



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

Advisory Opinion # AO-2013-004

Subject: Representation of briefly incarcerated client under 45 C.F.R. § 1637

Date: June 24, 2013

QUESTION

Southwest Virginia Legal Aid Society (“SVLAS”) asked for an opinion on whether the LSC regulation on representation of prisoners, 45 C.F.R. § 1637, permits SVLAS to continue to represent a client in litigation after learning that the client is being incarcerated for a seven-week period.

BRIEF ANSWER

Yes. Section 1637.4 permits LSC grant recipients to represent a client in litigation after learning the client is incarcerated if: (1) the client became incarcerated after litigation had commenced; (2) the period of incarceration is brief, i.e., less than three months, and (3) the litigation is likely to continue beyond the period of incarceration. These prerequisites are met in this case. SVLAS represented the client prior to her incarceration. The client’s incarceration is for seven weeks. Finally, proceedings in the litigation have been deferred until after the client’s incarceration ends. Under these circumstances, SVLAS’s continued representation of the client during the seven week period of incarceration, and limited work on behalf of the client during the period of incarceration to protect her from prejudice and to comply with ethical standards, comport with the requirements of Part 1637.

DISCUSSION

The facts as we understand them are as follows. The client and SVLAS signed a representation agreement on April 5, 2013. Under the agreement, SVLAS represented the client in Juvenile and Domestic Relations Court (“JDR”) proceedings she had initiated for spousal support and a protective order. At the time the agreement was executed, the client had obtained a protective order.

On April 18, 2013, SVLAS counsel appeared with the client in JDR for a support hearing. At the hearing, the attorney for the client’s husband informed SVLAS counsel that the client’s husband had filed a divorce complaint in Circuit Court in which spousal support was placed at issue. Court documents show that the Circuit Court divorce case was filed on April 18, 2013. A hearing was scheduled in the Circuit Court case for May 3, 2013. On April 23, 2013, SVLAS

counsel sent the client a representation agreement for the Circuit Court case along with draft responsive pleadings to the Circuit Court complaint.

Under Virginia civil procedure, Circuit Courts and JDR courts have concurrent jurisdiction over spousal support cases. Va. Code Ann § 16.1-244.A. If a divorce case filed in Circuit Court places spousal support at issue, then the JDR is “divested of the right to enter any further decrees or orders to determine . . . support,” “unless both parties agree to a referral to the juvenile court.” *Id.* A Circuit Court divorce action including support claims displaces the jurisdiction of the JDR over previously filed support claims. *Calfee v. Calfee*, 509 S.E.2d 552, 555, 29 Va. App. 88, 94 (Va. Ct. App. 1999). Jurisdiction then becomes exclusive to the Circuit Court. *Ipsen v. Moxley*, 642 S.E.2d 798, 804, 49 Va. App. 555, 566 (Va. Ct. App. 2007). Accordingly, the Circuit Court divorce case vested exclusive jurisdiction over the client’s JDR support claims in the Circuit Court.

The client was incarcerated on April 25, 2013, with a release date of June 17, 2013. The client notified SVLAS of her incarceration on April 25, the day she was incarcerated. As of that date, she had not yet executed the representation agreement for the Circuit Court case, although, as described above, she had previously entered into a representation agreement with respect to the JDR proceedings. As of April 25, SVLAS had prepared responsive pleadings to the Circuit Court Complaint and the Circuit Court had scheduled a hearing for May 3, 2013. SVLAS concluded that representation of the client through the May 3 hearing was necessitated by ethical duties to the client and to avoid prejudice to the client. SVLAS, the opposing party and the Circuit Court have agreed to stay any further proceedings until after the client’s June 17 release date.

ANALYSIS

Section 504(a)(15) of the 1996 Appropriations Act addresses LSC grant recipients’ representation of prisoners, prohibiting use of appropriated funds to provide assistance to any recipient “that participates in any litigation on behalf of a person incarcerated in a Federal, State or local prison.” Pub. L. 104-134, § 504(a)(15).¹ Part 1637 of the LSC regulations implements this statutory mandate. 45 C.F.R. § 1637. Section 1637.3 states 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” 45 C.F.R. § 1637.3.

Section 1637.4 establishes an exception to this general proscription, allowing recipients to represent clients in ongoing litigation who are briefly incarcerated:

If, to the knowledge of the recipient, *a client becomes incarcerated after litigation has commenced*, the recipient must use its best efforts to withdraw

¹ See section 504(a)(15) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, Title V, 110 Stat. 1321, 1321-54 (1996), as incorporated and modified by Departments of Commerce, Justice, and State, and the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119, § 502, 111 Stat. 2440, 2510 (1997), and incorporated by reference thereafter in subsequent LSC appropriations (*see, e.g.*, Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. 113-6, Div. B, Title IV, 127 Stat. 198, 267 (2011)).

promptly from the litigation, unless *the period of incarceration is brief and the litigation is likely to continue beyond the period of incarceration.*

45 C.F.R. § 1637.4 (emphasis added).

The preamble to the regulation explains the purpose for the section 1637 exception as follows:

Incarceration, however, may be of short duration and, in some circumstances, by the time the recipient has succeeded in withdrawing from the matter consistent with its ethical duty to the client, the incarceration may have ended and with it the basis for the prohibition. To address such a situation, the rule provides an exception to the general prohibition. The exception would allow the continued representation by the recipient when the anticipated duration of the incarceration is likely to be brief and the litigation will outlast the period of the incarceration. *As a guideline, the recipient should consider incarceration which is expected to last less than three months to be brief.* This exception for a brief incarceration does not permit a recipient to take on new issues or matters for the client during the brief incarceration.

Representation of Prisoners, Fed. Reg. 19422 (April 21, 1997) (emphasis added).

The Section 1637.4 exception has three prerequisites: (1) a client becomes incarcerated after litigation has commenced, (2) the period of incarceration is brief (i.e., less than three months) and (3) the litigation is likely to continue beyond the period of incarceration. In this case, all three of the prerequisites are satisfied and thus SVLAS's representation of the client falls within the section 1637.4 exception.

First, the client's April 25 incarceration took place after the litigation commenced in JDR and after SVLAS agreed to represent the client in the JDR proceedings. The fact that the client had not yet executed the representation agreement for the Circuit Court case as of the date of her incarceration does not alter this analysis. Under Virginia's procedural rules, the Circuit Court had assumed jurisdiction over the JDR case, and thus the Circuit Court action is a continuation of the JDR litigation in which SVLAS represented the client.

Second, the period of incarceration is anticipated to be brief -- less than two months -- shorter than the three-month period that the preamble establishes as a guideline for determining whether incarceration is of sufficient brevity to fall within the Section 1637.4 exception.

Third, "the litigation is likely to continue beyond the period of incarceration." As described above, all proceedings have been deferred until after the client's June 17 release date.

In sum, the three prerequisites of the Section 1637.4 exception are met in this case and SVLAS may continue to represent the client so long as SVLAS does not take on new issues or matters for

the client during her period of incarceration. The limited work done by SVLAS during the incarceration does not violate 1637.4. SVLAS filed a responsive pleading (which it prepared prior to the client's incarceration), appeared at a hearing on May 3 scheduled prior to the client's incarceration, and obtained a continuance of all matters until after the end of the client's incarceration on June 17. SVLAS's limited work for the client during incarceration was necessary to preclude prejudice to the client and to comply with ethical obligations.



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