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GUIDANCE FOR LSC PROGRAMS RE: REENTRY GRANTS¹

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NLADA has been working with the U.S. Department of Justice's (DOJ) Legal Aid Interagency Roundtable (LAIR) to explore ways in which civil legal aid can support federal efforts to promote access to health services, housing, education, employment, family stability and community well-being. This includes helping civil legal aid programs and other equal justice advocates find additional federal funding to support their efforts to provide legal aid to families and individuals. There are a number of federal funding opportunities that focus on the provision of services that eliminate barriers for people, particularly veterans, who have criminal records and/or are reentering society after being incarcerated. These interventions have been shown to be an important step in helping formerly incarcerated individuals lead successful, productive lives in the community.

NLADA has reviewed the key LSC regulations that may restrict the types of legal services that are funded by these grants. NLADA's review included three specific regulations governing: 1) representation in criminal proceedings - 45 C.F.R. 1613; actions collaterally attacking criminal convictions, such as habeas corpus petitions; 45 C.F.R. 1615; and 3) representation of prisoners - 45 C.F.R. 1637. The review also included past LSC advisory opinions and program letters as well. There are circumstances when an LSC program may provide legal services as part of a federal reentry grant depending upon the nature of the services to be provided and the status of the persons to be served as defined in the grant.

Representation in Criminal Proceedings

One question is whether an LSC program can provide representation to an individual with a criminal record in order to help the person obtain employment, public benefits, housing, student loans or other benefits or provide representation in child welfare,

¹ Update of *Opinion and Analysis for NLADA Reentry Track*, by Alan Houseman and Linda Perle. November 4, 2002

immigration or other proceeding at which the criminal conviction is or could be an issue. The most common examples of these cases involve bringing actions to seal or expunge a criminal record, seek a pardon of the criminal conviction, or seek certifications of rehabilitation where they are allowed (as in NY State) or clean up errors in criminal records.

These actions are all actions that do not violate the restrictions on criminal representation in 45 CFR §1613.

Part 1613 only prohibits criminal defense representation that is in a “criminal proceeding.” In §1613.2, LSC narrowly 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.

This has been interpreted by LSC in Opinions by the General Counsel (OGC) “to mean a proceeding which is intended to determine the client’s guilt or innocence of the offense charged in the complaint, information or indictment.” See OGC Opinion, June 2, 1981 and OGC Opinion, May 17, 1993. If the program is not involved in the adversarial proceeding to determine the client’s guilt or innocence of an alleged offense, the representation does not violate Part 1613.

Actions which are brought to seal or expunge a criminal record, to seek a pardon, to seek a certification of rehabilitation, to clean up errors in a criminal record or other similar actions are not part of the adversarial proceeding to determine the guilt or innocence of the client and do not violate Part 1613. It does not matter whether the action is formally brought under the caption of the original criminal case or not.

In addition, advisory opinions from LSC’s Office of Legal Affairs (OLA, formerly OGC), based on the definition of criminal proceeding in 42 C.F.R. 1613.3, also indicate that LSC funds can be used to provide representation in matters that are not punishable by a jail sentence, such as tickets and outstanding warrants for violations of local ordinances. LSC External Opinions, EX 2006-1002, EX 2004-1002 and EX 2002-1005.

It should also be noted that the restrictions in Part 1613 apply only to LSC and private funds. These restrictions are not part of the 1996 appropriation restrictions and do not apply to non-LSC public funds, such as IOLTA funds, state filing-fee funds, state general revenue funds. 45 C.F.R. 1610.

Habeas Corpus Actions Seeking to Collaterally Attack a Criminal Conviction

Part 1615 of the LSC Regulations prohibits legal assistance using LSC or private funds

“in an action in the nature of habeas corpus collaterally attacking a criminal conviction if the action ... (b) Alleges that the conviction is invalid because of any alleged acts or failures to act by an officer of a court or a law enforcement official.” See 45 CFF § 1615.2.

Actions which are brought to seal or expunge a criminal record, to seek a pardon, to seek a certification of rehabilitation, to clean up errors in a criminal record or other similar actions are not actions in the nature of habeas corpus collaterally attacking a criminal conviction and are permitted under LSC regulations.

It should also be noted that the restrictions in Part 1615 apply only to LSC and private funds. These restrictions are not part of the 1996 appropriation restrictions and do not apply to non-LSC public funds, such as IOLTA funds, state filing-fee funds, state general revenue funds. 45 C.F.R. 1610.

Representation of Prisoners

The LSC prohibition on representation of prisoners does not apply to persons who are not incarcerated in a Federal, State or local prison. The key definitions used by LSC in its regulation on representation of prisoners in 45 CFR §1637.2 include:

“Incarcerated means the involuntary physical restraint of a person who has been arrested for or convicted of a crime.”

“Federal, State or local prison means any penal facility maintained under government authority.”

The preamble to the regulation provides clarification regarding this restriction; the prohibition “...would apply to pre-trial detainees even though they are persons who have not been convicted of a crime. Conversely, it would not apply to parolees and probationers, even though they are persons who have been convicted of a crime and are still under the jurisdiction of the corrections department, because they are no longer physically held in custody in a prison.” 62 Federal Register 19421

According to an advisory opinion from LSC’s Office of Legal Affairs (OLA) “This definition does not include persons who have been released, even if they are subject to house arrest.” LSC External Opinion, EX 1998-38, July 10, 1998, p. 1. The opinion was responding to an inquiry from a program seeking to represent a person released from prison on house arrest as a condition of his parole. He was required to wear a foot monitor and respond to phone calls during the day and was permitted to go to work, shop for necessities and care for his children. The definition of incarcerated also does not apply to persons held in mental health facilities, regardless of the reason for their confinement. 62 Federal Register 19421, EX 2001-1013.

A recent Department of Labor (DOL) Notice of Availability of Funds for Adult Reentry funding provides an example of a federal reentry grant. This grant covers different categories of people who have been incarcerated. The grant is designed to serve persons in work release programs (WRPs).

“WRPs are located in many local areas and are a bridge between life in a correctional facility and life in the community. Returning citizens in WRPs are responsible for finding and keeping regular jobs in the community and returning to the WRP during their non-work hours. They are expected to go to work every day, arrive at work on time, and complete required work tasks. For participants who have little steady job experience, a work release opportunity is invaluable. WRPs may engage employers, recruit and make referrals to jobs for returning citizens, and provide some supportive services. They may already be leveraging the services of AJCs and WIBs in their local communities.”

WRPs are responsible for the accountability of their participants 24-hours-per-day, 7- days-per-week. Grantees must be able to account for their participants' location at all times in order for the WRP to approve the participants' release to participate in the grantee's program.” <http://www.doleta.gov/grants/pdf/FOA-ETA-15-07.pdf>

The WRP category includes three categories of people who have been incarcerated. “...the term WRP refers to:

- Residential reentry centers (RRC), formerly called halfway houses that are operated under contract with the Bureau of Prisons (BOP);
 - Monitored home confinement; and
 - Work release centers (WRC), which are typically located in areas where RRCs do not exist and may include those created by intergovernmental agreements between BOP and state or local jails or those that are operated by or have a contract to operate under the authority of the local correctional facility. The WRCs allow participants to leave the jail to work or find employment for a specified period of time each day and return to the jail as their residence.”
- <http://www.doleta.gov/grants/pdf/FOA-ETA-15-07.pdf>

Persons in work release programs living at home or in halfway houses would not be considered incarcerated as defined in 45 C.F.R. 1637, since they are not physically held in custody in a prison. However, under the preamble to the regulation, the third category of people in work release centers who return to jail each day as their residence would likely be considered incarcerated. The language reads in pertinent part: “Intermittent imprisonment poses close questions, which will be resolved on a case-by-case basis by the Corporation, determined by whether the person is predominantly incarcerated or free. For example, persons on furlough or on daytime work-release should be considered to be incarcerated; however, persons serving a term of successive weekends in prison would be considered not to be incarcerated.” 62 Federal Register 19422.

However, it is important to note that an LSC funded program may be able to represent persons who fall within the definition of incarcerated persons depending on the nature of the representation. The restriction in this regulation only prohibits "any civil litigation" on behalf of a person who is incarcerated or "any administrative proceeding challenging the conditions of incarceration". For example, according to LSC External Opinion EX 2002-1006 counsel, advice and brief services would not be prohibited by 1637. "The kinds of activities that qualify as 'counsel and advice' and 'brief services' do not rise to the level of, or include, litigation or participation in an administrative proceeding challenging the conditions of incarceration, the activities prohibited by Regulation 1637.

Accordingly, your office is not prohibited from providing counsel and advice and/or brief services through an intake system to a person incarcerated in a prison." EX 2002-1006, p 2. So there may be a number of reentry services that do not involve "civil litigation" or "an administrative proceeding challenging the conditions of incarceration".

The key question for certain types of reentry services, such as expungement representation and driver license reinstatement, is whether the necessary action by the advocate is considered "civil litigation". This analysis is dependent upon the nature of the proceeding as determined by the relevant jurisdiction. Therefore, NLADA cannot provide guidance without knowing the exact nature of the procedure in a particular jurisdiction.

Unlike 45 C.F.R. 1613 and 1615, no funding received by an LSC funded program may be used for activities restricted by 45 C.F.R. 1637.