

Legal Services Corporation
Meeting of the Board of Directors
October 22, 2013

Operations and Regulations Committee Revisions to Part 1613 NPRM

- I. Remove proposed changes to section 1613.3 and restore language to read:

Corporation funds shall not be used to provide legal assistance with respect to a criminal proceeding, unless authorized by this part

- II. Include language in the preamble stating that, when analyzing whether an appointment will impair its primary responsibility to provide civil legal services, a recipient may consider whether a tribal court appointing the recipient to represent a criminal defendant will compensate the recipient for such representation and the sufficiency of such compensation.

Proposed language:

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 the recipient’s civil legal workload, 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 compensate the recipient 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.

- III. Include language in the preamble stating that the Corporation intends for court precedents upholding a recipient’s decision to decline a court appointment to apply to tribal court appointments as well.

Proposed language:

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). See, e.g., Rehmann v. Maynard, 376 S.E.2d 169, 172 (W.Va., Dec. 21, 1988); Central Florida Legal Servs v. Perry, 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. See, e.g., Rehmann, 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 C.F.R. § 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."); Central Florida Legal Servs, 406 So. 2d at 113; Central Florida Legal Servs. v. Eastmoore, 517 F.Supp. 497, 500 (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.

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.