city, county and zip code; client telephone area code; client date of birth; number of adults and children in client's household; client household income and assets; client status as citizen or eligible alien; client gender; client race; client language; client handicap status; case-opening date; and LSC problem code. Smith Decl. ¶¶19-20. However, CRLA withheld selected

⁴CRLA produced documents containing attorney work product with the work-product portions redacted, and the legal basis for each particular redaction noted on the face of the redacted document at or near the space left by the redacted text. Hoerger Decl. ¶61. The privilege review by CRLA senior lawyers and preparation of redacted copies were extremely time-consuming, and continued on a rolling basis after OIG served the Subpoena at issue in this proceeding (which sought the same materials as the Data and Document Requests) in October 2006. *Id.*

⁵In a few other cases, CRLA did not provide documents simply because it had not yet completed its review or needed further clarification as to what OIG was seeking. *See* Hoerger Decl. ¶56 & Ex. I at 38-50.

information that would specifically identify the client associated with the unique file number, including: client first and last name; client street address, client phone number; client Resident Alien Card (or “green card”) number; and spouse’s first and last name.⁶ *Id.*; Hoerger Decl. ¶45. CRLA also withheld adverse-party information linked to the file number. *Id.*

CRLA’s efforts, and the OIG’s refusal, to narrow and focus OIG’s demands to workable limits and develop means to protect clients’ rights. Although most of the client information OIG requested was provided promptly, the demand for client-identifying information along with the other client information that CRLA had promptly and voluntarily supplied created a serious dilemma. That dilemma arose because, as discussed in detail above and in the Attorney-Interveners’ briefing, in a legal aid practice such as CRLA’s, many clients consult CRLA confidentially, knowing full well that if their potential adversary—*e.g.*, an employer, a landlord, an abusive spouse—became aware that they were seeking advice about their rights, they would suffer immediate and potentially devastating retaliation. Many such consultations remain confidential. The client-identifying information OIG sought thus would often convey the client’s specific motivation for having confidentially sought legal advice, and thus comprise attorney-client privileged information.⁷ Moreover, all of those privileged consultations and more are also

⁶CRLA also redacted client-identifying information from documents related to specific cases and non-litigation matters, where there was no evidence that the clients’ names or the fact of the representation had been publicly manifested. Hoerger Decl. ¶¶29, 56-60.

⁷For example, information that a particular person (client name) consulted CRLA on a particular date (date of representation) regarding a particular kind of issue (problem code) with respect to a particular employer, landlord or family member (adverse party) is more than enough information to infer the particular client’s specific motivation for the consultation, and thus this information is privileged in any circumstance in which the consultation was confidential and not otherwise disclosed. Similarly, simply disclosing the name and address of an applicant who had attempted to obtain legal assistance along with the fact of CRLA’s denial of service because the applicant was an undocumented alien would expose the applicant to arrest, incarceration and deportation, and thus would render that applicant’s identity privileged. *See generally* Part II(A);

(continued . . .)

protected by the clients' rights of privacy, and CRLA's corresponding duties of confidentiality, under state law. The California Constitution grants each CRLA client a right of privacy protected to consult an attorney confidentially, and the law governing the professional responsibilities of CRLA and the attorneys it employs imposes strict obligations "[t]o maintain inviolate the confidence, and at every peril to [themselves] to preserve the secrets, of [their] client[s]." Cal. Bus. & Prof. Code §6068(e)(1). This duty encompasses *any* information imparted by the client in confidence, whether or not it would fall within the scope of the attorney-client privilege. *See* Part III(A); Atty-Intvnr. Br. at 16-23.

When CRLA attempted to raise these issues with OIG, its response was stark and disconcerting: OIG took the uncompromising position that CRLA and its California-licensed attorneys were obligated to disregard their clients' state-law rights of privacy and confidentiality, and their corresponding legal and ethical duties to respect and protect those client rights, because the OIG was not bound by them. *See, e.g.,* Hoerger Decl. ¶75 & Ex. W at 2 (May 11 letter from AIG Tarantowicz stating (1) that CRLA was legally obligated to provide all client identity information to OIG unless CRLA made a specific claim of attorney-client privilege as to a particular client identity, (2) that any reference to California law was inapposite to an OIG investigation, and (3) that OIG would "not agree to any procedure that would provide [fewer client names] than we requested"); *see also* OIG Br. at 14-17. And while OIG conceded that any material subject to the federal attorney-client privilege (and the federal attorney work-product doctrine) could be withheld, it demanded that CRLA go through *each* of the 39,000 client files OIG had demanded, one by one, and assert any privilege objection specifically on a client-by-

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Atty-Intvnr. Br. at 10-16.

client basis depending on the factual circumstances that each file revealed. *Id.*; *see also* OIG Br. at 12-14 (suggesting file-by-file review is appropriate even if CRLA's estimate that such review will take 3000 hours of attorney time and 4000 hours of staff time).

In the months following the service of OIG's Data and Document Requests, CRLA made urgent, serious and repeated efforts to engage OIG in discussions to develop means of addressing OIG's specific and legitimate informational needs consistent with CRLA's duties and its clients' rights. Hoerger Decl. ¶¶73-84, 89 & Ex. V, X & CC. CRLA repeatedly asked, in telephone conferences and in writing, what created the need for so much information about so many people. *Id.* The OIG refused to say. *Id.* For months CRLA sought to explore with the OIG whether the number of clients, the amount or type of information or the manner in which it was produced could be adjusted to reduce the burden on CRLA or preserve any of its clients' confidences. *Id.* The OIG consistently refused meaningfully to discuss these issues in any respect. OIG refused to assure CRLA that OIG would not disclose any confidential information it obtained from CRLA to third parties, in particular to members of Congress. *Id.* 84. CRLA repeatedly asked for the OIG's cooperation in developing protocols for inspection and production that would allow CRLA to provide all the information requested less expensively and more efficiently while preserving the confidential and privileged character of that information, which CRLA had successfully accomplished with other Inspectors General in past audits and investigations on a number of occasions. *Id.* ¶¶73-84, 89 & Exs. V, X & CC. This OIG refused to discuss it, stating in essence it had the power to make the demands it had made, and was not required to give any reason, justification or accommodation.⁸ *Id.* ¶¶75, 81-85 & Exs. W, Y, Z &

⁸As an indication of the absurd degree to which this has progressed, the OIG even insisted that the confidential information concerning clients' *wives* it had demanded was an
(continued . . .)

BB. AIG Tarantowicz' email to CRLA Executive Director Padilla in mid-July 2006 is typical:

I thought it only fair to inform you from the outset that although we are happy to work with CRLA to discuss and hopefully resolve concerns about the requested documents (including, for example, those implicating burdensomeness and privilege) as well as to clarify any request that have caused confusion, we continue to require the documents requested. I did not want to leave the impression that we would be discussing wholesale modification to our document request, for example, in the area of client names. (*Id.* Ex. Z)⁹

LSC requests CRLA to undertake a sample review to estimate the costs and burdens of compliance. In an effort to address the impasse, in September 2006 LSC management requested

(. . . continued)

indispensable feature of its investigation, but has refused to this day to explain how that could be the case. Hoerger Decl. ¶¶86 & Ex. CC.

⁹From the beginning of the current investigation, the OIG personnel administering the process have consistently evidenced a perplexing and singleminded rush to brand CRLA a scofflaw rather than engage in any discussion that might result in satisfactory compliance. For example, OIG demanded expedited production of certain materials in its March 16, 2006 Document Request within ten days after the Request, a demand with which CRLA effortfully complied. Hoerger Decl. ¶¶43, 48. OIG then instantly concluded that CRLA had willfully withheld portions of those materials that for the most part simply did not exist (and in one instance had been inadvertently omitted from the rushed production), and *without ever asking CRLA about those materials or providing notice to CRLA that it was doing so*, demanded that LSC impose immediate administrative sanctions on CRLA to coerce compliance. *Id.* ¶49. LSC explained OIG's concerns to CRLA, which naturally resulted in those concerns being resolved. Hoerger Decl. ¶¶ 47-55 & Exs. G & H. On April 27, 2006, without responding to a detailed letter from CRLA two weeks before describing at length CRLA's confidentiality concerns concerning client identities and requesting discussions to develop appropriate means of compliance with OIG's needs (*id.* Ex. E), OIG *again* wrote LSC, *again* without giving CRLA any notice or opportunity to respond, *again* demanding that CRLA be administratively sanctioned to coerce with its demands. *Id.* ¶¶73-76. Several of the alleged deficiencies of which OIG complained to LSC related to OIG requests as to which CRLA had requested further clarification from OIG but had received no response. *Id.* ¶76. AIG Tarantowicz then wrote CRLA that she considered it inappropriate for OIG to attempt to address CRLA's concerns while seeking administrative sanctions from LSC. *Id.* ¶75 & Ex. W. LSC again urged OIG to discuss its concerns with CRLA instead. *Id.* ¶¶77, 81 & Ex. Y. This resulted in discussions including AIG Tarantowicz' email quoted above. After yet again refusing any accommodation or compromise, OIG yet again went to LSC and asked it to sanction CRLA in August demanding coercive sanctions. *Id.* ¶¶84-87. LSC for a third time declined to impose such coercive sanctions—a telling gesture in and of itself—instead requesting the sample privilege review described in the following section.

that CRLA perform a pilot “privilege review” of a random sample of its files to estimate how many of the total client files would be privileged, and what it would cost CRLA—both financially and administratively—to review all of the approximately 39,000 files responsive to the OIG’s Data Request. Hoerger Decl. ¶¶90. The study was performed according to a detailed protocol created by CRLA in consultation with LSC. *Id.* ¶¶90-95 & Exs. GG, HH.

As summarized in two reports by CRLA to LSC, one of the study’s key findings was that literally thousands of the requested client records were likely subject to the federal attorney-client privilege, and even more—a majority—would be protected by California’s duty of confidentiality. Hoerger Decl. ¶¶98, 100 & Ex. II at 8-11, Ex. JJ at 1. The study also concluded that the financial and administrative cost of performing a wholesale privilege review would be staggering: Even using a conservative estimate of only four minutes per file for the review itself, retrieving and reviewing the 39,000 files encompassed by OIG’s request would require thousands of hours of attorney and staff time, would cost anywhere from hundreds of thousands to more than one million dollars (some 10% of CRLA’s entire annual budget!), and would severely disrupt CRLA’s operations for nearly a year and a half, including closing a number of CRLA’s offices altogether for weeks at a time. *Id.* Ex. II at 2-8, 13-17; Ex. JJ at 2, 4-9.

LSC asked OIG for comment on CRLA’s analysis of the back- (and bank-) breaking effort that would be required. Although OIG generally agreed with CRLA’s review protocols and legal analysis of the privilege that it had been supplied, OIG contended that CRLA had “misapplied” the attorney-client privilege to its sample. Hoerger Decl. ¶¶104. When LSC asked OIG to comment on CRLA’s estimate of the time, resources and disruption that would be required to conduct the review, OIG stated that it would not discuss those issues until CRLA applied the privilege correctly. *Id.* When LSC requested OIG’s guidance on how OIG believed the

privilege should be applied in these circumstances, OIG declined to provide it. *Id.*¹⁰

OIG issues a report to the congressional subcommittee overseeing legal aid, and CRLA responds. Unable to provide a basis that LSC considered adequate to ground the sanctions on which OIG seemed determined, in September OIG wrote—and publicly released—a so-called “interim report” directly to the congressional subcommittee that oversees LSC. *See Hoerger Decl.* ¶105; *Tarantowicz Decl. Ex. 3* (OIG report to congressional subcommittee). In a departure from the practice of LSC and all its prior Inspectors General, OIG chose not to review any of the substance of the report with CRLA prior to lodging it. *Id.* In fact, the report’s publication marks the moment in the ten-month investigation when CRLA was first told anything about what the OIG thought it was investigating. *Id.* Worse, the OIG Report is riddled with misconstructions of LSC regulations, ungrounded speculation and outright factual errors, often contradicted by materials already in OIG’s possession, all of which could have been corrected

¹⁰The OIG’s tactics raised concerns well beyond the legal aid community. On July 18, 2006, no less an authority than ABA President Michael Greco wrote OIG to express the ABA’s concern, based on the work of the ABA’s Presidential Task Force on Attorney-Client Privilege, about OIG’s request for confidential client names and information. *Hoerger Decl.* ¶85 & Ex. AA. The letter urged OIG to use well-established protocols that involve use of unique numerical identifiers to avoid disclosing confidential information and the burden of a full-on privilege review. *Id.* The OIG responded by letter that it considered itself within its authority to demand the materials at issue, and closes as follows:

Aware of the sensitivity of certain grantee information and the potential demands on the grantee’s time and resources, my office undertook a critical review to determine precisely what information was required for us to conduct our congressionally mandated work and whether alternative means of obtaining the information would suffice. I assure you that I am ever mindful of the responsibility that come with the authority entrusted to me as Inspector General, and carefully consider all relevant factors before determining its appropriate exercise. (*Id.* & Ex. BB)

The letter does not explain, and to this day the OIG has not explained—including in its moving papers in this case—how the names, addresses and telephone numbers of at least 39,000 individuals *and their spouses* are “precisely what information was required to conduct” its investigation, why *no* “alternative means of obtaining the information would suffice,” or what “relevant factors” OIG “carefully consider[ed]” in proceeding as it has.

had OIG only wished to inquire as well-considered custom had always dictated. *Id.*

Upon review of OIG's 35 pages of ill-considered accusations, LSC's Office of Compliance and Enforcement ("OCE") found only three allegations, concerning just two specific cases out of the thousands of cases and matters that CRLA handles every year, worthy of further inquiry. Hoerger Decl. ¶106 & Ex. KK. In November, CRLA provided the Subcommittee (and OCE) with a detailed point-by-point response to the OIG's Report, and to OCE's questions based on it. Hoerger Decl. ¶107 & Ex. LL. Though OIG saw fit to include its "interim report" in its moving papers, it inexplicably omitted CRLA's response, which we strongly urge the Court to review for its showing of how dramatically far afield the OIG has wandered in so many important respects.¹¹

C. OIG Serves Its Subpoena.

On October 17, 2006, OIG served an administrative Subpoena Duces Tecum (the "Subpoena") on CRLA. Hoerger Decl. ¶109; OIG Pet. Ex. A. In addition to a few documents not mentioned in OIG's March 2006 Data and Document Requests, the Subpoena sought all the materials (other than those protected by federal attorney-client privilege or the federal attorney work product doctrine) that OIG had previously sought, including those that CRLA had previously declined to provide or had provided in redacted form.¹² *Id.*

¹¹OIG complained in its Report that CRLA had not provided it the information necessary to complete its investigation, and a month later the Subpoena here at issue followed. But nowhere in the Report did OIG explain how the materials CRLA redacted or withheld would inform its investigation. And as shown in Part II(B) below, the OIG's sweeping requests lack any reasonable tailoring to any proper investigative purpose.

¹²Unlike OIG's March 16 Data Request, which called for data from CRLA's KEMPS database for cases that were open at any time during 2003-05, the Subpoena places no temporal limits on its request for KEMPS information. This would comprise over 110,000 client records. Hoerger Decl. 103. It is not currently known whether OIG's omission from the Subpoena of any limit on the time period for KEMPS information was inadvertent or not.

CRLA responded in detail to the Subpoena on November 17, 2006. Hoerger Decl. Ex. NN. CRLA continued to object to the request for client-identifying information from its client management database because it would require CRLA to produce substantial amounts of confidential information, and to undergo an assessment of over 39,000 client files one by one. *Id.* at 4-5, 8-9. CRLA also declined to produce any previously redacted documents in unredacted form. *Id.* ¶112.

On March 26, 2007, OIG filed its Petition For Summary Enforcement of the Subpoena.

I. THE SUBPOENA IMPROPERLY SEEKS CONFIDENTIAL STRATEGY AND PLANNING MATERIALS PROTECTED BY FEDERAL AND STATE WORK-PRODUCT PRIVILEGES.

OIG challenges CRLA’s decision to redact certain strategy and planning documents on the basis of the work product doctrine. OIG Br. at 17, 20-21. There are two main categories of documents in dispute: (1) employee work plans for CRLA’s Modesto office and (2) training and strategy records from CRLA’s internal substantive practice groups, or “task forces.” Hoerger Decl. ¶¶61-70.¹³ CRLA briefly describes these document categories and the scope and basis for its redactions below; representative examples of redacted documents are provided and discussed

¹³CRLA also asserts work product with respect to case summaries that were part of engagement letters created in its work with the California Affordable Housing Law Project, a non-profit law firm with which CRLA often co-counsels. Hoerger Decl. ¶72. As to another category of documents for which CRLA asserted work-product protection—strategy “white papers” prepared for CRLA’s 2003 Asilomar Conference—CRLA discovered in the course of preparing its opposition that these documents were disseminated more broadly than it originally believed. Accordingly, CRLA withdraws its objection with respect to those documents, and will produce the 2003 Asilomar documents in unredacted form. Some months after serving its March 2006 Document Request, OIG clarified that, in addition to papers from the 2003 Asilomar Conference, its request was also directed to certain roughly annual program-wide staff training conferences that are sometimes held at Asilomar, a broadening OIG incorporated into the Subpoena in October 2006. *See, e.g.*, Subpoena Request at 7 (requesting conference materials with regard to “CRLA Asilomar *and/or annual conferences*”). CRLA has not yet redacted or produced these latter documents because, before doing so, CRLA seeks guidance from the Court based on its redaction practices on the similar documents discussed in this section.

in more detail in Mr. Hoerger's Declaration. Hoerger Decl. ¶¶62-70 & Exs. P, Q, R, S & T.

A. The Federal Work-Product Doctrine Protects Documents Prepared In Anticipation Of Litigation, Including General Litigation Strategy Documents, And California's Work-Product Doctrine Extends Even More Broadly To Attorneys' Confidential Impressions, Opinions And Strategic Thinking Outside A Litigation Context.

The federal work-product doctrine protects written material lawyers prepare "in anticipation of litigation." Fed. R. Civ. P. 26(b)(3). "By insuring that lawyers can prepare for litigation without fear that opponents may obtain their private notes, memoranda, correspondence and other written materials, the privilege protects the adversary process." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998).¹⁴ A document qualifies for the federal work product protection if "the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* (quoting *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987)).

Documents reflecting attorneys' litigation strategies in connection with specific, active cases are at the core of the work product protection. However, a document need not relate to specific claims to be protected. For example, documents that discuss attorneys' plans and tactical advice with regard to possible future litigation, including general species of claims, are also protected as work product. *See, e.g., Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 126-28 (D.C. Cir. 1987); *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). *Delaney* held that the work product privilege protected IRS attorneys' memoranda discussing the possible

¹⁴As the Supreme Court seminally observed: "Were [work product] materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), *aff'd*, 170 F.2d 327 (3d Cir. 1948).

legal ramifications of a program the IRS was considering. 826 F.2d at 127-28. The memoranda were not directed at specific claims, but instead contained IRS attorneys' assessment of the "legal challenges likely to be mounted against [the] proposed program, potential defenses available to the agency, and the likely outcome." *Id.* at 127. *Schiller* held that work product protected documents prepared by the NLRB discussing general litigation strategies for use in cases under the Equal Access to Justice Act ("EAJA"). 964 F.2d at 1208. The documents that qualified for work-product protection contained, *inter alia*, "tips for handling unfair labor practice cases that could affect subsequent EAJA litigation . . . advice on how to build an EAJA defense and how to litigate EAJA cases . . . and instructions on preparing and filing pleadings in EAJA cases. *Id.*¹⁵

California work product doctrine is even broader: Statutorily, "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or thoughts is not discoverable *under any circumstances.*" Cal. Code Civ. Proc. §2018.030(a) (emphasis added).¹⁶ Attorney work product other than such "opinion" work product is also protected from discovery unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery or will result in an injustice. *Id.* at §2018.030(b). Unlike the federal work-product privilege, the California work-product privilege is not limited to the litigation context, but applies whenever a

¹⁵Both *Delaney* and *Schiller* concerned information requested under the Freedom of Information Act that the agency refused to produce under Exemption 5 to FOIA, which insures that members of the public cannot obtain through FOIA what they could not ordinarily obtain through discovery undertaken in a lawsuit against the agency. *See, e.g., Schiller*, 964 F.2d at 1208 (information prepared in anticipation of litigation falls within the attorney work-product privilege and, therefore, within Exemption 5).

¹⁶California work product doctrine is relevant to this federal court action to enforce OIG's administrative subpoena because, unlike auditors for other federal agencies, OIG has a statutory duty to respect attorneys' state-law professional responsibilities and to act in a manner consistent with them. *See* Parts I(C), III(A), *infra*.

lawyer is acting in his or her capacity as a lawyer. *State Comp. Ins. Fund v. Superior Court*, 91 Cal App. 4th 1080, 1091 (2001); *County of Los Angeles v. Superior Court*, 82 Cal. App. 4th 819, 833 (2000).

B. CRLA Has Carefully Identified The Specific Portions Of The Documents It Has Redacted On The Basis Of Federal Work Product, And OIG Improperly Fails To Specify Any Particular Redactions As Improper.

OIG does not challenge CRLA’s right to withhold documents, or portions of documents, on the basis of the federal work-product doctrine. Nonetheless, OIG argues in sweeping terms that CRLA’s federal work-product designations are suspect in their entirety, *yet does not challenge a single specific redaction in its moving papers*. OIG argues that CRLA has failed to provide a particularized basis for its claims of privilege (OIG Br. at 21), but that is simply incorrect: CRLA painstakingly reviewed each disputed document, and laboriously made specific and detailed redactions of the privileged portions of the documents by hand, noting the basis for each redaction, one by one, on the face of the document. Hoerger Decl. ¶¶61-70 & Exs. P, Q, R, S & T. The basis for those objections was also elaborated in memoranda provided to OIG. *Id.* Exs. I & O. The redactions and memoranda comprise a privilege log that fully satisfies CRLA’s burden to specifically identify and support its objections. The burden is now on OIG to challenge specific objections. Because OIG has not even attempted to meet that burden in its moving papers, OIG’s challenge to CRLA’s federal work-product designations fails.¹⁷

The documents that CRLA redacted for work-product that are in dispute are these:

Modesto Office Employee Work Plans: CRLA attorneys and Community Workers are required to prepare periodic written “work plans” describing their current and anticipated

¹⁷Moreover, the Court should reject as untimely any attempt by OIG to raise any new challenge for the first time in its reply brief, when CRLA would not be entitled to respond.

advocacy activities. Hoerger Decl. ¶¶62-63 & Ex. O. The Subpoena requests such plans for employees in CRLA's Modesto office. The work plans contain information including (1) client name, (2) brief description of the matter, (3) strategic goals, (4) procedural history of action taken to date and in the previous six months, and (5) specific future actions to be taken. *See id.* Ex. P (sample work plan).

CRLA produced all the responsive work plans to OIG, but redacted advocates' descriptions of cases, case objectives and actions to be taken going forward where justified by the federal and/or California work product doctrines. Hoerger Decl. ¶64; Ex. O at 3-4 (describing work product redactions); Ex. P.¹⁸ The redacted portions contain strategic information concerning goals and objectives in particular cases, and specific steps to be taken with regard to those cases. *See id.* Ex. P. This is core work product under any definition.

Internal practice group records: CRLA assembles internal practice groups, called "task forces," composed of attorneys and community workers in various CRLA offices who practice in a particular subject area (such as labor and employment or housing). Hoerger Decl. ¶65. These activities allow CRLA advocates from different locations and with different levels of experience to share strategies, tactics and ideas to advance the interests of CRLA's clients in litigation, administrative proceedings and other advocacy. *Id.*

CRLA produced more than 500 pages of documents relating to these practice groups' activities. Hoerger Decl. ¶66. Portions of the documents discussing active or contemplated

¹⁸CRLA also redacted a few entries in the work plans that disclosed confidential communications with a client and redacted the client's name on 17 work plans because the client's identity and the fact of CRLA's representation had not been made public or because representation of the client occurred within an administrative proceeding pursuant to which the party's identity and participation in the proceeding is confidential under applicable federal or state statutory law. Hoerger Decl. Ex. O at 4-5. These client identities are protected for the reasons discussed in Parts II and II(A).

litigation—including legal questions and developments relevant to that litigation—were redacted on the basis of the federal and California work product privilege. *Id.* ¶¶66-70 & Exs. Q, R, S & T.¹⁹ The redacted portions discuss current and future litigation priorities and tactics, and are an integral part of CRLA’s process of designing and executing litigation strategies and organizing resources to carry them out effectively. As such, they would provide an adversary with a blueprint for CRLA’s litigation strategy at both a macro and micro level and must be considered, like the documents in *Delaney* and *Schiller*, to be prepared in anticipation of litigation.²⁰

In summary, all the passages CRLA has redacted as federal work product discuss internal analyses of strategic and tactical questions related to pending or anticipated litigation—ranging from whether it would be fruitful to pursue a particular kind of claim or defense to how best to structure an argument or advance a claim or defense in a specific case. It is the kind of strategic thinking and planning that private-sector law-firm practice groups proactively invest in every day to serve and protect their clients’ interests. This effort is no less protected here because CRLA’s clients are indigent, and their representation is funded in part by LSC.

¹⁹Attorney analysis and proposed plans of action for non-litigation advocacy were redacted as California work product only. *Id.*

²⁰CRLA’s fear that turning over work product to OIG could lead it to fall into the hands of its adversaries is not unfounded. As discussed above, OIG refused to guarantee that information from its investigation would not be distributed to third parties, in particular Congress, and Rep. Nunes, the Congressman who instigated the current “investigation,” and who is a political ally of the dairy industry, a repeat litigation adversary in recent years. And under California law at least, attorneys can not “selectively disclose” privileged materials to one party without waiving the privilege more generally, including its litigation opponents. *McKesson HBOC, Inc. v. Sup. Court*, 115 Cal. App. 4th 1229, 1238-41 (2004). This is true even if the disclosing party made the disclosure to a government agency investigating it. *Id.* (company waived work product privilege by sharing documents with SEC for use in SEC’s investigation of company).

C. OIG’s Blanket Objection to CRLA’s California Work-Product Designations Is Unfounded.

As discussed above, the California work-product privilege is broader than the federal work-product privilege: It protects *any* writing containing the mental impressions, conclusions or opinions of an attorney, whether prepared in anticipation of litigation or not. Cal.Code Civ. Proc. §2018.030(a); *State Comp Ins. Fund v. Superior Court*, 91 Cal App. 4th 1080, 1091 (2001). CRLA redacted portions of documents that discuss both litigation and non-litigation strategy on the basis of the California work product protection.²¹

OIG does not claim that CRLA has misapplied California work-product doctrine to any specific redaction made on that basis. Instead, it argues that CRLA may not rely on California work product at all because administrative subpoenas are governed solely by federal law. OIG Br. at 17. While true for most federal agencies, it is not true for LSC or its OIG because, unlike other agencies, *LSC is statutorily required to respect attorneys’ professional responsibilities under state law*. 42 U.S.C. §2996e(b)(1)(B)(3) (LSC “shall not . . . interfere with any attorney in carrying out his professional responsibilities to his client . . . [and] shall ensure that its activities are carried out in a manner consistent with attorneys’ professional responsibilities”); *see United States v. Legal Servs. For New York City* (“LSNYC II”), 249 F.3d 1077, 1082-83 (D.C. Cir. 2001) (Section 2996e(b)(1)(B)(3) applies to OIG and imposes obligations on OIG with regard to both privileged and secret materials). Thus, through the operation of Section 2996e(b)(1)(B)(3), the scope of OIG’s Subpoena *is* limited by this state law.²²

²¹CRLA’s redactions related to pending or contemplated litigation were made under both the federal and California work product privilege. The California privilege would only be relevant—and would still protect—these redactions if the Court determined the underlying information was not prepared in anticipation of litigation.

²²In *LSNYC II*, the court held that OIG had a right to compel Legal Services of New York (continued . . .)

Here producing the redacted information would violate CRLA attorneys' duties of professional responsibility. Not only do many of the redacted passages reflect strategic and tactical analyses of ongoing cases, other passages contain sensitive information about CRLA's litigation tactics and priorities which, like similar internal discussions at any other firm, contain attorneys' mental impressions and opinions about how to best achieve the firms' *and their clients'* litigation goals and, as such, are protected from disclosure. Allowing this information to be disclosed would unfairly advantage CRLA's current and prospective adversaries in litigation, and would dissuade CRLA from engaging in valuable planning and cross-pollination activities in the future.

D. OIG Has Demonstrated No "Substantial Need" For The Work Product Materials Withheld By CRLA.

In a footnote to its opening brief, OIG correctly notes that documents subject to work-product protection can become discoverable upon a showing of "substantial need." OIG Br. at 20 n.7. However, OIG has made no such showing; indeed, the vague and generalized investigative purposes that OIG puts forward as a justification for its need are not proper or can be adequately served without recourse to the requested strategic information. *See* Part II(B)(2), *infra*. Moreover, even if OIG could show some need, the disputed redacted information—CRLA attorneys' strategic thinking on important issues related to CRLA's on-going and prospective

(. . . continued)

to produce the names of some of its clients, despite those attorneys' duties of professional responsibility. 249 F.3d at 1082-83. However, this holding was based on a specific statutory exception to OIG's Section 2996e(b)(1)(B)(3) obligations (Section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996) that explicitly permitted OIG, on the facts of that case, to seek *client names* except where subject to the attorney-client privilege. No corresponding statutory exception, under Section 509(h) or any other provision, exists for the work product material that CRLA seeks to protect here. OIG is simply overreaching in suggesting otherwise. For this reason and all the many other reasons explained by the Attorney-Intervenors (at 27-29) none of the issues presented in this Memorandum are resolved by *LSNYC* or its companion, *Bronx Legal Services*.

litigation—is subject to a heightened standard of protection because it is “opinion” work product that would require an “extraordinary” showing of need OIG has altogether failed to make. *See* Fed. R. Civ. P. 26(b)(3) (“the court shall protect against disclosure of . . . mental impressions, conclusions, opinions, or legal theories”); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) (“[O]pinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances . . . where weighty considerations of public policy and a proper administration of justice would militate against nondiscovery.”).

II. BY REQUIRING COMPREHENSIVE PROGRAM-WIDE REVIEW OF TENS OF THOUSANDS OF CLIENT FILES, THE SUBPOENA IMPOSES PARALYZING FINANCIAL AND LOGISTICAL BURDENS THAT ARE UNTAILORED TO ANY LEGITIMATE INVESTIGATIVE PURPOSE.

The OIG agrees that it is not statutorily entitled to, and does not seek, client-identifying material protected by the attorney-client privilege.²³ CRLA has the legal duty, and its clients have the right, to withhold such privileged materials. OIG inaccurately describes CRLA as improperly asserting a “blanket” claim of federal attorney-client privilege as to all the client-identifying information it has demanded, and argues that CRLA must make a particularized showing as to every single identity it seeks to protect before this Court can grant it any relief. OIG Br. at 18-19.

But CRLA has never asserted that *all* of the client-identifying information OIG demands is privileged, just as OIG does not seriously contend that *none* of that information is privileged. Even if only 5% of the client identities at issue here were privileged—and the sample review that

²³The appropriations rider on which OIG relies for access to such information, Pub. L. Nos. 104-134, 110 Stat. 1321 §509(h) (1996), provides that recipients of LSC funds shall make available to auditors or monitors of the recipient certain information, including “client names . . . except for reports or records subject to the attorney-client privilege.” Because the scope of California’s attorney-client privilege is similar to federal law’s for this purpose, we rely on federal authority.

CRLA conducted at LSC’s instruction (discussed in the Facts and the following section) indicates that the percentage is actually far higher than that—there are literally *thousands* of client identities that must be culled out and withheld. And the problem that OIG has created and refused to address is that it has insisted, by the indiscriminate breadth and scope of its demands, in constructing a “haystack” so unnecessarily enormous that it effectively makes the very significant number of privileged “needles” scattered through it inaccessible without an expenditure of time, effort and resources that would be crippling. The OIG’s continuing refusal even to discuss tailoring its demands to its legitimate practical needs so that the effort to locate and protect client identities that are privileged is not overwhelmingly (and unnecessarily) onerous exceeds the scope of its subpoena power, and is itself an independent wrong that justifies an immediate remedy.

A. Identifying Information For Substantial Numbers of CRLA Clients And Applicants Is Subject To The Federal Attorney-Client Privilege.

The OIG summarily dismisses as “generic,” “speculative and dubious” CRLA’s assertion that disclosure of its clients’ identities would in particular circumstances be tantamount to revealing their confidential communications, and would subject them to potential firings, evictions or physical harm from their potential litigation adversaries. OIG Br. at 19. Not only was such a showing included in the materials CRLA supplied to LSC and the OIG in connection with the sample file review LSC requested to determine the burdens of compliance (*see* Hoerger Decl. Exs. GG, II at 9-11), CRLA and the Attorney-Intervenors here provide copious and detailed evidence substantiating that explanation, including multiple declarations from knowledgeable legal aid lawyers.

The Attorney-Intervenors’ briefing (at 10-16) provides a careful analysis of the federal attorney-client privilege’s application to those facts. To avoid repetition, we incorporate that

discussion by reference here.²⁴ That analysis shows that the circumstances under which potential clients approach CRLA for assistance, coupled with the other engagement-specific information OIG has demanded, will with some frequency leave their identities attorney-client privileged. And given that *some* of these identities will prove to be protected, *all* of the demanded records will have to be reviewed and analyzed to determine which must be withheld.

B. The OIG Has Exceeded Its Subpoena Powers By Failing To Reasonably Tailor The Subpoena To Legitimate Investigative Purposes, And By Imposing Burdens That Unduly Interfere With CRLA's Operations And The Rights Of Its Clients.

An administrative subpoena is unduly burdensome if “compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” *Federal Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc). In addition to the degree of disruption compliance may impose, “in determining whether a burden is due, courts often examine [a subpoena’s] tailoring to the purpose for which the information is requested—that is, its relevance.” *United States v. Legal Servs. For New York City (“LSNYC II”)*, 249 F.3d at 1084 (D.C. Cir. 2001).²⁵ The OIG transgresses both these limitations on its subpoena power:

²⁴In addition to the specific references to the Attorney-Interveners’ briefing and evidence made throughout this Memorandum, CRLA hereby generally joins in the Attorney-Interveners’ brief and relies on their evidence in support of its Opposition.

²⁵*See also Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 209 (1946) (noting that the reasonableness of a subpoena “comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry”). In *Adair v. Rose Law Firm*, 867 F. Supp. 1111 (D.C. Cir. 1994), the court found it proper to modify a subpoena to protect the confidentiality of a law firm’s clients where the Inspector General of the Resolution Trust Corporation’s subpoena for client names in connection with an investigation of the law firm risked disclosure “of the names of clients who have themselves done nothing wrong, whose engagement of the [law firm] is wholly irrelevant to [the legitimate purposes of the IG’s investigation], and who had an expectation of privacy when they chose the law firm.” *Id.* at 1119-20. The Inspector General—who was investigating conflicts of interest—acknowledged that “the vast majority of the clients on [the law firm’s] client list will not present
(continued . . .)

1. The Subpoena Imposes Crippling Financial And Logistical Burdens.

Compliance with the OIG's Subpoena would require CRLA to review at least 39,000 individual client and applicant files to determine whether the information was already disclosed and the nature of the representation was such that the client's identity was privileged. And that is only if the request is deemed limited to the 2003-05 time period specified in the OIG's original informal administrative request. If the OIG is now demanding the production of client identity information unlimited by date, as the Subpoena itself may ambiguously suggest, there are well over *100,000* client files subject to review.

At LSC's request, in the fall of 2006 CRLA performed a sampling test to estimate the effort and burden imposed by the OIG's demands. *See* Hoerger Decl. Ex. FF. A review protocol was carefully constructed taking into account the different kinds of cases and matters CRLA undertakes and the bases on which they are undertaken and resolved. *See id.* Ex. GG. Over 500 files were randomly selected from three CRLA offices and reviewed by experienced litigators (one on CRLA's staff, two hired on a contract basis) according to the protocol. *See id.* Ex. II. The results were then used to estimate the financial and practical costs of a full-scale review. *See id.* Ex. II at 13-17; Ex. JJ.

Significantly, the sample review suggests that a substantial minority of the clients' identities at issue—thousands of the requested records—would be protected by the attorney-client privilege, and a majority of the identities would be protected by the attorneys' state-law duties of confidentiality and privacy. *See id.* Ex. II at 8-13. But whatever portion of files

(. . . continued)

potential or actual conflicts"; the court's concern stemmed from its judgment that the names of this vast majority of clients were therefore irrelevant to the Inspector General's investigation. *Id.* at 1120. The *Adair* court held that, despite its concerns, it did not have to modify the IG's subpoena because the IG had voluntarily undertaken to limit the subpoena in a manner that addressed the Court's confidentiality concerns. *Id.* at 1121-22.

eventually are determined to be privileged, obviously *some* client identities will prove to be protected.

And given the sheer volume of client information requested, it should surprise no one that the burdens of privilege review would be overwhelming. The sample data show that review of the roughly 39,000 client files from the three-year period specified in the OIG's earlier informal request alone would require over 3,200 hours of experienced attorney time for review, as well as 4,800 to 7,800 hours of staff time for records handling and support.²⁶ *See id.* Exs. II at 16-17 & Ex. JJ at 4-9. If the review is accomplished by CRLA employees, the cost—at the very low

²⁶OIG seems to suggest these figures are not appropriate for two reasons, neither of which has any support in the record or reality. *First*, OIG claims (at 12) that the production of client identifying information will not be burdensome because it exists in electronic form. This misses the point: The burdens of complying with the Subpoena do not come from gathering the electronic client-identifying information as such, but from the *need to perform a detailed review* of each client's electronic *and physical paper* files (retrieved, one by one, from on-site file cabinets or, in some offices, off-site storage facilities) to determine the nature of the consultation, ensure the electronic information was properly coded, evaluate the potential privilege claim, and determine whether confidentiality in that particular matter had been preserved—for example, whether or not a demand letter or other public disclosure of client identity had been authorized (which would waive confidentiality of the client's identity); or conversely in litigated cases whether the proceeding was nevertheless statutorily confidential (as certain benefits and other administrative proceedings are), or under seal (as many proceedings involving minors are). *See* Hoerger Decl. Ex. GG at 14-33 (detailing different review criteria for numerous different kinds of matters); Ex. II at 9 (“individual review of each file is needed because CRLA does not routinely track, either on paper or in electronic form, whether client identity is privileged . . .”). Even at just a few minutes' review time per file, the requirements for 39,000 files—not to mention over 100,000—quickly become overwhelming.

Second, OIG argues (at 13 & n.6) that CRLA overestimates the burden of reviewing client files because its file review protocol also tested whether the files were subject to state-law duties of confidentiality and client privacy which, according to the OIG, are inapplicable here. This argument is incorrect for two reasons: (1) these state law duties are relevant to what information can be properly be withheld (*see* Part III); and (2) in all events, CRLA's sampling data and reports make clear that it does not take significantly more time to review a file for both federal attorney-client privilege and state-law confidentiality concerns than it takes to review for attorney-client privilege alone. *See* Ex. II at 3-5 (75%-90% of review time spent on attorney-client privilege). In short, while the OIG may quibble about the amount of time and effort required for privilege review, the order of magnitude of this immense task is beyond any serious question.

salaries typically paid to CRLA attorneys and staff—will be in the range of \$270,000-\$360,000. *Id.* Ex. JJ at 9. If contractors from the private sector are used, the time for review will increase because the reviewers lack the institutional knowledge of CRLA’s staff, and the cost could easily exceed \$1 million—some 10% of CRLA’s entire annual budget, 40% of which itself comes from sources other than LSC. *See id.*; Ex. II at 4 n.1, 16; Ex. JJ at 2.

Moreover, the review will seriously and pervasively disrupt CRLA’s operations for an extended period of time. Because most of CRLA’s field offices are very small—one or two attorneys and support staff—the time and effort necessary to retrieve, review and catalogue hundreds or thousands of files per office will effectively derail the program’s mission of providing legal services to the poor. To avoid a complete shutdown and collapse of the program, the review process will take close to a year and a half. And even spread out over that period, the review will require at least eight field offices simply to close for weeks or months to effect the demanded review, while numerous other offices suffer significantly disrupted operations for extended periods while their staffs divide their attention between service to their clients and obeisance to the OIG . *See* Ex. II at 16-17; Ex. JJ at 4-5.²⁷ And these financial and logistical burdens will simply multiply if OIG eventually informs us that the Subpoena actually calls for the over 100,000 client identities unlimited by time to which it ambiguously may refer.

Surprisingly, OIG dismisses these concerns (at 13), arguing that “courts have enforced

²⁷There is some degree of tradeoff involved in using outside personnel. Use of private-sector contractors would lessen disruption to CRLA’s operations as more of its own personnel were actually permitted to do their jobs, but would multiply the cost of the effort. This is so both because outside contractors lack institutional knowledge that would make review proceed more quickly, and because they likely would be several times more expensive per hour (for more hours) than CRLA’s staff. *See* Hoerger Decl. Exs. II & JJ. And the money has to come from somewhere: If CRLA must pay contractors to accomplish a privilege review of the magnitude demanded, it will be unable to pay an appreciable number of its own staff to do their jobs, once again resulting in serious and pervasive operational disruption.

subpoenas imposing far greater burdens.” But for obvious practical reasons, the legal standard for undue burden measures not the absolute number of dollars or person-hours required, but their practical effect: whether “compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” *Texaco*, 555 F.2d at 882. The OIG relies principally on *United States v. Firestone Tire & Rubber Co.*, 455 F. Supp. 1072, 1083 (D.C. Cir. 1978), which enforced an agency’s information request related to the safety of Firestone’s tires over Firestone’s objection that compliance would require 100,000 man hours and \$2 million. But unlike CRLA, which is a small law firm with only 130 total employees, Firestone is a large, publicly traded, multinational corporation, with tens of thousands of employees, hundreds of millions of dollars’ worth of assets, and manufacturing and distribution facilities spread across the globe. And unlike *Firestone*, where the administrative burden of retrieving information did not directly interfere with the company’s core business—manufacturing tires—here the privilege review required for compliance with the Subpoena will have to be performed by the very CRLA attorneys that provide legal services to the poor. In short, the OIG’s suggestion that the burden on Firestone was “far greater” than the one OIG seeks to impose here is ludicrous.²⁸

²⁸Unlike CRLA, Firestone made no relevance objection, and the court held in dicta that all the information NHTSA sought was relevant to its safety inquiry. *Id.* at 1083-84. The other cases OIG cites don’t help it either. In *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371 (2d Cir. 1970), the issue of burden was apparently not raised in the trial court and was not considered on appeal. The Second Circuit noted that, on remand, the subpoena recipient was entitled to ask the district court for protective limitations if production of materials sought by the SEC would “threaten any unusual disruption of [the party’s] normal operations.” *Id.* at 1381. In *Okla. Press Club v. Walling*, 327 U.S. 186 (1946), the subpoena recipient made no attempt to show undue burden, arguing only that the subpoena would subject it to “inconvenience, expense and harassment.” *Id.* at 217. The Court found this to be an insufficient showing to stop the subpoena from being enforced. *Id.* Here, by contrast, CRLA has made a strong showing that its operations would be drastically impaired by the enforcement of the OIG’s subpoena.

2. The Subpoena's Burdens Are Not Reasonably Tailored To Any Legitimate Purpose.

Given these overwhelming burdens, it might well be asked what purpose justifies this extraordinary undertaking, and how the materials demanded are expected to serve that purpose. The OIG summarily suggests that the information sought in its Subpoena is “critical” to investigating allegations of “conducting work that appears to be impact-oriented”; “disproportionately focusing resources on Latino and farmworker issues”; “litigation activities involving no clients or clients represented by other counsel”; “inappropriate lobbying activities”; and soliciting clients. Ptn. ¶11; OIG Br. at 6, 11; Tarantowicz Decl. ¶12. The OIG’s moving papers offer *no* explanation of how disclosing tens of thousands of client identities is related to any of these subjects, let alone how it is tailored in scope, focus and process to their particular needs.²⁹ We examine the purported justifications in turn:

- **Conducting “impact-oriented” work.** As the OIG itself conceded in its Report to Congress: “it is important to note that a[n LSC] grantee bringing a case of a particular client that may also have broader reaching effects, thus making it an ‘impact’ case, *does not violate the LSC regulations.*” Tarantowicz Decl. Ex. 3 at 4 (emphasis added). In fact, “impact” work is not only encouraged by the American Bar Association’s “Standards for the Provision of Civil Legal Aid” (Hoerger Decl. Ex. U at 20), it is specifically funded and required by the terms of some of CRLA’s non-LSC grants (*id.* at 17-18), and *is affirmatively encouraged—indeed, expected—by LSC’s own policies and Performance Criteria.* *Id.* ¶108 (statements of LSC officers); Ex. MM at 15-16, 28 (congressional testimony of LSC President Helaine Barnett).³⁰ OIG thus seems to be substituting its

²⁹Once again, OIG should not be allowed to conduct enforcement by ambush and offer in its Reply new justifications not tendered with a fair opportunity for response in its motion.

³⁰The OIG’s papers (at 2) also refer to a purported ban on grants “to corporations expending 50 percent or more of their resources or time litigating issues ‘in the broad interests of a majority of the public,’” citing 42 U.S.C. §2996f. If this is supposed to be a ground for the OIG’s investigation, the citation is irresponsible. Section 2996f(b)(5) provides that LSC funds may not be used to “make grants to or enter into contracts with *any private law firm* which expends 50 percent or more of its resources and time litigating issues in the broad interests of a majority of the public” (emphasis added). As the legislative history of the provision makes clear, the term “private law firm,” which OIG conveniently omitted from its quotation of the statute, was narrowly intended to refer to law firms as “one which receives a majority of its revenues (continued . . .)

judgments about “proper” grantee priorities for the agency it is supposed to be serving, which is no proper basis for “investigation.” *Burlington N. R.R. Co. v. Office of Inspector General R.R. Retirement Bd.*, 983 F.2d 631 (5th Cir. 1993).

And even if some “investigation” of “impact” work were proper, the OIG offers no explanation how it would be served by the disclosure of tens of thousands of individual client names. “Impact” work by the OIG’s own definition quoted above involves “a case of a particular client that may also have broader reaching effects” That involves examining the substance of and advocacy in the case, not the “particular client’s” name and address. Nor is the OIG plausibly interested in reviewing 40,000 (or over 100,000) specific client names even if they had some tenuous relevance to “impact” work; a vastly smaller sample would suffice.

- **“Focusing resources on Latino and farmworker issues.”** Leaving aside the dismayingly racist undertones of this accusation, as a matter of agency policy LSC specifically encourages programs to devote resources to “problems or issues that uniquely or disproportionately affect distinct and significant segments of the eligible population, such as . . . farmworkers, ethnic and racial groups, . . . immigrants, and people who are not able to communicate well in English” Hoerger Decl. Ex. LL at 10, 29-30 (quoting LSC Performance Criteria). And services to farmworkers and non-English-speakers are also required by three of CRLA’s major non-LSC funding sources, which collectively provide 30% of its budget. *Id.* at 25-26, 30. As LSC’s President recently confirmed to Congress, LSC encourages and expects programs to formulate priorities focusing on “major segments” of the “low-income population” and “vulnerable clients”; and LSC specifically has “no problems . . . in terms of the population that [CRLA] deals with in terms of different ethnic groups and things like that.” *Id.* Ex. MM at 15-17, 28. Once again OIG appears to be attempting to dictate policy not within its purview to make.

Moreover, as CRLA has explained to Congress, case statistics already in LSC’s and OIG’s hands show that Latinos are represented in CRLA’s clientele proportionally to their concentration in the poverty population in CRLA’s service area. *Id.* at 26-27 & fn.27. Indeed, CRLA has already disclosed to OIG the data associated with all 39,000 client files open during 2003-05 describing the client’s race. Smith Decl. ¶20. Obviously the clients’ *names* and *addresses* are no reliable indicator of whether they are Latino or farmworkers. Revealing tens of thousands of client identities thus would tell the OIG nothing about what “resources” were focused on “Latino and farmworker issues.”

- **“Litigation activities involving no clients or clients represented by other counsel.”** This is more illicit policymaking in investigatory clothing. Substantial amounts of activity involving no particular client—including community education and outreach as well as

(. . . continued)

from retainers or fees of private clients, and therefore, no current recipient should be harmfully affected by this provision.” H.R. Rep. No. 93-247, Legal Services Corporation Act of 1974, P.L. 93-355, *reprinted in* 2 U.S. Code Cong. and Admin. News (1974), at 3881-82. In short, that statute has no application to CRLA.

internal strategic planning and priority setting—is expressly authorized and encouraged by LSC regulation. 45 CFR 1638.4(a); Hoerger Decl. Ex. LL at 31-36; *id.* Ex. MM at 20. CRLA’s non-LSC funding also properly requires work, such as community education and field monitoring for compliance with worker-safety laws, not focused on a particular client. *Id.* Ex. LL at 16-18, 33. Similarly, co-counseling with private counsel is recognized by LSC regulation and policy statements as permissible and appropriate, including as a means of meeting statutory obligations to involve local members of the private bar in legal aid activities (referred to in the LSC Act and regulations as “private attorney involvement” or “PAI”). *See id.* at 47-49 (citing 42 CFR Part 1614, LSC Program Letter No. 97-1 and LSC Office of Legal Affairs external opinion No. EX-2005-1003 (Dec. 16, 2005)). Indeed, during OIG’s 40-month “program integrity audit” that finally closed in 2004, OIG comprehensively reviewed CRLA’s co-counseling practices and documentation—and found no improprieties of any kind—all without the need to force disclosure of any confidential or privileged client identity. *Id.* ¶35; Ex. LL at 49. Once again, disclosure of tens of thousands of client names and addresses has no discernible connection to scrutinizing matters in which there is *no* identified client, or in which the client is also represented by other counsel.³¹

- **“Inappropriate lobbying activities.”** It is undisputed that CRLA interacts with a number of state governmental agencies as part of its legal services work and its non-LSC-funded projects. Although OIG apparently believes some of these activities may be proscribed (*see* Tarantowicz Decl. Ex. 3 at 21-27), that view is unsupported by governing regulatory language (*see* Hoerger Decl. Ex. LL at 36-42); and LSC itself, upon reviewing OIG’s allegations, did not find evidence of any violation in this regard. *Id.* Ex. KK. Disclosure of thousands of client identities will not advance OIG’s understanding of the proper interpretation of any statutes and regulations at issue, nor will disclosure of any particular client’s identity help anyone determine if improper lobbying was done on his or her behalf.
- **Solicitation.** In responding to OIG’s “interim report” to the congressional subcommittee, LSC raised solicitation concerns regarding two specific cases out of the thousands CRLA handles every year. LSC’s president has since represented to Congress that LSC does not “believe it’s a widespread practice” at CRLA. *Id.* Ex. MM at 18. In all events, once again disclosure of 40,000 client identities would tell the OIG nothing about whether the clients were solicited. A client’s name won’t tell OIG how the client came to CRLA in the first place. If individual client names are pertinent to this issue at all, a random sample of a tiny fraction of the total volume of files is the most that would be necessary.

In sum, no purpose on which OIG relies justifies OIG’s indiscriminate demand for tens of

³¹The same can be said about OIG’s passing references to “working a fee-generating case, seeking attorneys’ fees and associating CRLA with political activity.” Not only are these allegations legally and factually ungrounded (*see* Hoerger Decl. Ex. LL at 47-50, 51-54, 64-65), but no client name, let alone tens of thousands, would inform anyone whether these activities were being pursued. Again, the allegations concern only what CRLA personnel did or didn’t do, or the nature of a case, not the identity or characteristics of any client.

thousands of confidential client records, or forcing CRLA to spend thousands of what should be client service hours and huge sums of money sifting through those records to determine which may be privileged. Scrutiny of OIG’s justifications for its demands yields no coherent connection between the confidential information CRLA has withheld and the purposes OIG has grudgingly sketched, let alone one reasonably tailored to those purposes.

III. THE SUBPOENA IMPROPERLY DEMANDS CLIENT-IDENTIFYING INFORMATION BEYOND WHAT IS AUTHORIZED BY STATUTE AND THAT IS PROTECTED FROM DISCLOSURE BY STATE-LAW ATTORNEY DUTIES OF CONFIDENTIALITY AND CLIENT RIGHTS OF PRIVACY.

A. The Majority Of The Client-Identifying Information The Subpoena Demands Is Protected By State Law Duties of Confidentiality And Rights Of Privacy.

In addition to its duty to maintain the attorney-client privilege, CRLA has duties under California law “[t]o maintain inviolate the confidence, and at every peril to [itself] to preserve the secrets, of [its] client[s].” Cal. Bus. & Prof. Code §6068(e)(1). These duties guard clients’ rights of privacy, including rights to consult an attorney in confidence, that are enshrined in the State’s Constitution.³² As the Attorney-Intervenors’ briefing explains at length (at 16-23) and we incorporate herein by reference, these rights and duties are much broader than the attorney-client privilege, and protect client-identifying information the OIG has demanded for all the clients and potential clients who consulted CRLA in confidence and did not authorize their identities to be publicly disclosed. The sample privilege review that CRLA conducted at LSC’s request suggested that a *majority* of the client identities OIG has demanded—tens of thousands of

³²Cal. Const. Art. I, §1; *Hooser v. Superior Court*, 84 Cal. App. 4th 997, 1003, 1005-07 (2000) (protecting from disclosure under subpoena an attorney’s list of his client’s names); *Tien v. Superior Court*, 139 Cal. App. 4th 528, 531 (2006) (protecting the names of putative class members in an employment class action, because “[e]mployees may be reluctant to engage in any act their employer may perceive as adversarial for fear of retaliation. Therefore, if employees feel their employer will be informed whenever they contact an attorney suing the employer, many would be deterred from exercising their right to consult counsel”).

them—are protected by state law for this reason. Hoerger Decl. Ex. II at 8.³³

B. The OIG’s Affirmative Statutory Obligation To Ensure That Its Activities Are Carried Out “*In A Manner Consistent With Attorneys’ Professional Responsibilities*” Under State Law Must Be Construed Broadly To Preserve CRLA’s Confidentiality Obligations.

The Legal Services Corporation Act affirmatively requires LSC to “ensure” that activities under the Act are carried out “in a manner consistent with attorneys’ professional responsibilities” under state law—an obligation that Congress emphasized by repeating it no fewer than three times in a single section of the law:

“The Corporation shall not, under any provision of this title, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association (referred to collectively in this title as ‘professional responsibilities’) or abrogate as to attorneys in programs assisted under this title the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this title are carried out in a manner consistent with attorneys’ professional responsibilities.” (42 U.S.C. §2996e(b)(1)(B)(3) (emphasis added))

These obligations are equally binding on the OIG. *LSNYC II*, 249 F.3d 1077, 1082-83 (D.C. Cir. 2001) (Section 2996e(b)(1)(B)(3) applies to OIG and imposes obligations on OIG with regard to both privileged and secret materials).

³³“If [the public interest] in disclosure of private information [is] found to be ‘compelling,’ the individual’s right of privacy must give way and disclosure will be required.” *Hooser*, 84 Cal. App. 4th at 1004. In making this determination, courts “must consider the purpose of the information sought, the effect that disclosure will have on the affected persons and parties, the nature of the objections urged by the party resisting disclosure and availability of alternative, less intrusive means for obtaining the requested information.” *Id.* As discussed in Part II(B), *supra*, here OIG has failed to make *any* showing, let alone a “compelling” one, that the duties of confidentiality and the rights of privacy at issue here should be abrogated. The limited and conclusory purposes OIG tosses out to justify the scope of the Subpoena are completely inadequate in this regard. Some of the OIG’s proffered purposes are improper, and not one of them shows any “compelling” need for indiscriminate disclosure of tens of thousands of consultations by potential clients undertaken in confidence under risk of serious loss or harm, when examination of vastly fewer or no confidential engagements could fully serve any legitimate need.

It is fundamental that the states, not the federal government, have special authority to regulate the duties of attorneys and the rights of their clients, and to enforce their own standards of professional conduct. Thus, the Supreme Court has warned that federal courts may not “intrude into the state’s proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.” *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).³⁴ California specifically has reserved and exercised this power to regulate the practice of law. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 129 (1998) (“ ‘Regulation of the practice of law is accomplished principally by the respective states’ ”) (quoting American Bar Ass’n, Model Code of Professional Responsibility, Ethical Consideration EC 3-9).³⁵

The OIG, of course, relies on Section 509(h) of the 1996 appropriations bill to claim an absolute and unqualified power to demand “client names . . . except for reports or records subject to the attorney-client privilege”—a power that OIG asserts obviates *any* recognition or accommodation of state law protecting such names. But as the D.C. Circuit in *LSNYC II* observed, Section 509(h) is only a “limited exception” to the LSC Act’s statutory mandate of

³⁴Similarly, the Supreme Court has ruled that a federal attempt to curtail a state’s authority over who can serve as a state court judge would pose a “constitutional problem,” because a state’s choice of the qualifications of its state court judges “is a decision of the most fundamental sort for a sovereign entity.” *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991). *See also Erdmann v. Stevens*, 458 F.2d 1205, 1210 (2d Cir. 1972) (applying *Younger* abstention to a case challenging a New York state court’s ethics decision, because “if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court’s initiation of a disciplinary proceeding against its own officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness”).

³⁵*See also O'Brien v. Jones*, 23 Cal. 4th 40, 48 (2000) (“As we repeatedly have held, as the Legislature has recognized, and as respondents concede, the power to discipline licensed attorneys in this state is an expressly reserved, primary, and inherent power of this court”); *In re Attorney Discipline System*, 19 Cal. 4th 582, 589, 592-607 (1998) (California Supreme Court has “inherent and primary constitutional authority in the area of attorney discipline”).

respect for state professional responsibility laws. 249 F.3d at 1082. And rightly so: Fundamental principles of federalism dictate that “[i]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” *Gregory*, 501 U.S. at 460; *see also John v. United States*, 247 F.3d 1032, 1037 (9th Cir. 2001) (“In our federalist system of government, when Congress intends to alter the traditional balance of powers between states and the federal government, it must make its intent to do so clear in the statute”). As recently as 2004, the Supreme Court reiterated its “working assumption that federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power, in the absence of the plain statement *Gregory* requires.” *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

Nothing in Section 509(h) makes it “unmistakably clear” that the OIG’s power to obtain client names may be wielded with an absolute and unconditional disregard for legal aid lawyers’ professional responsibilities, including their duties of confidentiality (Cal. Bus. & Prof. Code §6068(e)(1)) or the absolute protection accorded opinion work product under state law (Cal. Code Civ. Proc. §2018.030(a)). Section 2996e(b)(1)(B)(3), which acknowledges the reality that the funding recipients LSC regulates are, unlike many other federal funding recipients, *law firms* with long-recognized state-regulated duties to their clients—still requires OIG to operate “*in a manner consistent with attorneys’ professional responsibilities*” (emphasis added). There is no reason to believe that this should not require OIG to seek any client names to which it is entitled “in a manner consistent” with those responsibilities—that is, with due regard for what is protected under state law, and with reasonable efforts to accommodate those protections where

feasible consistent with specific institutional imperatives. The requirements of the LSC Act and the principles of federalism embodied in the plain statement rule demand no less.

As discussed above, OIG's indiscriminate demands for confidential identifying information from tens of thousands of CRLA's clients and potential clients makes no effort to accommodate the longstanding and powerful interests reflected in California's laws of client confidentiality. These interests could easily be accommodated by rigorously focusing and limiting OIG's requests to closely tailor them to proper investigative purposes, while limiting the access demanded to non-confidential materials except where that cannot be avoided for compelling reasons, and adopting easily implemented measures to protect any confidential information that truly must be examined. *See Conclusion.*

C. OIG Improperly Seeks Information Protected By State Law That Is Beyond The Narrow Scope Of Section 509(h).

For the reasons just discussed, the incursion on state law's regulation of the attorney-client relationship authorized by Section 509(h) must be narrowly construed. In at least two respects, OIG oversteps the plain and limited terms of the statute on which it stakes its claim.

First, Section 509(h) is by its express terms limited to "*client*" names. Yet OIG's Subpoena seeks the names of persons who approached CRLA in contemplation of possible legal representation, but *never became CRLA clients*.³⁶ This happens regularly when CRLA determines during the intake process that an applicant for services (1) does not meet financial eligibility requirements, (2) is an undocumented alien and does not meet any of the limited exceptions under which a person with that status can be represented; (3) is seeking services

³⁶The duty of confidentiality, like the attorney-client privilege, takes effect as soon as someone consults an attorney in contemplation of possible representation, whether or not the attorney is eventually engaged. *See Barton v. U.S. Dist. Ct., 410 F.3d 1104-11 (9th Cir. 2005).*

beyond the scope of CRLA's current programs; (4) wishes to assert claims that it is immediately apparent lack merit so that CRLA declines the representation; or (5) during intake decides not to engage CRLA after all. *See e.g.* Smith Decl. ¶¶5-10.

Despite the fact that they do not become CRLA clients, information about many of these applicants is included in CRLA's client database. Smith Decl. ¶11. By its plain and literal terms, nothing in Section 509(h) authorizes OIG to demand the name of anyone who did not become a "client." Accordingly, Section 509(h)'s exception to OIG's duty to respect state law duties of professional responsibility does not apply to applicants who did not become clients, and OIG is bound to respect CRLA attorneys' state law duties of confidentiality towards those applicants, as well as those applicants' right to privacy under California law and the California Constitution.

Second and similarly, Section 509(h) authorizes discovery only of unprivileged client *names*; yet the Subpoena seeks other client-identifying information that Section 509(h) nowhere mentions, including addresses, telephone numbers and green card numbers. OIG is even seeking *spouses'* names (for whatever value that could possibly lend to its investigation). If Congress had wanted to authorize access to other client-identifying information, it could have done so; OIG cannot bootstrap Section 509(h)'s specific exemption with respect to client names to reach other or broader categories of information not enumerated. *See, e.g., Halverson v. Slater*, 206 F.3d 1205, 1206-7 (D.C. Cir. 2000) (under the rule of *expressio unius est exclusio alterius*, the mention of one thing in a statute implies the exclusion of other things not mentioned in the statute).

Where this additional information was revealed to CRLA in confidence and its disclosure has not been authorized, CRLA has a continuing duty under state law—which Section

2996e(b)(1)(B)(3) requires the OIG to respect—not to divulge it. *See, e.g., Matter of Johnson*, 4 Cal. State Bar Ct. Rptr. 179, 189 (Rev. Dept. 2000) (California’s duty of confidentiality prohibits an attorney from disclosing even matters of public record that the client does not authorize the lawyer to disclose). Because Section 509(h) does not authorize disclosure of this additional protected information, it is beyond OIG’s subpoena powers to demand it.³⁷

**CONCLUSION:
THE SUBPOENA’S ENFORCEMENT SHOULD BE DENIED
OR DRASTICALLY NARROWED.**

Given the overwhelming burdens imposed by the OIG’s demand, its lack of any reasonable tailoring to any proper purpose, and OIG’s repeated and categorical refusal to narrow or focus its requests to reduce that burden or avoid collision with lawyers’ duties and clients’ rights, the Court should deny enforcement of the Subpoena outright. At the very least, the Court should modify the Subpoena drastically to make it less burdensome, and to tailor its scope and reach so that compliance can be achieved, as the LSC Act requires, “in a manner consistent with attorneys’ professional responsibilities.”

“[A] district court is authorized to impose reasonable conditions and restrictions with respect to the production of the subpoenaed material if the demand is unduly burdensome.” *Texaco*, 555 F. 2d at 881. Such modifications rest within the court’s discretion. *Id.* Often they are unnecessary because the parties have already negotiated modifications rendering the burden and tailoring of the subpoena more reasonable.³⁸ But here, the OIG has refused even to entertain

³⁷This is doubly so given that OIG has provided no coherent explanation for why it needs this client-identifying information, or made any attempt to narrow its request to the objects of any specific inquiry.

³⁸*See, e.g., Texaco* at 882-83 (enforcing subpoena only after determining that information sought was directly relevant to investigation and that the parties had by negotiation narrowed the terms of the original information request to ameliorate burden); *United States v. Hunton &* (continued . . .)

the thought, leaving it to the Court to intervene. We respectfully request that it do so.

Restrictions can and should include each of the following:

1. For the reasons set out in Part I above, CRLA's claims of federal and state work-product protection have been properly made and none has been properly challenged. OIG's motion to enforce its Subpoena with respect to any materials redacted on work-product grounds accordingly should be denied.
2. If any client-identifying information is needed at all (and even that is in doubt), the number of client records to be reviewed and produced can be reduced drastically by simply limiting the demand to a random sample of manageable size that the OIG actually intends to examine, and that CRLA can more easily review for privilege before producing.
3. Client-identifying information requested should be confined to a limited number of client files specifically identified (and easily located) by other means, such as by subject matter, type of advocacy activity, or other criteria tailored to an expressly identified and proper purpose.
4. OIG should make every reasonable effort to restrict its demands to client files that are recognizable with minimal search or review effort as unlikely to be confidential or privileged. Client records should be demanded for cases or matters in which the client's identity has not already been publicly disclosed only where this is clearly necessary to a specifically articulated and compelling purpose. *See Hooser*, 84 Cal. App. 4th at 1004 (requiring "compelling" interests to overcome privacy rights).
5. Applicants for services who did not become clients should be excluded.
6. Any confidential client identity information still called for after the foregoing limitations are honored should exclude confidential information other than the client's name.
7. Any confidential client identifying information should be produced separately from the other information maintained about the client, for example by the use of a unique numerical identifier or other separating strategy, so that the two cannot be linked together to facilitate the inference of further confidential information. The OIG agreed to such a procedure in the *LSNY* case, in which verifying that client files actually corresponded to a unique existing individual was part of the OIG's audit (which it is not here). *See United States v. Legal Servs. for New York City ("LYSNYC I")*, 100 F. Supp. 2d 42, 44 & n.1 (D.D.C. 2000) (describing screening procedure that OIG implemented to prevent association of client names and problem codes prior to issuing its administrative subpoena), *aff'd*, *United States*

(. . . continued)

Williams, 952 F. Supp. 843, 855 (D.C. Cir. 1997) (concluding that subpoena from the inspector general of the Resolution Trust Corporation seeking client names was not unduly burdensome because the inspector general voluntarily limited the number of clients encompassed by the subpoena).

