President
John McKay

Board of Directors
Douglas S. Eakeley
Roseland, NJ
Chairman

John N. Erlenborn
Issue, MD
Vice Chairman

Hulett H. Askew
Atlanta, GA

LaVeeda M. Battle
Birmingham, AL

John T. Broderick, Jr.
Manchester, NH

Edna Fairbanks-Williams
Fairhaven, VT

F. Wm. McCalpin
St. Louis, MO

Maria Luisa Mercado
Galveston, TX

Nancy H. Rogers
Columbus, OH

Thomas F. Smegal, Jr.
San Francisco, CA

Ernestine P. Watlington
Harrisburg, PA

February 16, 2001

J. Edwin McDonnell
Executive Director
Piedmont Legal Services Inc.
148 East Main Street
Spartanburg , SC 29306

RE: Recipient Representation of Complainants in Domestic Violence Criminal Proceedings, Opinion Number EX-2001-1003

Dear Mr. McDonnell:

You recently requested an opinion from the Office of Legal Affairs on the issue of whether a recipient of LSC funding may enter into a contract to represent complainants in criminal domestic violence cases in certain South Carolina counties in which victims are not routinely represented by the prosecutor's office. More specifically, you asked: 1) whether such a contract would violate the LSC Act, regulations, or any LSC appropriations restrictions; 2) whether the 1613 prohibition applies only to the legal defense of persons charged with crimes or to all types of participation in criminal proceedings; and 3) whether programs could include such cases in their Case Service Reports (CSR) if such representation was deemed permissible. Based on the following analysis, we believe that it would not violate the LSC Act, Regulations or appropriations restrictions for your program to enter into a contract of the nature you described. However, because the contract you proposed is the first such contract contemplated by a recipient, a clear cut answer does not exist regarding the reporting of such cases on the CSR, and the issue of reporting will require further analysis.

Factual Background

Upon asking for an opinion on this issue, you provided the Office of Legal Affairs with the following information. You indicated that in some counties in your service area, the solicitor's office (i.e. the prosecutor's office), declines to prosecute "criminal domestic violence" cases. The charge of "criminal domestic violence" is a magistrate level crime (i.e. an offense carrying a maximum penalty of a $500 fine or 30 days in jail), and you indicated that solicitors almost never appear in magistrate courts for magistrate level crimes. Because the solicitor's office does not prosecute these cases, the victims in "criminal domestic violence" cases must represent themselves, functioning as prosecutors. You indicated that defendants in these cases

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov

are routinely represented by counsel, and they have a right to request a jury trial, which they frequently do. Consequently, non-lawyer victims must prosecute such cases by themselves, against trained lawyers, before juries, performing such functions as jury selection; the delivery of an opening statement; the examination and cross-examination of witnesses; the introduction of evidence; the objection to legally inappropriate testimony and other evidence; and the delivery of a closing statement. It is self-evident that such a system places victims at an extreme disadvantage, and consequently, your office wants to bid on a contract to provide the victims with legal assistance.

Legislative History of Relevant Statutory and Regulatory Provisions

The relevant statutory and regulatory provisions that apply to your first inquiry are ∋1007(b)(2) of the LSC Act, codified at 42 U.S.C. ∋2996(f), and Part 1613 of the LSC Regulations, codified at 45 C.F.R. ∋1613. Section 1007(b)(2) of the LSC Act reads, in relevant part, that

> No funds made available by the Corporation under this title . . . may be used . . . to provide legal assistance with respect to any criminal proceeding, except to provide assistance to a person charged with a misdemeanor or lesser offense or its equivalent in an Indian tribal court[.]

Section 1613.3 of the LSC Regulations, promulgated pursuant to ∋1007(b)(2) of the Act, provides that "Corporation funds shall not be used to provide legal assistance with respect to a criminal proceeding, unless authorized by this part." Section 1613.4 provides two exceptions to this prohibition, neither of which illuminate the question of whether the representation proposed would violate the LSC Act or Regulations.

Although the plain language contained in the Act and the Regulations does not differentiate between the prosecution of criminal acts and defense in criminal proceedings, the legislative history of the Act clearly indicates that the only activity contemplated in the promulgation of this prohibition was criminal defense work. The following excerpts from Congressional testimony, copies of which are appended hereto as Attachment A, suggest that the prosecution of crime by LSC recipients was never contemplated in the formulation, analysis or approval of the prohibition on recipient involvement in criminal proceedings.

- Testimony before the House of Representatives of Roger C. Cramton, Dean of Cornell Law School and Chairman of the Board of Directors of the Legal Services Corporation, on February 22-23,1977. In discussing whether LSC should acquiesce to the various Congressional restrictions on the types of cases that LSC recipients could handle, Mr. Cramton stated**,** "...Noncriminal, yes, because that marks us off from *the Criminal Justice Act* [which requires, among other things, that each United States district

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov

court establish a plan for providing legal representation to indigent persons accused of crimes] and the *public defenders*." [Emphasis added.]

- Statement of Frank N. Jones, Executive Director of the National Legal Aid and Defender Association (NLADA), before the House of Representatives on February 22-23, 1977. "The [NLADA]endeavors to promote legal assistance for the poor in criminal as well as civil cases. Nevertheless, it is the view of NLADA that the prohibition in section 1007(b)(1)[1] against legal assistance in criminal proceedings is appropriate. While availability of federal monies for the legal representation of indigent *defendants* in state court proceedings would ultimately be beneficial, any such eventuality must be carefully planned so that incentives are not created for the states and localities to shirk their responsibilities in this area." [Emphasis added.]

- Statement of Llewelyn G. Pritchard on behalf of the American Bar Association, before the Subcommittee on Employment, Poverty and Migratory Labor of the Senate Committee on Human Resources on April 25, 1977. "Section 1007(b)(1)...provides that legal services attorneys shall not provide legal assistance with respect to any criminal proceeding. While we are concerned about the level of federal support for *criminal defense work*, we acknowledge that the federal government has developed programs other than the Legal Services Corporation to meet these needs." [Emphasis added.]

- Statement of Representative Cohen in discussion contained in the House Congressional Record on H 6536 on June 27, 1977, and response from Representative Meeds, the House Sponsor of the 1977 Amendments to the LSC Act.

    - Representative Cohen: [A]s I understand the amendment offered by... [Mr. Meeds], it would confine this bill to its original intent, to apply legal services for civil matters, and that the burden of providing legal counsel in criminal cases would be through some form *of public defender*, or *defense system*, or by the bar association, and so forth, correct? [Emphasis added.]
    - Representative Meeds: That is correct, the *public defenders* and the *defense systems* and the bar associations will provide counsel which, incidentally, are required by the law. [Emphasis added.]

While the LSC prohibition on involvement in criminal proceedings was clearly contemplated to apply to criminal defense work, the absence of references to prosecutorial work in the legislative history suggests that there was a presumption on

[1] What is now ∋1007(b)(***2***) of the Legal Services Corporation Act As Amended 1977, was ∋1007(b)(***1***) in the Proposed Amendments to the Legal Services Corporation Act.

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov

the part of Congress and other relevant parties that LSC recipients would not become involved in prosecutorial work. This would have been a logical presumption, as crimes have historically and routinely been prosecuted by the governments of the localities in which the crimes have been committed. It appears that the type of situation present in your service area, where a local government is declining to prosecute certain categories of crime, was not anticipated in the formulation and passage of the relevant provisions of the LSC Act and Regulations. An examination of the history of 45 C.F.R. ∋1613 also shows that while some jurisdictions have attempted to shirk their criminal defense duties through the assignment of criminal defense work to LSC grantees,[2] we have no institutional record of a locality attempting to shirk prosecutorial duties on a large scale, thereby creating a previous need for an LSC recipient to assist indigent victims of crime.

Indications of Congressional Intent with Respect to Criminal Defendants

In addition to the provisions and legislative history outlined above, Parts 1615, 1633 and 1637 of the Regulations suggest general Congressional disapproval of the use of LSC funds to assist the category of persons arrested for, or convicted of, crimes. Part 1615, for example, generally prohibits the use of Corporation funds to provide legal assistance in an action in the nature of a habeus corpus collaterally attacking a *criminal conviction*, when certain conditions are met with respect to the respondent and the underlying allegations.[3] [Emphasis added.] Part 1633 prohibits LSC recipients from defending any person in a proceeding to evict that person from a public housing project if the person has been *charged with, or convicted of, illegal drug activity*, and said activity threatens the health or safety of other tenants or public housing agency employees.[4] [Emphasis added.] Part 1637, which defines "incarcerated" as "the involuntary physical restraint of a person who has been *arrested for or convicted of a crime,*"[5] provides that "[a] recipient may not participate in any civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison, whether as a plaintiff or as a defendant, nor may a recipient participate on behalf of such an incarcerated person in any administrative proceeding challenging the conditions of incarceration."[6] [Emphasis added.]

---

[2] *See* Mid-Missouri Legal Services Corporation, et al. v. Kinder, 656 S.W.2d 309 (Mo. App. 1983) (granting a writ of prohibition against a state Circuit Court judge to prohibit him from enforcing the appointment of an LSC recipient staff attorney to represent a criminal defendant); Central Florida Legal Services v. Eastmore, 517 F. Supp. 497 (D.C.M.D.Fla.1981) (granting an injunction against the appointment of an LSC recipients' staff attorneys to represent criminal defendants where the recipient had determined that such representation was inconsistent with its primary responsibility in civil matters).

[3] 45 C.F.R. ∋1615.2 (1976).

[4] 45 C.F.R. ∋1633.3 (1996).

[5] 45 C.F.R. ∋1637.2(a) (1997).

[6] 45 C.F.R. ∋1637.3 (1997).

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov

In contrast to the above-referenced provisions which restrict the use of LSC funds to assist persons charged with, or convicted of, crimes, there are no provisions which explicitly express disapproval of the use of LSC funds to assist victims of crime. Thus the Regulations, taken as a whole, seem to suggest that the motivation behind ∋1007(b)(2) of the Act and Part 1613 of the Regulations is more routed in a desire to withhold the benefit of LSC funds from alleged or convicted criminals, rather than a more general desire to prohibit recipient involvement in criminal actions at all costs. This interpretation is supported by ∋1613.4, which permits recipients to provide legal assistance in criminal proceedings (a) pursuant to a court appointment made under a statute or a court rule or practice of equal applicability to all attorneys in a jurisdiction, and (b) when professional responsibility requires representation in a criminal proceeding arising out of a transaction with respect to which a client is being, or has been, represented by a recipient.[7]

Indications of Congressional Intent with Respect to Victims of Domestic Violence

Just as there are indications of Congressional disapproval for the use of LSC funds to assist accused or convicted criminals, there are other regulatory provisions which suggest Congressional support for grantee assistance to victims of domestic violence. Part 1626, for example, which restricts the provision of legal services to ineligible aliens, makes an exception for victims of battery or extreme cruelty, allowing recipients to use non-LSC funds to represent such victims.[8] Similarly, Part 1636, which requires recipients' plaintiff-clients to sign statements at the outset of representation providing the identity of the client and the factual support for the cause of action, allows an exception where a court has entered an order protecting a client from such disclosure based on a finding, after notice and opportunity for hearing, of probable, serious harm to the client if disclosure is not prevented.[9] Additionally, ∋1636.2(c) allows recipients to proceed with litigation without a signed statement if the delay caused by obtaining a signed statement would be "likely to cause harm to a significant safety...interest of the client."[10] The recipient, however, is required to obtain a signed statement from the client as soon as possible thereafter.[11]

Conclusion Regarding the Permissibility of the Proposed Contract

Based on the foregoing factors, namely 1) the lack of consideration of prosecutorial work by recipients in the formulation, analysis and approval of the relevant statutory and regulatory provisions; 2) the evidence that the Congressional motivation behind the relevant provisions seems to be a desire to withhold the benefit of LSC funds from alleged or convicted criminals rather than a more general desire to prohibit recipient involvement in criminal actions at all costs; and 3) the indications of

[7] 45 C.F.R. ∋1613.4 (1978).
[8] 45 C.F.R. ∋1626.4 (1997).
[9] 45 C.F.R. ∋1636.2(a)(1) (1997).
[10] 45 C.F.R. ∋1636.2(c) (1997).
[11] *Id.*

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov

Congressional support for assistance to domestic violence victims by recipients, it is the opinion of the Office of Legal Affairs that the 1613 prohibition applies only to criminal defense work, rather than to prosecutorial work, and that the proposed contract would not violate the LSC Act, Regulations, or any LSC appropriations restrictions.

Our conclusion with respect to your proposed contract is further supported by an external opinion issued by the LSC Office of Legal Affairs (previously "Office of General Counsel") on January 30, 1984. This opinion was written in response to an inquiry about whether Part 1613 of the LSC Regulations "prohibits representing eligible clients in a 'plaintiff' or prosecutor role in nominally criminal proceedings resulting from spousal abuse. . ." The opinion noted that while prosecutions for spousal abuse are not merely "technically criminal," the Office of Legal Affairs believed "that the prohibitions in the Act against criminal practice were not directed against such representation." I am enclosing a copy of this opinion as Attachment B.

Notwithstanding our conclusion, however, it is preferable that LSC recipients refrain from the prosecution of crime when possible.[12] As is stated in ∋1003(a) of the LSC Act, LSC was established "for the purpose of providing financial assistance in *noncriminal* proceedings or matters to persons financially unable to afford legal assistance."[13] [Emphasis added.] It is apparent from the legislative history of the Act that the primary purpose of LSC is to facilitate the representation of indigent persons in *civil* actions.[14] [Emphasis added.] Therefore, if there are lawyers in your service area who are qualified for the proposed representation and are interested in pursuing the contract, it would be preferable for your program to allow those lawyers to secure the contract. If, however, your program is the only qualified law office which bids on the contract, and its bid is accepted, it would be acceptable for you to undertake the contract under these very limited and extraordinary circumstances.

Reporting of Criminal Cases on Case Service Reports

Your final inquiry on this issue was whether your office may report cases handled under the proposed contract on its CSR. Because an LSC recipient has never before entered into such a contract, there is nothing instructive in the Regulations or past Office of Legal Affairs opinions which addresses this question. This issue will

[12] It is axiomatic that prosecutorial representation by LSC recipients should never be considered unless this function is being categorically ignored.

[13] 42 U.S.C. ∋2996b (1974).

[14] *See Legal Services Corporation Act Amendments of 1977: Hearings on H. 6536*, 95th Cong. 939 (1977) (statement of Representative Cohen) (copy appended hereto in Attachment A, and relevant excerpt is enumerated on page 3 of this opinion). *See also*, 45 C.F.R. ∋1613.4 (a) (1978) (allowing an exception to the prohibition on recipient involvement in criminal proceedings pursuant to a court appointment, but only after a determination that such representation is consistent with the recipient's *primary responsibility to provide legal assistance to eligible clients in civil matter* [Emphasis added]).

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov

require additional research and analysis, and perhaps the formulation of a policy decision on the part of LSC. Consequently, we cannot provide you with an answer on the CSR question at this time, but we will continue to research this issue and provide you with a response as soon as possible.

I hope that this information is helpful. If you have any further questions or need clarification, please feel free to contact the Office of Legal Affairs.

Sincerely,

Dawn M. Browning
Assistant General Counsel

Victor M. Fortuno
General Counsel

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov