



# Public Interest Issues for the Private Practitioner

By Clanitra L. Stewart and Susan B. Berkowitz

*Disclaimer: This article is for educational purposes only. It is not intended to be applied to a specific set of facts and is not an exhaustive list of program rules, options or legal arguments for attorneys or other advocates.*

Private attorneys may find themselves addressing issues that were previously thought to be within the sole purview of pro bono and public interest attorneys. In the past, it was rare to find a criminal defense attorney with an intimate knowledge of subsidized housing regulations or a personal injury litigator well versed in welfare policies. However, as individuals with fewer financial resources find private representation in legal matters, a thorough attorney must be knowledgeable of not only the law surrounding the immediate legal issue, but also related areas of the law that may affect a client's life.

As daunting as it can be for a veteran attorney to face the prospect of learning an entirely new, or previously-avoided, area of the law, the frustration is minor compared to that of defending against a Bar complaint or a malpractice claim! In order to give your clients accurate and comprehensive legal assistance, you will need to know how the course of your representation in a substantive area of the law may affect a low-income client's life with respect to

another area of law. With that in mind, we invite you to sit down, roll up your sleeves and delve into the following hypothetical situations involving a few areas of public interest law that are essential knowledge for the well-rounded practitioner.

## **HYPOTHETICAL #1: THE CRIMINAL DEFENDANT**

*A client hires you for representation in a criminal case that involves allegations of drug activity. Through the course of your representation, you determine that your client receives one or more types of federal assistance. In deciding how to best represent your client, what facts should you consider?*

Understandably, the primary concern for most lawyers in this case would be to defend their client against the immediate criminal charges. However, depending on the type of charge against the client, the client and the client's family may also face the loss of essential public assistance. We address these types of assistance one by one:

### **Public and subsidized housing**

The most common types of federal rental housing assistance that a criminal attorney may need to become familiar with are Public Housing, Section 8 Project-Based Housing and the Housing Choice

Voucher Program. Each of these programs provides rental assistance to low-income individuals or households. The Public Housing and Project-Based Section 8 programs require a tenant's household to live in a particular rental unit in order to receive assistance, while the Housing Choice Voucher Program allows the tenant to access private-market rental units and still pay no more than a small amount of money as the tenant's share of the rent. The federal regulations for these three programs address what happens when a tenant or a member of the tenant's household is accused of drug-related criminal activity or other criminal activity, some of which need not occur on the rental premises to negatively affect a tenant and the tenant's family.

Public housing regulations state that part of a tenant's responsibility while in public housing is to ensure that neither he nor any member of his household engages in drug-related criminal activity on or off the premises or any criminal activity that "threatens the health, safety or right to peaceful enjoyment of the premises by other residents." 24 C.F.R. § 966.4(f)(12)(i) (2006). Note that this requirement includes more than just drug-related activity—it also includes any criminal activity that poses a threat to other tenants. Note also that the tenant is as culpable for drug-related activity *outside* the housing premises as the tenant is for drug activity thereon. *Id.* § 966.4(f)(12)(i)(B) (2006). In fact, federal regulations *require* Public Housing Authorities (PHAs)—the agencies that administer Public Housing—to terminate the lease of *any* household in which a household member engages in the aforementioned criminal activities or in which any household member is *convicted* of a felony. *Id.* § 966.4(l)(2) and (3) (2006).

The regulations for the Section 8 Project-Based Housing Program and the Housing Choice Voucher Program contain similar provisions. Under the Housing Choice Voucher Program, "drug-related criminal activity or violent criminal activity or other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents and per-

sons residing in the immediate vicinity of the premises" are a few of the potential causes for lease termination and eviction. *Id.* § 982.551(l) (2006). Both the owner of the unit (generally a private-market landlord) and the Public Housing Authority that pays the owner all or the majority of the rent for the unit (minus the tenant's share, if any) can seek lease termination or eviction for violation of these provisions. *Id.* § 982.310(c) (discussing owner termination of lease) (2006); *Id.* § 982.553(b) (discussing PHA termination of lease) (2006). Under the Section 8 Project-Based Housing Program, the same criminal activities are grounds for termination of the lease and eviction. *Id.* § 983.257(a) (2006); *id.* § 5.858 (2006); *id.* § 5.859 (2006). Other criminal activity, including committing violent crimes, being a fugitive felon or violating the terms of parole, can be found in the regulations as crimes that lead to eviction under this program. *Id.* § 5.859 (2006).

If the criminal case against your client relates to the use of illegal drugs, you should also be aware that a pattern of illegal drug use can be held against the client-tenant, and neither an arrest nor a conviction on the criminal charges is required for lease termination or eviction. *Id.* § 966.4(l)(5) (2006); *id.* § 5.861 (2006); *id.* § 982.553(c) (2006). Such crimes may also cause the denial of a future application for rental housing assistance. *Id.* § 960.205 (2006); *id.* §§ 5.854, 5.855 (2006); *id.* § 982.552 (2006).

Because the regulations for all three housing programs provide a tenant with various options to defend against the denial of admission to the housing or the termination of the tenancy (ranging from an informal review to a formal hearing), a wise attorney can, through proper investigation into the facts of the case, determine the extent to which these regulations will affect a client's circumstances. *Id.* § 966.55 (2006); *id.* §§ 982.554, 982.555 (2006). Such investigation can include questioning your client about his or her housing situation during the initial interview with the client, obtaining a release from your client to review his

or her housing file with the PHA and discussing with your client the potential effects that the outcome of the criminal case could have on the client's housing situation.

### **Temporary Assistance to Needy Families and food stamps**

A client in the situation described in Hypothetical #1 may also face the loss of vital financial and food assistance as a result of a criminal case on alleged drug activity. The Temporary Assistance to Needy Families, or TANF, program is a federal welfare program that provides monetary assistance to low-income families with children under the age of 18. 45 C.F.R. §§ 260.20, 260.30 (2006). In South Carolina, the TANF program is known as the Family Independence Program and is administered by the S.C. Department of Social Services. S.C. CODE ANN. § 43-5-1105 (1976).

Under South Carolina regulations, assistance under the Family Independence Program is not available to inmates of a correctional institution. S.C. Code Ann. Regs. 114-1130(I) (2006). That loss of benefits could have negative ramifications on the client's household. Additionally, individuals who have been convicted of offenses relating to alcohol abuse or drug abuse or who have been identified as having a drug or alcohol problem can be required to submit to a rehabilitation program and/or random drug tests. S.C. CODE ANN. § 43-5-1190 (1976).

If your client receives assistance through the Food Stamps Program, there are additional considerations to be made. As with the Family Independence Program, individuals who are currently incarcerated are not eligible for food stamps, although a new application for food stamps can be filed after the individual is released. 7 C.F.R. § 273.1(b) (2007). However, the Personal Responsibility and Work Opportunity Reconciliation Act permanently bars those individuals with drug-related felony offenses who were convicted after August 22, 1996, from receiving food stamps unless a state takes affirmative steps to permit otherwise. South Carolina has not made that election.

Individuals who are in violation of their probation or their parole are also ineligible for the Food Stamps Program. 7 U.S.C.A. § 2015(k) (2006); 42 U.S.C.A. § 608(a) (9) (2006).

### Supplemental Security Income and Medicaid

The client may also stand to lose his or her Supplemental Security Income (SSI) and Medicaid benefits. The Supplemental Security Income program (SSI) is a program run through the Social Security Administration for people who are disabled, who have limited income or who are 65 years old or older. 20 C.F.R. § 416.202 (2006). With SSI, individuals who are addicted to drugs or who are alcoholics can qualify for the program, depending on whether the addiction contributed materially to the disability and whether the individual seeks treatment for the addiction. *Id.* §§ 416.202(e), 416.936 (2006). However, those who flee to avoid prosecution, custody or confinement for a felony and those who violate a condition of their state or federal

probation or parole are ineligible for SSI. *Id.* § 416.202(f) (2006).

The Medicaid program, called Partners for Health in South Carolina, is a health insurance program that pays for health care for those who qualify. Partners for Healthy Children is the name of the Medicaid program for children. Adults who live in a household with a child and have a low income (at or below 50 percent of poverty) can qualify for the Medicaid program. The Medicaid program in South Carolina is administered through the S.C. Department of Health and Human Services. S.C. Code Regs. 126-125 (2006). Recipients of TANF and SSI are automatically eligible for Medicaid benefits, although an application must be filed by a TANF recipient in order to be enrolled. While a failure to qualify for one of these other programs generally means that an individual would fail to qualify or stop receiving Medicaid benefits, it may not bar the beneficiary's family members (e.g., children) from continued receipt. Incarcerated persons are not eligible for Medicaid during

their incarceration. This provision includes children under the age of 21. S.C. Code Regs. 126-365(B)(4) (2006). Clearly, a person who loses public assistance due to a criminal conviction risks losing not only financial and food assistance, but also the ability to afford health care.

### HYPOTHETICAL #2: THE WINDFALL DILEMMA

*You are representing a low-income client in a case where the client stands to receive a great deal of money either in the form of annuity payments or in a lump sum. While this is a great victory for your client in terms of the immediate case, how might this affect your client's life otherwise?*

Obtaining a large settlement or judgment for a client is cause for celebration. However, for clients that receive public assistance, there are potential negative ramifications from the client's financial gain. Often the client is unaware of these ramifications, and many attorneys without knowledge of public assistance programs do not realize that

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there may be cause for concern.

Generally, clients who receive public assistance benefits such as public and subsidized housing, Medicaid, SSI, food stamps and other such benefit programs must show that their income and resources are below a certain amount to qualify for the program. In order to show this, the applicants must submit evidence of income (or lack thereof) and allow the agencies administering the assistance to access certain financial records. The benefit recipient's financial position is reviewed periodically. It is the recipient's responsibility to notify the agency supplying the assistance of a change in income or assets. It is best if the recipient's attorney is able to thoroughly review the regulations for any public assistance programs the recipient is participating in and to advise the recipient about how an increase in income from a settlement or judgment may affect the assistance received.

#### **Public and subsidized housing**

Public Housing, the Section 8 Project-Based Housing Program and

the Housing Choice Voucher Program regulations require a Public Housing Authority to review a potential tenant's financial situation by looking at the applicant's annual income. 24 C.F.R. § 5.609 defines "annual income" and lists specific types of income that are excluded from being considered as part of an applicant's or tenant's annual income for program eligibility. Under § 5.609(c), funds that are a lump-sum addition to family assets (e.g., inheritances) and sporadic or non-recurring income are excluded from income. *Id.* However, some interest, dividends and payments that are made in lieu of earned income are included in the annual income calculation. *Id.* § 5.609(b)(5) (2006). Regular gifts, alimony, child support and business income for the self-employed are also included as income, as are other types of funds listed under the regulations. *Id.* § 5.609(a), (b) (2006). This additional income could temporarily disqualify a tenant from receiving housing assistance or increase the tenant's portion of the rental payment.

#### **Temporary Assistance to Needy Families and food stamps**

Under the TANF program, S.C. Reg. 114-1140 lists the financial criteria that are used to consider whether a Family Independence Program applicant qualifies for the program and whether a current Family Independence recipient is eligible to continue receiving benefits based on income. This regulation specifies that nonrecurring gifts of \$100 or less per quarter, up to \$400 in interest and dividend per year, and other specified funds are to be excluded as income to be considered. However, the following payments are to be included in the determination of resources for Family Independence eligibility: income tax refunds, lump-sum payments and other specified funds. *Id.* A recipient who receives a lump sum can have \$2,500 in liquid assets. In addition, the recipient can have an Individual Development Account worth \$10,000. S.C. Code Ann. Regs. 114-1140I (2006). These funds can be accessed, but only for limited use of purchasing a car, education, start-

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ing a business or purchasing a home. Each licensed driver in the home may also own a car. *Id.* ¶ E.

The Food Stamps Program also has limitations for income and assets. Generally, an individual can have no more than \$2,000 in liquid assets, or \$3,000 if elderly. He or she may own a car worth up to \$4,650. If a household receives any type of non-cash TANF assistance while on food stamps, then the household can claim the same asset amounts used in the Family Independence Program. S.C. Code Ann. Regs. 114-1300(C)&(D) (2006).

### **Supplemental Security Income and Medicaid**

20 C.F.R. §§ 416.1102 and 416.1103 explain what is and is not counted as income under the Supplemental Security Income program. Things received in cash and in kind are considered income under these regulations. 20 C.F.R. § 416.1102 (2006). Things not included as income are gifts or anything paid for recipient to a provider by a third party. 20 C.F.R. § 416.1103 (2006). Income tax refunds, payments from a credit life or credit disability insurance plan, and money borrowed from or repaid to the recipient are also excluded from income. *Id.* Life insurance policies with a combined face value of \$1,500 or less, the total value of one vehicle per household, the recipient's primary place of residence (unless there is income-earning property on the home property), Earned Income Tax Credits (for up to nine months only) and other listed resources are exempt from inclusion as resources for the purposes of determining eligibility. *See* 20 C.F.R. §§ 416.1212 (home), 416.1218 (vehicle), 416.1230 (insurance), 416.1231 (burial spaces) and 416.1235 (Earned Income Tax Credit) (2006). Court settlements and awards are considered "unearned income" under the SSI program and are counted in determining eligibility. 20 C.F.R. §§ 416.1120 - 416.1123 (2006).

As with SSI, the Medicaid program also looks at an applicant's or recipient's combined income, resources and assets to determine eligibility or continued eligibility for the

program. Individuals who qualify for Medicaid under the Low-Income Family or SCHIP program may have up to \$30,000 in liquid assets and two automobiles worth no more than \$20,000 each. South Carolina Dept. of Health and Human Res., Medicaid Policy and Procedures Manual (hereinafter "MPPM") Chapter 202.01-202.15 (2006). For TANF-based Medicaid assistance, the following types of income are most frequently excluded from an eligibility determination: irregular income, Earned Income Tax Credit monies, cash gifts and proceeds from the sale of personal property. MPPM 201.02 (2006). Severance pay, workers' compensation payments and child support (after the first \$50) are counted as income. *Id.* Lump-sum insurance settlements, inheritances and court awards are considered non-recurring payments and are treated as income in the month they are received and as a resource if retained in the following month. *Id.* SSI-based Medicaid assistance, income tax payments, wage-related payments and credit life or disability payments, and other funds are not counted as income. *Id.* at 301.04 (2006). Infrequent (received no more than once per calendar quarter) and irregular (income that the client has no reasonable expectation of receiving) income is excluded at the amount of the first \$60 dollars of unearned income per calendar quarter and the first \$30 of earned income per calendar quarter. *Id.* at 301.09. Alimony and spousal support payments are counted as income, as are child support payments (although one-third of the amount of a child support payment for children less than 18 years of age is excluded). *Id.* Court awards are specifically counted as unearned income. *Id.* at 301.09.16.

When a beneficiary receives a windfall payment that could make him ineligible for either SSI or TANF, it can have very serious consequences. First, an affirmative and knowing failure to report this information could subject the beneficiary to a finding of fraudulent receipt of benefits. Overpayment can be assessed with the showing of intentional program violation even if it cannot be proven that criminal fraud

was involved. Even if the failure to report was not intentional, the beneficiary will be forced to reimburse for the overpayment of either program, which can cause the family great hardship. 20 C.F.R. § 416.537 (2006) (SSI); S.C. Code Ann. Regs. 114-1140Q (2006). If a beneficiary comes to you with an agency error, you can assert this hardship in an effort to have the overpayment waived.

### **HYPOTHETICAL #3: HOLISTIC CARE**

*A client contacts you for representation (or you accept a pro bono case) on a foreclosure matter. From reviewing the documents and interviewing the client, you discover the client's mortgage payments were often late. The mortgage also reflects a higher-than-normal interest rate. In the course of your investigation, it becomes obvious that the client's credit is less than stellar, and he or she is in a difficult and unstable financial position. Aside from your help in the case, what other assistance can you provide to the client?*

Clearly, we cannot list here every possible benefit program for which your client may qualify. However, both S.C. Legal Services (SCLS) and the S.C. Appleseed Legal Justice Center have Web sites containing information that may be useful to your client.

SCLS provides legal representation in civil cases for low-income people across the state. SCLS's Web site is located at [www.lawhelp.org/sc](http://www.lawhelp.org/sc). S.C. Appleseed is a non-profit agency dedicated to advocacy for low-income individuals in South Carolina to effect systemic change by acting in and through the courts, the legislature, administrative agencies, communities and the media, and helping others do the same through education, training and co-counseling. S.C. Appleseed has many brochures, manuals and other information on benefit programs and matters affecting low-income individuals on its Web site located at [www.scjustice.org](http://www.scjustice.org).

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