

OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2004-1002

To: Lee Richardson
Deputy Director
Legal Aid of Arkansas
714 S. Main St.
Jonesboro, AR 72401

Date: February 17, 2004

Subject: **Representation of Persons in Actions Under Arkansas Criminal Eviction Statute**

You requested an Opinion from this Office regarding the permissibility of your program representing persons facing eviction of Arkansas' criminal eviction statute.

Brief Answer

Yes. The Arkansas criminal eviction statute, A.C.A. §18-16-101, although nominally criminal, is not a "criminal proceeding" for the purposes of 45 CFR Part 1613. Legal Aid of Arkansas may represent persons facing eviction and prosecution under that statute.

Background

Arkansas has a criminal eviction statute that is commonly used in place of Arkansas' civil eviction statute. Under the criminal statute, a landlord may issue a notice to vacate to a tenant. If the tenant refuses to vacate, the tenant can be found guilty of a misdemeanor and fined \$25.00 per day for each day the tenant does not vacate. The tenant cannot be sentenced to jail for the failure to vacate. A.C.A. §18-16-101. The statute also provides that a tenant charged with failure to vacate shall deposit with the court a sum equal to the amount of rent alleged to be due. If the tenant fails to make such a deposit, and is subsequently found guilty of (or pleads guilty to) the refusal to vacate offense, the failure to make the required deposit is a misdemeanor which may result in a jail sentence of not more than 90 days. *Id.*

Notwithstanding the criminal nature of the statute, because of the subject matter (eviction for non-payment of rent) and because the potential for a jail sentence is, technically, within the defendant's control, the Arkansas public defender's office considers this proceeding essentially civil in nature and does not provide representation services to persons facing eviction under A.C.A. §18-16-101.

Analysis

LSC regulations prohibit a recipient from using Corporation funds to “provide legal assistance with respect to a criminal proceeding . . .”¹ 45 CFR 1613.3. Thus, the basic question being presented here is whether A.C.A. §18-16-101 is a criminal proceeding for the purposes of Part 1613.

The regulation defines “criminal proceeding” as:

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.

The preamble to the rule provides the following regarding the definition:

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 on the Model Penal Code and the ABA recommends their removal from criminal codes. . . . Because the Corporation believes such offenses are basically civil in nature, and because the imposition of a fine may be extremely burdensome for the clients of legal services programs, the regulation permits the representation of defendants in such cases. . . .

If no more than a fine can result from conviction, the Part does not prohibit representation.

41 Fed. Reg. 38506 (Sept. 10, 1976). *See also* External Opinion EX-2002-1005. In addition, previous Opinions have discussed the legislative history of section 1007(b)(2) of the Legal Services Corporation Act (upon which Part 1613 is based). For example, an Opinion of March 4, 1985 (to Mark Griffin, Guam Legal Services Corporation) notes that Congress:

was primarily, if not solely, concerned with criminal defendants being provided legal representation from public funds that were earmarked for legal services to poor people. Both the House and Senate floor debates on 1007 were dominated by concern over felons being able to use federally-funded legal services in an attempt to end their incarceration.

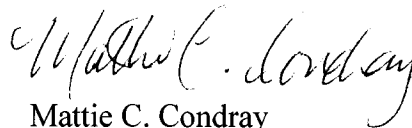
¹ The regulation provides two exceptions to the general prohibition, neither of which is pertinent to this Opinion.

Based on this legislative and regulatory history, this Office has interpreted section 1007 and Part 1613 as permitting representation in “nominally criminal matters” or matters “which can fairly be considered to be ‘technically criminal cases,’ but which are ‘basically civil in nature’.” Opinion of January 30, 1984 (to Linda Pederson, Tidewater Legal Aid Society).

In this case, there is no possibility of imprisonment or a jail sentence for conviction of the offense charged – failure to pay rent and vacate upon notice. Rather, the possibility of a jail sentence attaches only to the failure to deposit a bond with the court, a matter not at issue in the underlying trial for which the defendant seeks representation.² Moreover, eviction for failure to pay rent, is reasonably characterized as “nominally criminal” and “basically civil in nature.” Housing matters, like eviction, are one of the examples noted in the preamble discussion quoted above as infractions not intended to be covered by the prohibition when the penalty for the infraction involves only a fine. In addition, we note that the Arkansas public defender’s office does not provide representation services to defendants charged under A.C.A. §18-16-101 because it considers proceedings under A.C.A. §18-16-101 civil in nature and because the possibility of incarceration is associated only with the deposit of the bond which, technically at least, is within the control of the defendant.³

Thus, A.C.A. §18-16-101 is not a “criminal proceeding” for the purposes of 45 CFR Part 1613 and Legal Aid of Arkansas may represent persons facing eviction and prosecution under that section.

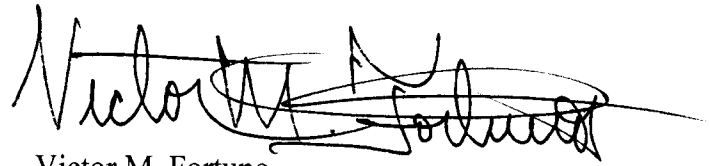
Very truly yours,



Mattie C. Condray
Senior Assistant General Counsel
Office of Legal Affairs

² This situation can be distinguished from a situation that was the subject of a previous Opinion from this office. In that case, a recipient inquired about the permissibility of representing a individual in a criminal proceeding which was punishable by a fine or imprisonment when the prosecutor was willing to stipulate that no sentence of imprisonment would be sought in the case. We found that the possibility of such a stipulation did not create a situation in which the proceeding would be considered outside the scope of §1613.2. The Opinion states that the “controlling factor is whether the offense itself is one for which imprisonment or a jail sentence may be imposed, and not whether such imprisonment or jail sentence will actually be imposed against a particular individual. Therefore, the offense charged is not converted into one punishable only by a fine, and it comes within the definition of criminal proceeding.” Opinion of Feb. 9, 1979. Although in this case, a particular defendant may eliminate the possibility of imprisonment or a jail sentence through the posting of a bond, there are key differences. First, as noted above, the *offense charged* (failure to pay rent and vacate upon notice) is not punishable by imprisonment or a jail sentence for *any* defendant. Second, the elimination of the possibility of imprisonment or a jail sentence through the posting of a bond is available to any defendant and is not tied to the particular facts of a specific case and dependant upon the concurrence of the prosecutor or judge.

³ Per email exchange with the Executive Director of the Arkansas Public Defender Commission.

A handwritten signature in black ink, appearing to read "Victor M. Fortuno", with a long horizontal flourish extending to the right.

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