

*External Opinion*  
*File # 99-05*

336-8817

March 4, 1999

Deierdre L. Weir, Executive Director  
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Dear Ms. Weir:

This is a response to your request for an opinion on whether the Legal Aid and Defender Association of Detroit (LADA) would be in violation of 45 C.F.R. Part 1637 (Representation of Prisoners), if it renews its contract with the Third Circuit Court of Michigan to represent persons who are in arrears on their child support and are facing a possible jail sentence under the Court's contempt power.

Your letter does not provide sufficient information on the terms and scope of the contract agreement with the Court to provide a definitive response. However, I provide the following guidance on the scope of the restriction on representation of prisoners in 45 C.F.R. Part 1637.

The Legal Services Corporation's (ALSC's) rule on the representation of prisoners provides that:<sup>1</sup>

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.

45 C.F.R. §1637.3. The term "incarcerated" is defined in the rule as "the involuntary physical restraint of a person who has been arrested for or convicted of a crime." 45 C.F.R. §1637.2(a). Finally, the definition of "Federal, State or

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<sup>1</sup> See enclosed *Federal Register* copy of the rule with the preamble.

local prison $\cong$  means any penal facility maintained under governmental authority. $\cong$   $\S$ 1637.2(b).

According to these regulatory provisions, several factors must be present to trigger the restriction on representation of prisoners. First, the client must be currently incarcerated. The rule does not prohibit representation of a person who will be or is likely to be incarcerated in the future. Thus, representation of a client in a civil matter to prevent incarceration is not prohibited.  $\S$ 1637.3.<sup>2</sup> Although representation prior to incarceration is not prohibited, your program would still need to consider the ethical and professional responsibility implications of accepting cases from which you would need to withdraw when clients found guilty of contempt are imprisoned. Section 1637.4 sets out the actions a recipient must take when a client becomes incarcerated after representation has begun.<sup>3</sup>

Second, the type of representation that is prohibited is civil litigation or representation in any administrative proceeding that challenges the conditions of incarceration.  $\S$ 1637.3.

Third, the restriction on representation applies only to a person who is incarcerated as a result of having been arrested for or convicted of a crime. This is made clear in the definitions of Aincarcerated $\cong$  and AFederal, State or local prison. $\cong$  A person is considered incarcerated only if arrested for or convicted of a crime. The definition of a AFederal, State or local prison $\cong$  (Aprison $\cong$ ) includes reference to a Apenal facility $\cong$  to clarify that a Aprison $\cong$  constitutes facilities intended to house convicted criminals, and not persons with mental illnesses.  $\S$ 1637.2(b); 62 Fed. Reg. 19421 (April 21, 1997).

Your letter states that the contempt proceedings envisioned in the contract with the Court constitute civil proceedings. You also state that some individuals are arrested pursuant to bench warrants or have been found to be in contempt of court. It is not clear whether all or some of the clients to be served under the contract are arrested for or convicted of criminal contempt. If the arrest or imprisonment of individuals served under the contract is the result of a civil contempt proceeding, the clients served under the contract would not be *incarcerated* for the purposes of Part 1637. However, if the imprisonment is the result of an arrest for or a conviction of criminal contempt or any other crime, it would constitute an incarceration under  $\S$ 1637.2(a)<sup>4</sup> and representation of such persons would be prohibited by Part 1637.

I hope this letter provides sufficient guidance for you to determine whether LADA=s

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<sup>2</sup> Of course, most incarcerations stem from criminal prosecutions and LSC recipients are prohibited by 45 C.F.R. Parts 1613 and 1615 from involvement in criminal matters. However, *see* exemptions for separately funded public defender programs. 45 C.F.R.  $\S$ 1610.6.

<sup>3</sup> In such cases,  $\S$ 1637.4 requires the recipient to attempt withdrawal unless the period of incarceration is anticipated to be brief and the litigation is likely to continue beyond the incarceration.  $\S$ 1637.4. *See* enclosed preamble discussion of this provision of the rule. 62 Fed. Reg. 19422.

<sup>4</sup> Contempt proceedings may be civil or criminal. *See* Black=s Law Dictionary 289 (5th Ed. 1979).

contract with the Court may be renewed. Please let me know if you have any questions or need additional assistance.

Sincerely,

Suzanne B. Glasow  
Senior Assistant General Counsel