

# Colorado Legal Services

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Stefanie K. Davis  
Assistant General Counsel  
Legal Services Corporation  
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Washington, DC 20007  
Via email: [lscrulemaking@lsc.gov](mailto:lscrulemaking@lsc.gov)

Re: Comments on Proposed Revisions  
to Rule 45 CFR Part 1613

Dear Ms. Davis:

Colorado Legal Services (CLS) respectfully submits the following comments in response to the Legal Services Corporation's Notice of Proposed Rulemaking (NPRM), Proposed Rule 45 CFR Part 1613, "*Restrictions on Legal Assistance with Respect to Criminal Proceedings*" 78 Fed. Reg. 65933-65936 (Nov. 4, 2013).

CLS generally supports the proposed revisions to 45 CFR Part 1613 and the references to the Tribal Law and Order Act and the discretion granted to recipients of LSC funding to accept felony cases in Tribal Courts. CLS' single concern is with the proposed new standard for accepting criminal cases in Tribal Courts set forth in 1613.4(a) and in 1613.5.

LSC desires to provide LSC grantees with somewhat greater discretion in deciding whether to represent defendants in criminal cases in Tribal Courts. It is not absolutely clear that the new standard achieves this purpose. The current standard in 1613 states that the recipient may provide representation if "...it is consistent with the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters". It is proposed that that standard be revised to provide that such representation is authorized in a wider range in criminal matters if "...acceptance of appointment would not impair the recipient's primary responsibility to provide civil legal assistance to eligible clients." Changing the standard from "inconsistent" to "impair" may inadvertently further limit and further complicate a grantee's ability to provide representation to defendants in criminal cases in Tribal Court rather than ease the decision. A common definition of impair is to "diminish in quality or strength." Just as criminal representation may arguably be inconsistent with a responsibility to provide civil legal services, so too, in a zero sum game, with seriously limited resources, criminal representation will similarly "impair" the provision of civil legal services. Any criminal case that is taken is a

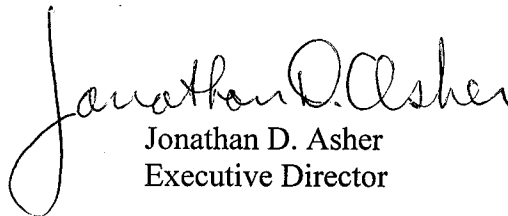
civil matter that cannot be accepted. A decision to accept a criminal case, arguably, would always “impair” the grantees’ ability to provide civil legal assistance.

In addition, while LSC may expect that its interpretations and analysis of the current standard will also apply to the revised standard, given LSC’s determination that a new standard is desirable and needed, it is inevitable that issues and new questions will arise and need to be addressed. It is not likely that a new standard will avoid new issues.

LSC’s desire to allow grantees the discretion to provide representation in serious criminal matters in Tribal Court, or to decline to do so, may best be achieved by providing no standard for exercising that discretion, and the Regulation should simply state that grantees may or may not choose to accept such criminal appointments. Any standard necessarily circumscribes the discretion of the grantee. If that is not the intended desire, then the standard complicates matters and does not simplify the choice the grantee must make. At most, a standard requiring that the decision of the grantee have a “rational basis” and that the reasons for its choice be documented, would be simpler and clearer than requiring that a grantee “dance” around what “impair” means in the context of finite resources available to provide legal assistance. It is, therefore, respectfully requested that LSC consider eliminating the standard altogether, or at least making it less subject to debate and review.

Thank you for your consideration of these modest comments. CLS certainly supports the intent and virtually all of the proposed revisions to the Rule. If you have any questions concerning these comments, however, or if CLS can be of any further assistance in the consideration of these proposed revisions to the proposed Rule, please inform me at your convenience.

Respectfully,



Jonathan D. Asher  
Executive Director

JDA/cog