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Stefanie K. Davis
Assistant General Counsel
Legal Services Corporation
lscrulemaking@lsc.gov
sent via email only

Re: Proposed Amendments to 45 C.F.R. Part 1613: “Restrictions on Legal Assistance with Respect to Criminal Proceedings”

Dear Ms. Davis,

I am writing you in regard to the Notice of Proposed Rulemaking (the “Notice”) as published in the Federal Register at 78 FR 65933. Specifically, I wish to comment on the proposed amendment to section 1613.4(a) and new proposed section 1613.5, and the appropriate scope of Legal Services Corporation (“LSC”) representation for criminal defendants in Indian tribal courts. The purpose of the comment is to respectfully suggest that these sections be amended so as to better reflect LSC’s mission to promote equal access to justice.

Introduction

The Notice mentions several compelling reasons as to why LSC should limit its representation of criminal defendants in Indian tribal courts. Resources available from LSC’s Native American grants are limited. Tribal courts might execute their responsibility to provide representation at tribal expense by appointing LSC-funded attorneys, but there is currently no guarantee that such courts will reimburse LSC. That Native American grants could be used for non-Indian defendants is also concerning, as are the possible conflicts of interest. Perhaps most importantly, the purpose of LSC is to provide low-income Americans with representation in *civil* cases, and the addition of a criminal caseload potentially impairs the fulfillment of that purpose.

But although LSC focuses its efforts on civil cases, the promotion of equal access to justice remains the underlying goal. Proposed sections 1613.4(a) and 1613.5 encumber that goal, because they do not contemplate equal access to justice as being a relevant factor for a recipient to consider in determining whether to represent a criminal defendant in Indian tribal court.

Instead, the only factor for recipients to consider is whether acceptance of the criminal appointment would not impair their civil practices. The result is that recipients may deny representation to criminal defendants where doing so is antagonistic to the mission to promote equal access to justice.

Equal Access to Justice

Proposed sections 1613.4(a) and 1613.5 encumber LSC's mission to promote equal access to justice because they do not authorize representation under circumstances where denial would amount to injustice. Certainly, there is no need to expend scarce LSC resources on criminal representation when there is an adequate alternative for the accused; for example, in jurisdictions with a public defender system or student legal aid clinic available to represent the accused. But in other situations denial of a court appointment may effectively deny justice for an indigent defendant.

Many low-income Americans are held in pre-trial confinement on minor allegations because they cannot afford to post bond, sometimes no matter the amount. Oftentimes they plead guilty to inaccurate charges, or even while factually innocent, simply because it is the fastest way to get out of jail and move on with their lives. Depending on the practices of a particular jurisdiction, denying representation after a court appointment may retard the criminal process and prolong the period of pre-trial confinement. Such an extension could ultimately be determinative of the accused's plea decisions, encouraging a guilty plea without advisement of counsel and for the sole purpose of escaping confinement. This is not the same "justice" received by wealthier defendants who immediately bond out of jail and hire counsel.

The myriad of situations where denial of a court appointment could result in injustice is beyond the scope of this comment. But proposed sections 1613.4 and 1613.5 should authorize representation when equal access to justice so demands it. In determining whether LSC recipients should provide representation in a criminal proceeding in an Indian tribal court, recipients should consider many factors, including:

- The availability of other competent counsel to defend the accused;
- The necessity of a background in Indian law or tribal communities to a good defense;
- The complexity of the case, and necessary expertise in criminal law;
- The financial means of the accused; and,
- Whether the accused is currently in pre-trial confinement, and is able to post bond.

Suggested Changes

Proposed sections 1613.4 and 1613.5 should incorporate language that reflects LSC's mission to promote equal access to justice, and allows recipients flexibility to undertake

representation in furtherance of a substantial interest in justice. The following are examples of suggested language:

Revise § 1613.5, adding § 1613.5(c) as follows:

§ 1613.5 Criminal representation in Indian tribal courts.

(c) Legal assistance may be provided in a criminal proceeding in an Indian tribal court pursuant to a court appointment if authorized by the recipient after a determination that acceptance of the appointment is necessary to avoid denying equal access to justice to the accused.

Or,

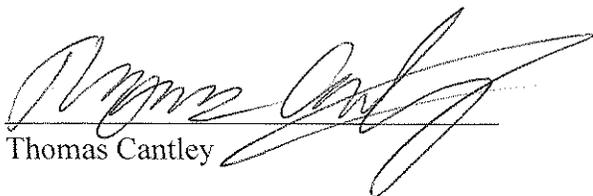
(c) Legal assistance may be provided in a criminal proceeding in an Indian tribal court pursuant to a court appointment if authorized by the recipient after a determination that acceptance of the appointment is necessary to avoid injustice.

This or similar language also better comports with the language of some of the panelists at the July 22, 2013 Committee Meeting, as it “allow[s] flexibility for recipients of LSC Native American grants to take on this type of representation if they determine it is a priority,” but does not “require grantees to do it.”

Conclusion

Please consider this comment as you finalize the amendments to 45 C.F.R. Part 1613: “Restrictions on Legal Assistance with Respect to Criminal Proceedings.” More flexibility is needed in proposed sections 1613.4 and 1613.5 to ensure that court appointments are accepted where doing so would substantially promote equal access to justice, despite a minor or trivial impairment to LSC’s civil practice. Without further amendment LSC risks an unfortunate irony – one where justice is denied by an agency whose mission is to promote equal access to justice.

Sincerely,


Thomas Cantley