

Legal Services Corporation
750 First Street, N.E.
Washington, DC 20002

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External Opinion
File # 99-07

202-336-8817

June 21, 1999

W. Marshall Prettyman
Director of Litigation
Ozark Legal Services
26 East Center Street
Fayetteville, AR 72701-5301

Dear Mr. Prettyman:

This letter responds to your request for a formal opinion from the Legal Services Corporation's Office of the General Counsel (OGC) on whether Section 1610.6(b) provides a safe harbor for court appointments to civil cases.

According to your May 28, 1999 letter, Rule 17(c) of the Arkansas Rules of Civil Procedure provides that no civil judgment shall be rendered against a prisoner in the penitentiary unless he is represented by counsel. Judges in your county routinely appoint attorneys, including legal aid attorneys, on a rotating basis to handle civil cases on behalf of prisoners. You have asked whether Section 1610.6(b) applies to such appointments.

Section 1610.6 provides, in pertinent part, that:

the prohibitions referred to in Section 1610.2(a)(4)(Criminal Proceedings), (a)(5) (Actions challenging criminal convictions), (b)(7) (Aliens) or (b)(11) (Prisoner litigation) of this part will not apply to:

(b) Criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.

This provision provides that the prisoner restriction does not apply to criminal or related

cases accepted under a court appointment.

As you know, Part 1637 prohibits recipients from participating in any civil litigation on behalf of prisoners. Section 1637.3.¹ Court appointments under Rule 17(c) would require recipients to participate in civil representation of prisoners. Thus, involvement in cases under Rule 17(c) is clearly prohibited unless otherwise permitted by law.²

There is only one exception to the prisoner restriction in Part 1637. It permits representation of a client who becomes incarcerated after representation has begun by the recipient in certain delineated circumstances.³ This obviously does not provide a safe harbor for court appointments under Rule 17(c) because it addresses a different issue and the clients in cases assigned under Rule 17(c) are already incarcerated when the cases are appointed by the court.

The safe harbor for court appointments in Section 1610.6(b) also does not provide

¹ Section 1637.3 provides that:

A recipient may not participate in any civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison, whether as a plaintiff or as a defendant; nor may a recipient participate on behalf of such an incarcerated person in any administrative proceeding challenging the conditions of incarceration.

² The type of representation prohibited by Part 1637 is civil litigation or representation of a prisoner in an administrative proceeding challenging the conditions of incarceration. Thus, representation that does not include litigation or does not challenge the conditions of incarceration is not prohibited.

³ This exception requires the recipient to use its best efforts to withdraw unless the period of incarceration is likely to be brief and the representation would likely continue beyond the period of incarceration. Section 1637.4.

relief for most civil cases that would be assigned under Rule 17(c) because it applies only to court appointments for criminal or \$related cases.\$ The term \$related cases\$ is referring to cases related to criminal cases because there is no other type of case listed in the provision to which the term \$related cases\$ could possibly be referencing. Also, the introductory language of Section 1610.6(b) identifies the type of case that is related to a criminal case in its reference to the restriction on actions challenging criminal convictions, i.e. the reference to 1610.2(a)(5). This restriction, listed in Part 1610, is implemented by Part 1615 which prohibits recipients from representing clients in actions collaterally attacking criminal convictions. Such actions are often civil in nature but are clearly related to the criminal actions that resulted in the convictions under challenge.

The LSC Act and regulations have long prohibited recipient involvement in criminal cases generally and in cases challenging criminal convictions. 42 U.S.C. Section 2996f(b)(2) and (3).⁴ Part 1613 implements the restriction on criminal cases and, as stated above, Part 1615 implements the restriction on challenges to criminal convictions.⁵ Both regulations include exceptions for court appointments. Section 1610.6(b) simply restates those exceptions.

The preamble to the final publication of Section 1610.6(b) confirms that the provision is not intended to include court appointments to civil cases, except for actions collaterally attacking criminal convictions.⁶ The preamble explains that there is no conflict in the section with the restrictions on prisoner representation because the prisoner restriction in Part 1637 applies only to civil actions and not to criminal representation. Preamble to final rule, 61 Fed. Reg. 63751 (Dec. 2, 1996).⁷ This statement recognizes

⁴ ACases challenging criminal convictions≡ are described in Section 2996f (b)(3) of the LSC Act as Alegal assistance in civil actions to persons who have been convicted of a criminal charge where the civil action arises out of alleged acts or failures to act and the action is brought against an officer of the court or against a law enforcement official for the purpose of challenging the validity of the criminal conviction.≡

⁵ Part 1613 was first promulgated in 1976 and was revised only once in 1978. *See* 41 Fed. Reg. 38506 (Sept. 10, 1976); 43 Fed. Reg. 32775 (July 28, 1978). Part 1615 was promulgated in 1976 and has never been revised. 41 Fed. Reg. 38508 (Sept. 10, 1976).

⁶ Beginning in August 1996, Part 1610 underwent two rounds of rulemaking, with each round including an interim and a final rule. It was in the first round of rulemaking that the current language in Section 1610.6 was finalized and adopted. Understandably, the regulatory history of the first round provides the most insight into the meaning of this section. *See* 61 Fed. Reg. 41960 (Aug. 13, 1996)(interim rule); 61 Fed. Reg. 63751 (Dec. 2, 1996)(final rule); 62 Fed. Reg. 12101 (March 14, 1997)(interim rule); 62 Fed. Reg. 27695)(final rule).

⁷ In the preamble discussion of Section 1610.6, the commentary explains:

There is no conflict with the restrictions in section 504 on representation on aliens and prisoners because these restrictions apply only to civil representation.

that, if court appointments to civil cases were generally permitted by the section, there would be a clear conflict with the prisoner restriction.

Accordingly, under Section 1610.6(b), a recipient may represent a prisoner in a criminal case or a civil case that collaterally attacks a criminal conviction, if required to do so by court appointment.⁸ However, a recipient may not represent a prisoner in any other court appointed civil case.

I hope this adequately responds to your inquiry. I suggest that you advise the court of the LSC restriction. If you need our assistance in this matter, please let us know.

Sincerely,

Suzanne B. Glasow
Senior Assistant General Counsel

⁸ This opinion does not discuss the exception for public defender programs because you have not requested relief under that exception. However, the same analysis would apply. Recipients may represent clients in criminal or related cases pursuant to their separately funded public defender programs as authorized by Section 1010(c) of the LSC Act and Part 1610.