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MEMORANDUM FOR JOHN A. MINTZ
Assistant Director, Legal Counsel
Federal Bureau of Investigation

This responds to your inquiry of October 15, 1980 which raised several questions about the role of the Federal Bureau of Investigation's attorneys in the field (Principal Legal Advisors) and at headquarters in the Legal Counsel Division. With respect to your basic question, we have concluded that the federal government is the client of FBI attorneys. 1/

A necessary predicate for an attorney-client relationship is an attorney. The Principal Legal Advisor in a field office who is not an attorney cannot have an attorney-client relationship with anyone. We assume, therefore, that your question refers to individuals who are working under the direct supervision of an attorney. Personnel who have not yet been admitted to the bar may assist a lawyer, but they may not perform the professional functions of a lawyer, such as conducting trials or giving professional advice to a client. ABA Canon of Professional Ethics No. 3; ABA Opinion No. 316 (1967). It is the duty of the hiring attorney "to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved." ABA EC 4-2. The Disciplinary Rules require a lawyer "to prevent his employees, associates and others whose services are utilized by him from disclosing or using confidences or secrets of a client" ABA Disciplinary Rule 4-101(D). See also 47 N.Y.S.B.J. 429 (1975) (Op. No. 393); 46 N.Y.S.B.J. 61 (1974) (Op. No. 304); Op. No. 9232, Digest of Bar Association Opinions (1975 Supp.), Informal Op. No. 1127, II ABA Informal Ethics Opinions (1975); Informal Op. 1367, ABA Recent Ethics Opinions. We

1/ The Civil Division has provided its comments on your opinion request and has arrived at the same conclusion. Memorandum to John M. Harmon, Assistant Attorney General, Office of Legal Counsel from Alice Daniel, Assistant Attorney General, Civil Division, December 15, 1980 (copy attached).

conclude, therefore, that those who have not yet been admitted to practice but who work in the FBI's legal offices should, like the FBI's paralegals, be instructed to follow the dictates of ABA Canon of Professional Ethics No. 4 and thereby respect the confidences and secrets of the client, which is, as discussed below, the FBI. If the individual is not acting as the associate of a duly licensed attorney, it is questionable whether any privilege would attach. See Dabney v. Investment Corp. of America, 82 F.R.D. 464 (E.D. Pa. 1979).

The client of a government attorney is the government -- not the government's employees. 2/ See Diamond v. City of Mobile, 6 Fed. Evid. Rptr. 109, 114 (S.D. Ala. 1978). The ABA Code of Professional Responsibility EC5-18 states: "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." Department of Justice attorneys are subject to the Code. 28 C.F.R. § 45.735-1(b) (1979). An FBI attorney, whether employed as a Principal Legal Advisor in a field office or as a staff attorney in the Legal Counsel Division, owes his professional loyalties to the FBI, not to individual FBI employees. This is so regardless of where the attorney works. The FBI should make this clear to both its attorneys and the employees with whom they work.

The decision whether to disclose information obtained from the FBI will be made by the client -- the FBI. The decision whether to waive the attorney-client privilege in a particular case is the responsibility of the FBI's management, subject to the supervisory authority of the Attorney General. If the FBI's decision to press a claim of privilege is disputed within the Department of Justice by the Civil Division or the Office of Professional Responsibility, the Attorney General or his designate would resolve the dispute. If the claim of privilege,

2/ See also C. Poirier, The Federal Government Lawyer and Professional Ethics, 60 A.B.A.J. 1541, 1543 (1974) (Federal Ethical Consideration 5-1); The Government Client and Confidentiality, 32 Fed. B.J. 71, 72 (1973) (Op. 73-1); Professional Responsibility of the Lawyer in Government Service, in Professional Responsibility of the Lawyers: The Murky Divide Between Right and Wrong 93 (Assoc. of the Bar of the City of New York) (1976).

advanced in good faith, is disputed in court, the department attorneys representing the FBI would, unless policy considerations intervened, argue the merits.

Under certain limited circumstances, an FBI employee who has been sued or subpoenaed may ask that he be represented by attorneys from the Civil Division. 28 C.F.R. § 50.15 (1979). The Civil Division undertakes a formal review of the case before it decides whether to provide assistance, and no attorney-client relationship is established until the Civil Division agrees to undertake the representation. The only exception is for "[t]he communication between the employee and an individual acting as an attorney at his employing agency, with regard to the request for representation, [which] shall be treated as subject to the attorney-client privilege." 28 C.F.R. § 50.15(a)(1) (emphasis added). We understand that such requests for representation from agents who have been sued or subpoenaed may be expected to arise infrequently in the normal course of the work of an FBI attorney.

Care should be taken that the substance of conversations involving requests for representation not be disseminated within the FBI. If the information is restricted to the attorney to whom it was communicated, the agency will remain free to take administrative action against the employee, based on independently derived information, should it desire to do so. The FBI might wish to consider designating one person within each office as the person with whom requests for possible representation should be discussed.

For further discussion of the attorney-client privilege in representational situations, we defer to the view of the Civil Division.

Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel