REPRESENTING INDIVIDUALS WITH CRIMINAL RECORDS
UNDER THE LSC ACT AND REGULATIONS

ALAN W. HOUSEMAN
LINDA E. PERLE
CENTER FOR LAW AND SOCIAL POLICY

LEGAL OPINION AND ANALYSIS FOR NLADA REENTRY TRACK

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We have been asked to clarify whether legal services programs funded by the Legal Services Corporation (LSC) can provide representation to ex-offenders with civil legal problems specific to their criminal history records. The prisoner reentry track at the 2002 NLADA Convention will explore a range of civil legal strategies and policy proposals to address the legal issues of individuals with criminal records.

SUMMARY AND CONCLUSIONS

1. LSC funded programs can attend and fully participate in the luncheon and workshops that are presented during the reentry track at the NLADA Convention.

2. LSC funded programs can represent individuals with criminal records who are no longer in prison in civil matters that directly relate to their prior criminal records. This would include, but is not limited to, actions to seal or expunge criminal records, seek a pardon of the criminal conviction, seek certifications of rehabilitation where they are allowed (as in NY State) or clean up errors in criminal records. Such civil representation is not prohibited by either the prohibitions on criminal representation in 45 CFR 1613 or the restrictions on actions collaterally attacking criminal convictions in 45 CFR § 1615.

3. LSC funded programs can engage in a range of advocacy to change policies regarding the treatment of individuals with criminal records as long as they comply with the requirements of 45 CFR §1612.

ANALYSIS

These three conclusions are based on a review of the key LSC regulations governing representation in criminal proceedings (Part 1613), actions in the nature of habeas corpus seeking to collaterally attack a criminal conviction (Part 1615), representation of prisoners (Part 1637), and training and policy advocacy (Part 1612).

Representation in Criminal Proceedings

The initial inquiry 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, immigration or other proceedings at which the criminal conviction is or could be an issue. The primary examples involve bringing actions to seal or expunge a criminal record, seek a pardon of the criminal conviction, seek certifications of rehabilitation where they are allowed (as in NY State) or clean up errors in criminal records. These actions are all permitted actions. They do not violate the restrictions on criminal representation in 45 CFR§1613.

Part 1613 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 definition has been further interpreted by LSC in opinions by the Office of General Counsel (OGC) (currently Office of Legal Affairs) “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 civil in nature and are not part of the adversarial proceeding to determine the guilt or innocence of the client and do not violate Part 1613. Representation in a civil matter is permissible even if the action is formally brought under the caption of the original criminal case.

It should also be noted that the restrictions in Part 1613 apply only to a recipient's LSC and private funds. These restrictions are not part of the 1996 appropriation restrictions and do not apply to a recipient's non-LSC public funds, such as IOLTA funds, state filing-fee funds, or state general revenue funds.

**Habeas Corpus Actions Seeking to Collaterally Attack a Criminal Conviction**

Part 1615 of the LSC Regulations prohibits an LSC recipient from providing legal assistance supported with 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. The do not challenge the underlying conviction, but seek to ameliorate the effects of such a conviction on an individual, and are permitted under LSC regulations.

Representation of Prisoners

The LSC prohibition on representation of prisoners does not apply to a person who is no longer incarcerated in a Federal, State or local prison (or to a person still serving a sentence but is no longer in prison.) Under the key definitions used by LSC in its regulation on representation of prisoners in 45 CFR §1637.2:

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.

Persons who are ex-prisoners can be represented in actions 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.

Policy Advocacy

The reentry track may include sessions which discuss actions that should be considered by private and public entities to change their policies or practices in order to assist persons with criminal records. These changes may be necessary to help ex-offenders to become or remain employed, participate in welfare to work programs, obtain public benefits and safe, decent and affordable housing, prevent losing their children through the child welfare system, obtain student loans or remain in the United States. Current policies and practices may restrict what can be done for persons with criminal records. In order to effectively represent a client who has a criminal record, it may be necessary to engage in policy advocacy to change those policies and practices. LSC funded programs are permitted to engage in some policy advocacy under the restrictions set out in 45 CFR §1612. A very brief summary is provided below.

LSC programs can work to change agency practices. LSC program staff members are permitted to advocate with administrative officials and represent clients in efforts to change the practices of institutions and agencies so that they are more responsive to low-income persons with criminal records, as long as such advocacy is not a part of a formal agency rulemaking process.

Administrative Policy Advocacy: Except as noted below, LSC programs cannot represent clients or client interests before administrative agencies engaged in
rulemaking and cannot use LSC funds to respond to requests of administrative officials with regard to rules directly affecting clients. However, an LSC program is permitted to use non-LSC funds to: (1) provide oral or written comment in a public rulemaking proceeding, or (2) respond to a written request for information or testimony from a government agency, so long as the response is made only to the parties that made the request and the recipient does not arrange for the request to be made.

**Legislative Advocacy**: Except as noted below, LSC programs are precluded from engaging in advocacy and representation before legislative bodies on pending or proposed legislation. However, an LSC program is permitted to use non-LSC funds to respond to a written request for information or testimony from a legislative body or committee, or a member of such body or committee, as long as the response is made only to the parties that made the request and the recipient does not arrange for the request to be made.

**Grass roots lobbying**: LSC programs are prohibited from participating in any grass roots lobbying. Prohibited activities include oral or written communications, letter writing, telephone or e-mail campaigns that make a specific call to action designed to influence members of the public to contact legislators or public officials to support or oppose pending or proposed legislation, regulations, executive orders, or ballot measures.

**Participation in NLADA Workshops on Prisoner Reentry**

On Thursday and Friday of the NLADA 2002 Annual Conference, there will be a number of special sessions and workshops on how to effectively represent persons with criminal records who are trying to reenter mainstream society. Staff and directors from LSC programs are permitted to fully participate in these sessions.

Under 45 CFR§1612.8, LSC programs may not support or conduct training programs to advocate particular public policies or political activities or to train people to engage in restricted activities. None of the training programs during the reentry track will involve these restricted types of training. Instead, all of the reentry track training programs will be fully consistent with the training provisions and LSC recipient staff may attend and participate. For example, LSC program staff may participate in training programs that provide information about substantive poverty law developments and include the discussion of statutes, regulations or administrative or judicial decisions that have an impact on the legal rights of ex-offenders. They may also participate in training programs that discuss legal remedies that may be attempted on behalf of ex-offender clients adversely affected by implementation of existing or new policies and practices of public or private agencies and organizations.

If you have any additional questions or concerns regarding the issues addressed in this opinion, please feel free to contact Alan Houseman at ahouse@clasp.org or 202-906-8001 or Linda Perle at lperle@clasp.org or 202-906-8002.