



NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
GUIDANCE FOR LSC PROGRAMS RE: COURT DEBT COLLECTION

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JULY 2016

NLADA has prepared this memo to provide guidance to Legal Services Corporation (LSC) funded programs regarding when their staff may provide legal services to individuals in their client community with court debt matters. Many low income individuals and families are unable to meet their basic needs of food, shelter, health care and, at the same time, meet financial obligations imposed by courts. Individuals who are unable to pay their debt or who pay for basic necessities instead of their court debt, are subject to penalties such as arrest, jail, or loss of their driver's licenses, jobs and housing "...creating a vicious cycle that makes court debt even harder to repay."¹ Other sanctions for failure to pay court debt include wage garnishments, public benefit offsets, and denials for relief available through expungement, good conduct and restoration of rights proceedings.

Although LSC regulatory restrictions place certain limits on when grantees can advocate for eligible clients in court debt matters, there are many eligible clients who LSC-funded programs can assist.

NLADA has reviewed the key LSC regulations that may limit LSC grantees from advocating for clients in this area. In addition to LSC eligibility criteria, 45 C.F.R 1611 and Priorities in use of Resources, 45 C.F.R. 1620, these regulations include:

- 1) 45 C.F.R. §1613 - Restrictions on legal assistance with respect to criminal proceedings;
- 2) 45 C.F.R. §1615 – Restrictions on actions collaterally attacking criminal convictions;
- 3) 45 C.F.R. §1637 - Representation of prisoners;

The restrictions in regulations, 45 C.F.R. §1613 and 45 C.F.R. §1615 only apply to LSC and private funds received by an LSC program. If a program is only using public non-LSC funds, for the purposes for which

¹ Sophia Quinton, *After Ferguson, States Struggle to Crack down on Court Debt*, THE PEW CHARITABLE TRUST (October, 30, 2015, 3:56PM), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/08/26/after-ferguson-states-struggle-to-crack-down-on-court-debt>.

the funds were provided to the program, restrictions in 45 C.F.R. §1613 and 45 C.F.R. §1615 do not apply.²

Whether an LSC grantee can provide advocacy services in a court debt proceeding includes consideration of four questions.

1. Does your advocacy constitute representation in a criminal proceeding set out in 45 C.F.R. 1613?
2. Does the representation entail a collateral attack on a criminal conviction as defined in 45 C.F.R. 1615?
3. Is this representation of a client who falls within the definition of a prisoner in 45 C.F.R. 1637?
4. If the client falls within the definition of a prisoner in 45 C.F.R. 1637, does the representation fall with the two categories of prohibited representation (1) civil litigation or (2) an administrative proceeding challenging the conditions of the client's incarceration?

Discussion

1. Does your advocacy constitute representation in a criminal proceeding as defined in 45 C.F.R. 1613?

The LSC Act establishes that LSC funds must not be used: "to provide legal assistance with respect to any criminal proceeding." 42 U.S.C.A. § 2996f (b) (2). This prohibition is clarified in 45 C.F.R. 1613 of the LSC regulations. When promulgating this rule, LSC considered whether to incorporate sometimes conflicting rules of various jurisdictions on a case by case basis, or to simply establish a universal definition. 41 Federal Register 38506, September 10, 1976. LSC explicitly chose the latter – to establish a universal definition. Id. The definition in the regulation states:

"Criminal proceeding" means the adversary judicial process 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. 45 C.F.R. 1613.2.

If the proceeding is not an adversarial proceeding to determine the client's guilt or innocence of an alleged offense, representation of that individual does not violate 45 C.F.R. 1613. LSC guidance states that a criminal proceeding is one: "which is intended to determine the client's guilt or innocence of the offense

² 1610.4 (b) Authorized use of non-LSC funds. "A recipient may receive public or IOLTA funds and use them in accordance with the specific purposes for which they were provided, if the funds are not used for any activity prohibited by or inconsistent with Section 504." Activities prohibited or inconsistent with Section 504 are also referred to as entity restrictions and apply to all activities of an LSC funded program regardless of funding source. 45 C.F.R. 1637 is included in the list of Section 504/entity restrictions, however, 45 C.F.R. 1613 and 1615 are not listed as entity restrictions so non LSC public funds are not subject to the prohibitions in these two regulations. 45 C.F.R. 1610.2 Definitions.

charged in the complaint, information or indictment.” LSC External Opinions dated June 2, 1981 and May 17, 1993.

Examples of proceedings that do not fall within LSC’s definition of criminal proceeding and, therefore, are permissible areas of representation with LSC funds include:

- i. Post-conviction proceedings, such as probation revocation, court debt remission hearings, garnishments, suspension of licenses or registrations, or modification of a court fine payment schedule.

The 1976 preamble to 45 C.F.R. 1613 states: “This part does not prohibit legal assistance with respect to any matters that are not a part of a criminal prosecution, such as probation revocation after a sentence has been imposed, “Mempa v. Rhay”, 389 U.S. 126 (1967), parole revocation, “Morrissey v. Brewer”, 408 U.S. 471 (1972), or relief from illegal conditions of confinement. “ 41 Federal Register 38506, September, 1976. ³ It is important to keep in mind that even though 45 C.F.R. 1613 permits representation after a sentence has been imposed, 45 C.F.R. 1637, promulgated much later in 1997, explicitly prohibits representation of individuals who are incarcerated, as defined by the regulation, in any civil litigation or in any administrative proceeding challenging the conditions of incarceration. Therefore, both regulations must be considered in determining when representation is prohibited.

LSC provides further guidance in two advisory opinions that address post-conviction representation to modify a payment schedule for a court ordered fine, imposed as a result of pleading guilty to or being convicted of a criminal matter. The opinions indicate that this type of representation does not fall within the definition of a criminal proceeding and therefore is permissible. LSC External Opinions, dated June 2, 1981 and May 17, 1993.

- ii. Matters defined by a state as criminal proceedings that are only punishable by fine and not incarceration.

Proceedings that solely involve the imposition of a fine and do not carry any period of incarceration are also not included in the definition of a criminal proceeding by LSC in 45 C.F.R. 1613. The preamble specifically indicates that:

“Many minor infractions, such as housing, sanitation, and traffic law violations, that are punishable by no more than a fine are basically civil in nature. They are treated as civil in some states and in the Model Penal Code, and the ABA recommends their removal from criminal codes. ‘ABA Report, New Perspectives on Crime, iv (1973)’. Because the Corporation believes such offenses are basically civil in nature, and because the imposition of a fine maybe be extremely burdensome for the clients of legal services programs, the regulation permits representation of defendants in such cases.” 41 Federal Register 38506, September 1976.

³ Note: There are some jurisdictions where probation revocation is defined as a separate crime in and of itself, so it is important to determine whether the jurisdiction defines probation revocation as a crime that falls within LSC’s definition.

Three advisory opinions from LSC's Office of Legal Affairs (OLA, formerly OGC), provide further guidance on how LSC funded programs may provide representation in matters that are not punishable by a jail sentence.

Two of these LSC opinions, LSC External Opinion, EX 2006-1002 dated May 8, 2006 and LSC External Opinion, EX 2002-1005, dated May 7, 2002, were responses to inquiries from LSC-funded programs regarding the programs' receipt of a Housing and Urban Development (HUD) grant to represent homeless persons with tickets and outstanding violations of local ordinances. The purpose of the HUD grant was to assist homeless people with tickets and outstanding warrants that: "often impede the homeless from reintegrating into mainstream society by securing jobs, housing and other forms of assistance." In both opinions LSC indicated that assistance with offenses solely punishable by a fine and not incarceration is not prohibited by the LSC Act or regulations.

The third advisory opinion, LSC External Opinion, EX 2004-1002, dated February 17, 2004, discusses the permissibility of representing clients in an eviction action, designated by the state of Arkansas as a criminal offense. This LSC opinion reviews the legislative and regulatory history of 45 C.F.R. 1613 concluding that the regulation permits representation in "nominally criminal matters" or matters considered "technically criminal cases" which are "basically civil in nature." A key factor LSC uses in distinguishing between a civil and criminal proceeding is whether there is the possibility of incarceration for conviction of the initial offense. The Arkansas statute provided that the failure to vacate, after service of an eviction notice, was considered a misdemeanor offense and carried a fine of \$25 per day for each day the tenant did not vacate. The tenant could not be incarcerated for a conviction of failure to vacate. However, the statute also required the tenant to deposit a sum equal to the amount of rent due with the court. If the tenant is found guilty of the failure to vacate and did not make the deposit, conviction of the offense could result in a jail sentence of up to 90 days. Since the court could not impose a jail sentence for the initial offense, even though the person could be incarcerated subsequently for not paying the fine or deposit, the LSC opinion concludes that the Arkansas statute is not a criminal proceeding and the LSC program could represent persons facing eviction under the statute.

Based on the above opinions if the initial offense does not carry a penalty of incarceration, even if a defendant could be incarcerated subsequently for failure to take action, such as not vacating, not making a deposit with the court, or not paying a fine or other cost, the matter may still be considered civil in nature and representation by an LSC program permissible with LSC funds or private funds.

Based on the above guidance from LSC, if state agencies are using collection methods to obtain payment for court imposed fines or fees (court debt), these matters would not be classified as criminal proceedings. Therefore, LSC programs may provide representation to individuals in cases that involve obtaining relief from levies, garnishments, revocation of licenses and registrations by state agencies as a result of nonpayment of court fines and fees. Representation may be provided by requesting modifications or reinstatements of payment plans, or settling a court debt.

iii. Petitions for expungement and representation.

Other matters, such as expungement petitions that are administrative in nature based on the law of the jurisdiction and not considered criminal matters, would also not be prohibited. LSC External Opinion dated June 8, 1984. Similarly, in states where defendants charged with crimes must petition for representation and cannot pay the fee to file the petition, LSC funds can be used to provide legal assistance to request a waiver of the fee to file the petition. LSC External Opinion dated May 17, 1993. However, the opinion cautions the LSC-funded program attorney to inform the court that representation is limited to the petition and the criminal matter should not be assigned to the program.

Representation by LSC-funded programs in actions brought to seal or expunge a criminal record, to seek a pardon, to seek a certification of rehabilitation, to clean up errors in a criminal record or other similar matters that are not part of the adversarial proceeding to determine the guilt or innocence of the client do not violate 45 C.F.R.1613.

iv. Civil contempt relief

LSC-funded programs must be cautious when representing individuals in matters of contempt. Courts may find an individual in contempt of court and order incarceration, though the distinction between civil and criminal contempt is not always clear.⁴ “[C]ontempts are neither wholly civil nor altogether criminal... [i]t is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases.” *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). Whether a contempt is civil or criminal can generally be determined by the nature of the punishment. If an individual is ordered incarcerated until they comply with the court’s order (for example, the payment of child support), then the contempt is generally considered civil in nature. However, if an individual is found in contempt and ordered incarcerated for a definite period, the contempt is generally considered criminal contempt. *Id.* **The analysis of whether a contempt is civil vs. criminal must include an individualized determination which includes taking into account the laws of the jurisdiction where the LSC-funded program is located.**

LSC-funded programs may provide representation in civil contempt proceedings with LSC funds: “if the arrest or imprisonment of individuals servedis the result of a civil contempt proceeding, the clients served ... would not be incarcerated for the purposes of 45 C.F.R. 1637. However, if the imprisonment is the result of an arrest for or conviction of contempt or any other crime, it would constitute incarceration under 1637.2 and representation of such persons is prohibited by Part 1637.” LSC External Opinion 99-05 dated March 4, 1999. However, as previously indicated, since 45 C.F.R. 1637, prohibits LSC funded programs from representing incarcerated individuals in civil matters, even if representation in a civil

⁴ Contempt findings are neither wholly civil nor altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." [Bessette v. Conkey, 194 U.S. 329](#). But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418,441 (1911).

contempt proceeding is permitted by 45 C.F.R 1613, if the individual is incarcerated representation may be precluded based on the provisions in 45 C.F.R. 1637

v. Juvenile matters

Juvenile delinquency cases are not considered criminal proceedings, unless, a juvenile case is transferred to adult court and the matter becomes an adult criminal proceeding. 61 Federal Register 19422 dated April 21, 1997, LSC Program Letter, 15-5, dated November 19, 2015. Even then, 45 C.F.R. 1613.4(b) allows an attorney to continue to represent a client in a criminal matter arising “out of a transaction with respect to which the client is being, or has been, represented by a recipient”, if required by the rules of professional responsibility.

vi. Other exceptions to restrictions in 45 C.F.R. 1613:

Court appointments:

45 C.F.R. 1613.4, Authorized representation.

“Legal assistance may be provided with respect to a criminal proceeding:

(a) Pursuant to a court appointment made under a statute or a court rule of equal applicability to all attorneys in the jurisdiction, if authorized by the recipient after a determination that acceptance of the appointment would not impair the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters.

(b) When professional responsibility requires representation in a criminal proceeding arising out of a transaction with respect to which the client is being, or has been, represented by a recipient.”

Criminal representation in Indian tribal courts:

45 C. F.R. 1613.5, Criminal representation in Indian tribal courts.

“(a) Legal assistance may be provided with Corporation funds to a person charged with a criminal offense in an Indian tribal court who is otherwise eligible.

(b) Legal assistance may be provided in a criminal proceeding in an Indian tribal court pursuant to a court appointment only if the appointment is made under a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction, and is authorized by the recipient after a determination that acceptance of the appointment would not impair the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters.”

- vii. Non-LSC public funds may be used to provide representation in criminal proceedings, regardless of any penalties, including incarceration

As previously indicated, LSC-funded programs can use public non-LSC funds to provide representation in criminal proceedings if the advocacy falls within the purposes of the public funding. The restrictions in 45 C.F.R. 1613 only apply to LSC and private funds. These restrictions do not apply to non-LSC public funds, such as IOLTA funds, state filing-fee funds, and state general revenue funds. 45 C.F.R. 1610.4, LSC External Opinion, EX 2006-1002, dated May 8, 2006. This Opinion provides guidance on other factors LSC-funded programs should consider when taking on a grant to represent individuals in court debt and reentry matters, such as “the program’s own priorities and resources, other available legal services in the community, whether the work is an efficient use of time and resources as well as the expertise of the staff to handle such matters.”

2. Is this an action that collaterally attacks a criminal conviction?

45 C.F.R. 1615.2 of the LSC regulations prohibits legal assistance using LSC or private funds:

“(a) in an action in the nature of habeas corpus collaterally attacking a criminal conviction if the action ... or

(b) alleges that the conviction is invalid because of any alleged acts or failures to act by an officer of a court or a law enforcement official.”

Actions brought to seal or expunge a criminal record, to seek a pardon, to seek a certification of rehabilitation, to clean up errors in a criminal record or other similar actions are not actions in the nature of a collateral attack on a criminal conviction and are not prohibited under LSC regulations for services using LSC funds. Neither are actions focused on challenging the methods of collection of court debt, as contrasted with its imposition. LSC External Opinion 2002-1005 dated May 7, 2002.

3. Is this representation for a client that falls within the definition of a prisoner in 45 C.F.R 1637?

- i. The LSC prohibition on representation of prisoners does not apply to persons who are not incarcerated in a Federal, State or local prison.

The key definitions used by LSC in its regulation on representation of prisoners in 45 C.F.R. §1637.2 include:

“Incarcerated means the involuntary physical restraint of a person who has been arrested for or convicted of a crime.”

“Federal, State or local prison means any penal facility maintained under government authority.”

The preamble to the regulation provides clarification regarding this restriction. The prohibition: "...would apply to pre-trial detainees even though they are persons who have not been convicted of a crime. Conversely, it would not apply to parolees and probationers, even though they are persons who have been convicted of a crime and are still under the jurisdiction of the corrections department, because they are no longer physically held in custody in a prison." 62 Federal Register 19421 (April 21, 1997)

LSC Program Letter 15-5, dated November 15, 2015, provides a comprehensive discussion of when LSC-funded programs may provide assistance to incarcerated and formerly incarcerated individuals consistent with LSC's regulation at 45 C.F.R. Part 1637. This guidance cites a previous advisory opinion, LSC External Opinion, EX 1998-38, dated July, 1998, which stated: "This definition does not include persons who have been released, even if they are subject to house arrest." This guidance concluded that an LSC-funded program could represent a person released from prison on house arrest as a condition of his parole. The individual applying for services was required to wear a foot monitor and respond to phone calls during the day and was permitted to go to work, shop for necessities and care for his children.

The definition of incarcerated also does not apply to persons held in mental health facilities, regardless of the reason for their confinement. 62 Federal Register 19421, April 21, 1997, LSC External Opinion, EX 2001-1013 dated August 31, 2001, LSC Program Letter 15-5, dated November 19, 2015.

Persons in work release programs living at home or in halfway houses would not be considered incarcerated as defined in 45 C.F.R. 1637, since they are not physically held in custody in a prison.

However, under the preamble to the regulation, the third category of people in work release centers who return to jail each day as their residence would likely be considered incarcerated. The language reads in pertinent part: "Intermittent imprisonment poses close questions, which will be resolved on a case-by-case basis by the Corporation, determined by whether the person is predominantly incarcerated or free. For example, persons on furlough or on daytime work-release should be considered to be incarcerated. However, persons serving a term of successive weekends in prison would be considered not to be incarcerated." 62 Federal Register 19422, April 21, 1997.

- ii. Advocates may, in certain circumstances, continue representation if an individual is incarcerated after representation begins

45 C.F. R. 1637.4, allows LSC-funded programs to continue representation of a client who becomes incarcerated after the representation begins: "If, to the knowledge of the recipient, a client becomes incarcerated after litigation has commenced, the recipient must use its best efforts to withdraw promptly from the litigation, unless the period of incarceration is anticipated to be brief and the litigation is likely to continue beyond the period of incarceration."

The preamble to this regulation provides further guidance on when representation can continue:

When a program learns that its client has become incarcerated in a prison, it must use its best efforts to discontinue representation of the individual. Incarceration, however, may be of short duration and, in some circumstances, by the time the recipient has succeeded in withdrawing from the matter consistent with its ethical duty to the client, the incarceration may have ended and with it the basis for the prohibition. To address such a situation, the rule provides an exception to the general prohibition. The exception would allow the continued representation by the recipient when the anticipated duration of the incarceration is likely to be brief and the litigation will outlast the period of the incarceration. As a guideline, the recipient should consider incarceration which is expected to last less than 3 months to be brief. This exception for a brief incarceration does not permit a recipient to take on new issues or matters for the client during the brief incarceration.

When incarceration has occurred after litigation has begun and its duration is uncertain, there may be circumstances where a court will not permit withdrawal in spite of the recipient's best efforts to do so, generally because withdrawal would prejudice the client and is found to be inconsistent with the recipient's professional responsibilities.

62 Federal Register 19421, April 27, 1977.

The preamble indicates that whether continued representation is permissible when incarceration is not likely to be brief will be determined on a case by case basis. Grantees are cautioned to carefully document their efforts to withdrawal and consider renewing these efforts. The preamble further states:

“During the period in which the recipient is seeking alternate counsel or other proper ways to conclude its involvement in such litigation, it may file such motions as are necessary to preserve its client's rights in the matter under litigation. The recipient may not file any additional, related claims on behalf of that client, however, unless failure to do so would jeopardize an existing claim or right of the client.”

4. If the client does fall within the definition of a prisoner, does the representation fall within the two categories of prohibited representation: civil litigation or administrative proceedings challenging the conditions of the client's incarceration?

LSC-funded programs may be able to represent persons who fall within the definition of incarcerated persons depending on the nature of the representation.

In 2015, LSC's Office of Legal Affairs corroborated that: “1637.3 prohibits only two types of representation of incarcerated individuals: (1) civil litigation and (2) representation in administrative proceedings challenging the conditions of the prisoner's incarceration.” Thus, representation that **does not include litigation** or **does not challenge the conditions of incarceration** is not prohibited.” LSC Program Letter 15-5, dated November 19, 2015.

There are a number of services that LSC-funded programs may provide to their client community because these activities do not fall within the two prohibited types of representation. The areas include:

i. Advice and counsel and brief services:

LSC Program Letter 15-5 dated November 19, 2015, cites to LSC External Opinion 2002-1006 dated June 14, 2002, stating: "...a recipient may provide "brief services" and "advice and counsel" to incarcerated individuals, because 'the kinds of activities that qualify as 'counsel and advice' and 'brief services' do not rise to the level of, or include, litigation or participation in an administrative proceeding challenging the conditions of incarceration.' "

ii. Legal information:

LSC Program Letter 15-5 dated November 19, 2015, also indicates that Part 1637 does not prohibit any non-representation activities that qualify as: "legal information" limited to "the provision of substantive information not tailored to address a person's specific legal problem." LSC CSR Handbook, § 2.3 and 45 C.F.R. § 1614.3(f).

iii. Administrative proceedings that do not challenge a client's conditions of incarceration:

The guidance in LSC's Program Letter 15-5, dated November 19, 2015, indicates that there are a number of matters in which LSC-funded programs can provide representation to incarcerated individuals, stating: "While a recipient may not represent an incarcerated individual in a prison disciplinary hearing challenging that individual's conditions of confinement (for example, a transfer to administrative segregation), the recipient may represent that incarcerated individual in other, non-conditions-of-incarceration, federal and state administrative proceedings (such as challenging the denial of veterans' benefits or Social Security benefits, or overpayment collection actions)."

The **key question** for certain types of legal services, such as expungement representation and driver's license reinstatement, is whether the necessary action by the advocate is considered "civil litigation". This analysis is dependent upon the nature of the proceeding as determined by the relevant jurisdiction.

Conclusion

Please carefully review the guidance above and if you have any questions or would like to discuss this guidance on what may be permissible, contact NLADA's Chief Counsel for Civil Programs, Robin C. Murphy at r.murphy@nlada.org.