

Signed at Washington, DC, on October 30, 2013.

David Michaels,

[FR Doc. 2013-26337 Filed 11-1-13; 8:45 am]

BILLING CODE 4510-26-P

## LEGAL SERVICES CORPORATION

### 45 CFR Part 1613

#### Restrictions on Legal Assistance With Respect to Criminal Proceedings

**AGENCY:** Legal Services Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rule updates the Legal Services Corporation (LSC or Corporation) regulation on legal assistance with respect to criminal proceedings. The Tribal Law and Order Act of 2010 (TLOA) amended the LSC Act to authorize LSC funds to be used for representation of persons charged with criminal offenses in tribal courts. This proposed rule will bring the regulations into alignment with the amended LSC Act. The proposed rule will also revise the conditions under which LSC recipients can accept or decline tribal court appointments to represent defendants in criminal proceedings.

**DATE:** Comments must be submitted by December 4, 2013.

**ADDRESSES:** Written comments must be submitted to Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW., Washington, DC 20007; (202) 337-6519 (fax) or

Electronic submissions are preferred via email with attachments in Acrobat PDF format. Written comments sent to any other address or received after the end of the comment period may not be considered by LSC.

**FOR FURTHER INFORMATION CONTACT:** Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW., Washington, DC 20007, (202) 295-1563 (phone), (202) 337-6519 (fax),

#### SUPPLEMENTARY INFORMATION:

#### I. Statutory and Regulatory Background.

The Corporation first issued 45 CFR part 1613 in 1976 to implement a statutory prohibition on the use of LSC funds to provide legal assistance in criminal cases. Section 1007 of the LSC Act prohibited the use of LSC funds to provide legal assistance "with respect to any criminal proceeding." Public Law

93-355, § 1007(b)(2), 88 Stat. 383 (Jul. 25, 1974) (42 U.S.C. 2996f(b)(2)). The original section 1613.2 defined "criminal proceeding" as "the adversary judicial proceeding prosecuted by a public officer and initiated by a formal complaint, information, or indictment charging a person with an offense denominated 'criminal' by applicable law and punishable by death, imprisonment, or a jail sentence. A misdemeanor or lesser offense tried in an Indian tribal court is not a 'criminal proceeding.'" 41 FR 38506, Sept. 10, 1976. Neither the proposed rule nor the final rule explained why the Corporation exempted minor criminal cases in tribal courts from the general prohibition.

The following year, Congress amended the LSC Act to codify the Corporation's exemption of minor crimes in tribal courts from the types of criminal proceedings for which LSC funds could not be used. Public Law 95-222, § 10(b), 91 Stat. 1620-1623 (Dec. 28, 1977). According to the House Report on H.R. 6666, which became Public Law 95-222, it made this amendment at the Corporation's request. H.R. Rep. 95-310, 1977 U.S.C.C.A.N. 4503, 4515-16 (May 13, 1977). The Committee on the Judiciary explained:

Er LSC UT\* (criminaareegal assvices )Tj T\* -1.111 Td (Thocegramo provide lepresent dion ex tra rsa)Tj

isovuteouldel, nd puniic Lanonsered

The TLOA previously amended section 202(c) to require tribes exercising expanded criminal sentencing authority to provide counsel only to defendants facing total terms of imprisonment that would exceed one year. Public Law 111-211, § 234(a), 124 Stat. 2280.

In summary, the TLOA and the 2013 VAWA amended the Indian Civil Rights Act to expand both the sentencing authority and the jurisdiction of tribal criminal courts. The TLOA also amended the LSC Act to allow the use of LSC funds for representation of criminal defendants in tribal courts facing sentences of more than a year. LSC grant recipients now have the option of using their LSC funds to provide criminal representation. Additionally, because tribes must

representation of a defendant in a domestic violence case would create a conflict of interest that would prevent the provider from providing legal assistance to the victim. The second was that requiring representation of criminal defendants could mean using the limited LSC Native American funding to represent non-Indian defendants in tribal criminal proceedings. Finally, the commenter recommended that LSC amend Part 1613 to be consistent with the TLOA and allow grantees the option of representing defendants in tribal criminal proceedings, but not require such representation.

Pursuant to the LSC Rulemaking Protocol, LSC staff prepared a proposed rule amending Part 1613 with an explanatory rulemaking options paper. On October 22, 2013, the Board approved the proposed rule for publication in the **Federal Register** for notice and comment. A section by section discussion of the proposed rule is provided below.

### III. Authority

The authority is revised to update the provision of the LSC Act governing representation in criminal proceedings and reflect the change in authorization made by the Tribal Law and Order Act of 2010.

### IV. Proposed Changes

#### 1613.1 P

The Corporation proposes to revise this section to state that LSC grant recipients may not represent individuals in criminal proceedings unless authorized by Part 1613. Previously, this section only recognized that recipients were authorized to provide assistance in criminal proceedings if the attorney's responsibilities as a member of the bar required him to provide such assistance. The LSC Act has been amended twice to authorize criminal representation in tribal proceedings since the regulation was originally enacted in 1976, and the Corporation now proposes to amend Part 1613 to be consistent with those statutory amendments. For these reasons, the Corporation believes it is necessary to amend this section to recognize that, in addition to an attorney's professional responsibilities, Federal statutes and regulations may also authorize an LSC-funded attorney to undertake criminal representation.

#### 1613.2

The Corporation proposes to amend the definition of "criminal proceeding" to remove the exclusion of misdemeanors or lesser offenses in Indian tribal courts from the definition.

This change is proposed for two reasons. First, removing the exclusion of misdemeanors or lesser offenses within tribal court jurisdiction would bring the rule into alignment with section 1007(b)(2) of the LSC Act, which authorizes LSC funds to be used for representation in criminal proceedings before Indian tribal courts. Second, removing the exclusion makes clear that criminal proceedings in Indian tribal courts are "criminal proceedings" subject to the provisions in proposed 1613.5.

#### 1613.4

The Corporation proposes to revise section 1613.4(a) to allow recipients to undertake criminal appointments after a determination that such appointment "will not impair the recipient's primary responsibility to provide civil legal services." Under the current rule, recipients must determine that accepting a criminal appointment will be "consistent with" its primary responsibility to provide civil legal services. The Corporation believes that changing the standard to impairment of the recipient's primary responsibility to provide civil legal services will allow recipients to consider the impact a criminal appointment will have at a more meaningful level because it contemplates that such appointments may have a measurable impact on a recipient's financial and human resources.

The existing language in section 1613.4(a) has been the subject of litigation in several jurisdictions in which trial courts appointed attorneys at LSC recipients in criminal cases over the Part 1613 objection of the recipients. Courts have overwhelmingly upheld recipients' declinations of criminal appointments under section 1613.4(a). *W. Va. v. P.*, 376 S.E.2d 169, 172 (W.Va. Dec. 21, 1988); *Fla. App. 1981*, 406 So. 2d 111, 113 (Fla. App. 1981). Courts considering this issue placed considerable weight on the recipients' determinations that an appointment was not consistent with their duty to provide civil legal services. *W. Va. v. P.*, 376 S.E.2d at 173 ("We conclude . . . that a circuit judge is prohibited by 42 U.S.C.S. 2996f(b)(2) (1974) and 45 CFR 1613.4 (1978) from appointing an attorney employed by a local legal services program that receives funds from the federal Legal Services Corporation to represent an indigent criminal defendant, where the local legal services program has made a formal policy determination that such criminal representation is inconsistent with its primary responsibility to

provide legal assistance to eligible clients in civil matters."); *Fla. App. 1981*, 406 So. 2d at 113; *W. Va. v. P.*, 376 S.E.2d at 172. *W. Va. v. P.*, 376 S.E.2d at 172 (M.D. Fla. 1981) ("[T]he CFLS attorneys may not represent criminal defendants in light of the CFLS determination that it does not have sufficient resources to devote to a criminal proceeding."). Because the proposed change to section 1613.4(a) does not affect a recipient's discretion to determine whether a particular court appointment will impair its ability to provide quality civil legal services, the Corporation believes that the precedents discussed above should continue to apply.

#### 1613.5

The Corporation proposes to add a new section 1613.5 to address representation in criminal cases before Indian tribal courts and the circumstances under which recipients may accept a tribal court appointment to represent a criminal defendant. Subsection (a) reiterates the statutory authorization for LSC funds to be used for representation of a person charged with an offense in an Indian tribal court. Subsection (b) is similar to section 1613.4(a) in that it allows recipients to accept court appointments when the recipient determines that the appointment will not impair the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters. The Corporation has incorporated the revised language from section 1613.4(a) into section 1613.5(b) to make clear that, consistent with the discussion of this language and related court precedents in section 1613.4 above, the recipient remains the final arbiter of whether accepting a criminal appointment from a tribal court will impair the recipient's responsibility to provide legal assistance to eligible clients in civil proceedings.

Section 234 of the TLOA requires tribal courts exercising the expanded sentencing authority to provide indigent defendants with the assistance of a licensed attorney "at the expense of the tribal government." In conjunction with the TLOA's amendment to the LSC Act authorizing the use of LSC funds for representation in any criminal proceeding in tribal court, this provision may lead to increased interest on the part of tribal courts to appoint recipient attorneys to serve as defense counsel. Indeed, in response to the RFI, two tribes commented that they welcome the increased ability of LSC recipients to use LSC funds to serve as defense counsel. Because the provision

requiring that tribes provide defense counsel at the tribes' expense and the provision authorizing LSC recipients to use LSC funds to provide criminal representation are not linked in the TLOA, it is unclear whether tribal courts will reimburse LSC recipients for providing representation pursuant to a tribal court appointment.

Proposed section 1613.5(b) allows a recipient to consider whether accepting an appointment from an Indian tribal court will impair the recipient's responsibility to provide civil legal assistance. A recipient may evaluate many factors in determining whether impairment will occur, including but not limited to the recipient's civil legal workload, the recipient's program priorities, the recipient's existing expertise in tribal criminal law, the recipient's capacity to investigate and defend a criminal case competently, the frequency and number of proceedings in the case, and the distance to the court where the proceedings will take place. A recipient may also consider whether, and to what extent, the tribal court will compensate the recipient for accepting the appointment. The fact that a tribal court will or will not compensate the recipient may or may not be dispositive of whether the appointment will impair the recipient's responsibility to provide legal assistance in civil cases. It is within the recipient's discretion to determine what factors to consider and the weight to be given to each factor when deciding whether to accept a criminal appointment.

#### **List of Subjects in 45 CFR Part 1613**

Crime, Grant programs—law, Legal services, Tribal.

For the reasons stated in the preamble, and under the authority of 42 U.S.C. 2996g(e), the Legal Services Corporation proposes to amend 45 CFR Part 1613 as follows:

#### **PART 1613—RESTRICTIONS ON LEGAL ASSISTANCE WITH RESPECT TO CRIMINAL PROCEEDINGS**

■ 1. The authority citation for Part 1613 is revised to read as follows: