

## **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 [INSERT DATE 30 DAYS AFTER PUBLICATION OF THIS NOTICE IN THE FEDERAL REGISTER].

**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 [insert address]. 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), [insert address].

**SUPPLEMENTARY INFORMATION:**

## Background

### 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.” Pub. L. 93-355, § 1007(b)(1), 88 Stat. 383 (Jul. 25, 1974) (42 U.S.C. 2996e(b)(1)). 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, Sep. 10, 1976. Neither the proposed rule nor the final rule explains 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. Pub. L. 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:

Section 7(b)(2) permits a legal services program to provide representation in a very narrow category of technically criminal cases that may be viewed as basically civil in nature to a person charged with an offense involving hunting, fishing, trapping or gathering fruits of the land when the principal defense asserted involves rights arising from a treaty with Indians. A number of legal services programs have developed expertise in the highly specialized area of Indian treaty law. Prior to the passage of the

Legal Services Corporation Act they provided assistance to Indians charged with criminal offenses when the defense arose out of an asserted treaty right. Because an effective defense depends on knowledge of treaty law, rather than a criminal law, state-appointed private counsel and public defenders generally lack the legal background required to provide an effective defense.

The provision of section 7(b)(2) authorizing representation of an Indian charged with a misdemeanor or lesser offense in an Indian tribal court is declaratory of existing law and codifies current Corporation Regulations.

The committee approves the provisions of current Corporation Regulations, that appropriately define the scope of the prohibition against criminal representation and the narrow exceptions to the prohibition that are required for fulfillment of a lawyer's professional obligations and responsibilities.

In 2010, Congress enacted the TLOA. The TLOA had two major effects on tribal criminal jurisdiction. First, it authorized tribal courts to impose longer sentences, raising the maximum duration from up to one year to a total of nine years for multiple charges. Pub. L. 111-211, Tit. II, Subtitle C, § 234(a), 124 Stat. 2280 (Jul. 29, 2010). Second, it required tribes exercising the expanded sentencing authority to, “at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney.” Pub. L. 111-211, Tit. II, Subtitle C, § 234(c)(2), 124 Stat. 2280. Of most relevance for LSC funding recipients, the TLOA amended section 1007(b)(2) of the LSC Act to authorize the use of LSC funds to provide representation in all criminal proceedings before tribal courts. Pub. L. 111-211, Tit. II, Subtitle C, § 235(d), 124 Stat. 2282.

Congress further expanded tribal court jurisdiction in 2013. Through the Violence Against Women Reauthorization Act of 2013 (2013 VAWA), Congress amended the Indian Civil Rights Act of 1968 to authorize tribal courts to exercise special criminal jurisdiction over domestic violence cases. Pub. L. 113-4, § 904(b)(1), 127 Stat. 120-121 (Mar. 7, 2013) (25 U.S.C.

§ 1304(a)). This “special domestic violence criminal jurisdiction” is exercised concurrently with state or Federal jurisdictions, or both, as applicable. Pub. L. 113-4, § 904(b)(2), 127 Stat. 121 (25 U.S.C. § 1304(b)(2)). Unlike prior congressional enactments, the 2013 VAWA explicitly authorizes tribes to exercise jurisdiction over both Indian and non-Indian defendants in certain circumstances.

In order for the tribe to assert special domestic violence criminal jurisdiction, the alleged act must have occurred within Indian country. Pub. L. 113-4, § 904(c), 127 Stat. 122. “Indian country” is a term of art defined in 8 U.S.C. § 1151. If neither the victim nor the accused is Indian, the court may not exercise jurisdiction. Pub. L. 113-4, § 904(b)(4)(A)(i), 127 Stat. 121. If only the accused is a non-Indian, the court may exercise jurisdiction only if the accused resides in the Indian country over which the tribe has jurisdiction; is employed in the Indian country of the tribe; or is a spouse, intimate partner, or dating partner of a member of the tribe or an Indian who resides in the Indian country of the tribe. Pub. L. 113-4, § 904(b)(4)(B), 127 Stat. 122.

The 2013 VAWA also introduced another set of crimes in Indian country for which defendants are entitled to counsel at the tribal government’s expense. Section 904(d)(2) states that if a sentence of any length of time may be imposed, the defendant is entitled to all of the rights laid out in Section 202(c) of the Indian Civil Rights Act. Pub. L. 113-4, § 904(d)(2), 127 Stat. 122. 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. Pub. L. 111-211, § 234(a), 124 Stat. 2280.

In summary, the TLOA and the 2013VAWA 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 funding recipients now have the option of using their LSC funds to provide criminal representation. Additionally, because tribes must provide defendants with counsel at tribal government expense in certain circumstances, LSC recipients may be faced with increasing numbers of appointments to represent criminal defendants.

#### LSC Consideration of the Statutory Changes

On January 25, 2013, the Operations and Regulations Committee (the Committee) of the LSC Board of Directors (the Board) voted to recommend that the Board authorize rulemaking to conform Part 1613 to the amendments to the LSC Act and to address recipients' concerns regarding criminal appointments. On January 26, 2013, the Board authorized the initiation of rulemaking.

In response to the statutory changes described above, LSC sought input from experts in tribal law, including tribal court officials and practitioners, and the public to determine whether the Corporation needed to amend its regulations. LSC published a Request for Information (RFI) regarding the restrictions on legal assistance with respect to criminal proceedings in tribal courts. 78 FR 27341, May 10, 2013. Additionally, during its July 22, 2013 meeting of the Board of Directors, the Committee heard from a panel of five experts in tribal law representing a variety of perspectives.

During the July 22, 2013 panel presentation, the panelists' commentary focused on two main issues: the limited availability of resources to provide representation in criminal cases, and the political and cultural difficulties of representing defendants charged with domestic violence, particularly non-Indian defendants. One commentator noted that at the current time, LSC's Native American grants are too small to meet the existing needs of tribal communities. The

clients tend to live far from the grantee's offices and from each other, requiring attorneys to travel long distances and incur expenses for gas and lodging. The costs associated with this travel and the limited funding available to cover them make it difficult to attend frequent court hearings. For this reason, the commentator did not see LSC Native American grant recipients undertaking widespread representation under TLOA. He recommended that any potential amendments to the regulations allow flexibility for recipients of LSC Native American grants to take on this type of representation if they determine it is a priority, but not to require grantees to do it.

In a similar vein, a member of the Board raised a concern he had heard from recipients: that tribal courts would execute their responsibility to provide representation at tribal expense by simply appointing LSC-funded attorneys. One commentator concurred with the concern and recommended that any amendments to the rule provide the flexibility that the previous panelist preferred, but at the same time protect grantees from having to accept compulsory appointments. A third commentator followed up on a related question by opining that LSC-funded grantees, as the attorneys working in tribal communities and conversant with tribal cultures, are more appropriate to undertake expanded criminal representation than attorneys with expertise in criminal law, but with no background in Indian law or tribal communities.

With respect to the policy of representing defendants in domestic violence cases, panelists generally agreed that doing so would raise thorny issues of parity among victims and defendants, as well as Indian and non-Indian defendants. Two panelists noted that their organizations approach domestic violence representation from the victim's perspective and would be reluctant to represent the defendant in a domestic violence case. One panelist also identified the possibility that representation of a defendant would prevent an LSC-funded

organization from representing the alleged victim in the case, thereby reducing the amount of assistance available to victims. Similarly, the two panelists also stated opposition to using LSC Native American funds to represent non-Indian defendants in cases involving Indian victims. Their opposition arose out of both the potential use of Native American grant funding to represent non-Indian defendants, thereby reducing the amount of funding available to assist Indian victims, and to the need to ensure that if non-Indian defendants had access to counsel, Indian victims would have access to counsel as well.

The RFI, published on May 10, 2013, asked commenters to answer questions about the impact of the TLOA and VAWA on criminal laws in tribal jurisdictions and on tribal appointments of defense counsel. 78 FR 27341, May 10, 2013. The comment period closed on August 23, 2013. LSC received comments from three tribes, one tribal prosecutor, and one organization representing attorneys practicing in front of tribal courts. Of the four responding tribal entities, one does not exercise criminal jurisdiction, one indicated that it was not aware of any changes that the tribe would be making to its authority to hear and hand down sentences in criminal cases, one was in the process of reviewing its criminal laws to determine whether they needed amending to be consistent with the TLOA and VAWA, and one had received a grant to begin drafting a criminal code that would comply with TLOA and VAWA. Both of the tribes that are working on their criminal codes welcomed the ability of grantees to use LSC funds to represent defendants in all criminal matters, including domestic violence cases. One tribe invited LSC's involvement as it develops its domestic violence case policies and identified direct contracts between itself and LSC grantees as a way to ensure that it can fulfill its responsibility under TLOA to provide counsel to defendants in criminal cases. Another stated its opinion that representation of indigent defendants is hindered by a lack of funding, and that LSC funds could

help provide proper representation for indigent defendants facing criminal charges in its tribal court.

The representative organization's comments were substantially similar to some of the comments made by panelists at the July 22, 2013 Committee meeting. For example, the organization reiterated that LSC's Native American grant funding is limited and inadequate to meet existing needs, such that requiring grantees to provide counsel in criminal proceedings would exacerbate financial pressures. It stated that the primary mission of LSC Native American grant recipients is to provide high-quality civil legal services in matters that uniquely affect tribes, such as ensuring that the rights of tribes and tribal members guaranteed by the Indian Child Welfare Act are protected. The organization also reiterated two additional concerns stated by panelists at the July 22, 2013 Committee meeting. The first was that a provider's 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 XX, 2013, the Committee 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.

## 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.

## Proposed Changes

### 1613.1 Purpose

The Corporation proposes to revise this section to state that LSC funding 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 Definition

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 Authorized representation

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). 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.

#### 1613.5 Criminal representation in Indian tribal courts

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 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.

## List of Subjects in 45 CFR Part 1613

Crime, Grant programs – law, Legal services, Tribal

For the reasons stated in the preamble, 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:

Authority: Sec. 234(d), Pub. L. 111-211, 124. Stat. 2282; 42 U.S.C. § 2996f(b)(2)

2. Amend section 1613.1 to read as follows:

#### § 1613.1 Purpose

This part is designed to ensure that Corporation funds will not be used to provide legal assistance with respect to criminal proceedings unless such assistance is authorized by this part.

3. Amend section 1613.2 to remove the last sentence excepting misdemeanor or lesser offenses in tribal courts from the definition of “criminal proceeding”:

#### § 1613.2 Definition

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.

4. Amend section 1613.4(a) to read as follows:

#### § 1613.4 Authorized representation

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- (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.

5. Add section 1613.5 to read as follows:

§ 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.

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