

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE

Friday, June 27, 2003

3:45 p.m.

The Latham Hotel
3000 M Street, N.W.
Washington, D.C.

COMMITTEE MEMBERS PRESENT:

Thomas R. Meites, Chair
Lillian R. BeVier
Frank B. Strickland, ex-officio

BOARD MEMBERS PRESENT:

Herbert S. Garten
Florentino A. Subia
Maria Luisa Mercado
Ernestine P. Watlington

STAFF & PUBLIC PRESENT:

John N. Erlenborn, President
Victor M. Fortuno, Vice President for Legal
Affairs, General Counsel & Corporate Secretary
Randi Youells, Vice President for Programs

STAFF & PUBLIC PRESENT (continued):

Mauricio Vivero, Vice President for Governmental
Relations & Public Affairs
John Eidleman, Acting Vice President for Compliance
& Administration
Leonard Koczur, Acting Inspector General, Office of
the Inspector General
Laurie Tarantowicz, Assistant Inspector General and
Legal Counsel
David Maddox, Assistant Inspector General for
Resource Management
David Richardson, Treasurer & Comptroller
Mattie C. Condray, Senior Assistant General Counsel
Michael Genz, Director, Office of Program
Performance (OPP)
Alice Dickerson, Director, Office of Human
Resources
David Hall, LSC Board Nominee (by telephone)
Lisa Rosenberg, Congressional Liaison
Cynthia Schneider, Deputy Director, Office of
Program Performance (OPP)
Glenn Rawdon, Program Counsel, Office of
Program Performance (OPP)
Joyce Raby, Program Analyst, Office of Program
Performance (OPP)
Jennifer Bateman, Program Analyst, Office of
Program Performance (OPP)
Linda Perle, Senior Attorney-Legal Services, Center
for Law and Social Policy (CLASP)
L. Jonathan Ross, Chairman, ABA's Standing
Committee for Legal Aid & Indigent Defendants
(SCLAID)
Melville D. Miller, Executive Director, Legal
Services of New Jersey
Richard Zonza, Zonza Consulting
Bob Rudy, Executive Director, Maryland Legal
Services Corporation
Harrold Creasy, Legal Services of New Jersey
Julie Strandlie, ABA, Grassroots
Jeff Morningstar, Deputy Director, Office of
Information Technology

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P R O C E E D I N G S

CHAIRMAN MEITES: I'll call the meeting of the Operations and Regulations Committee to order.

I'm Tom Meites. The other two members of the committee are Lillian BeVier and John Broderick. I don't think John is on the phone, but Lillian and I will proceed.

Lillian, I'll accept a motion to approve the agenda.

M O T I O N

MS. BEVIER: I move to approve the agenda.

CHAIRMAN MEITES: I second the motion, and it is approved.

The first item on our agenda is a staff report on the LSC rulemaking process. Who's going to make that report?

(Pause.)

CHAIRMAN MEITES: We'll proceed. Hopefully, John will join us during the meeting. Vic, why don't you go ahead.

MR. FORTUNO: Good afternoon, ladies and

gentlemen. I thought before I forget that, I have with me here Mattie Condray, who was with me this morning at the Performance Reviews Committee. Mattie is our in-house rulemaking specialist, so I thought it appropriate that she be here with me and have an opportunity to address this issue and answer questions.

What we wanted to do was make a very brief presentation to explain that the Legal Services Corporation is not subject to the APA and other federal rulemaking statutes, that other than the LSC Act itself, Section 1008(e) is the statutory authorization for LSC to engage in rulemaking, and sets out a basic notice and comment process. And until the year 2000, the corporation conformed to that statutory provision, did not have anything beyond that setting out a specific process.

In 2002, the corporation, by action of the Board, adopted a rulemaking protocol, which was later revised in the year 2000 -- I'm sorry. In the year 2000, it was first adopted, and it was then revised in the year 2002. That now sets out a process for Board

■ guidance and direction in the rulemaking sphere that
■ goes beyond the basic notice and comment requirement
■ set out in Section 1008(e) of the LSC Act.

■ Mattie, do you have something to add to that?

■ MS. CONDRAV: Sure. I'll just kind of very
■ briefly hit the highlights of what the rulemaking
■ protocol does. First, it sets forth that is the Board
■ that both sets our regulatory policy and is responsible
■ for final adoption of rules. And it sets forth a
■ couple of different rulemaking methods that can be
■ used.

■ One is what we call traditional notice and
■ comment, where we publish a notice, we take written
■ comment, and we develop a final rule. And what we
■ have, we have the ability within the notice and comment
■ -- and this is something that was new in 2002, and we
■ haven't had a chance to try it yet -- to use rulemaking
■ workshops, which would be meetings where there could be
■ open discussion with the field and interested parties
■ about aspects of our rule for conducting the
■ rulemaking. It wouldn't be a negotiation, it wouldn't

■ be developing a proposed set of rules, but an open
■ discussion of what needs to be changed, where are the
■ problem issues, you know, kind of a free exchange of
■ ideas to help the corporation in developing its
■ proposals.

■ And the other method of rulemaking is
■ negotiated rulemaking, which is modeled on the federal
■ negotiated rulemaking model. It involves the use of a
■ neutral trained facilitator who's hired by contract,
■ and the formal convening of a working group. My own
■ personal experience with that is that they're very
■ useful. The corporation is in the process of using
■ negotiated rulemaking for two rules. It's expensive
■ and it's time-consuming, and you want to choose when
■ you use it judiciously, but it can be a useful tool.

■ And I think that's about all I would say at
■ this point. That's just a little flavor of what our
■ rulemaking processes are. We try to be collaborative,
■ yet keep a proper arm's-length distance.

■ CHAIRMAN MEITES: Question. Is this procedure
■ you described in our official regulations, or is it in

■ some other document?

■ MS. CONDRAY: It is not in the title of the
■ Code of Federal Regulations. It was published in the
■ Federal Register, and is posted publicly up on our web
■ site.

■ CHAIRMAN MEITES: Why wasn't the Board able to
■ adopt it other than through a procedure that will end
■ up in the Federal Register?

■ MS. CONDRAY: Because it is not -- the
■ internal rulemaking protocol, it's an internal guidance
■ document, really, for how the corporation conducts its
■ business. It's consistent with the requirements of
■ Section 1008(e). But that did not have to go -- itself
■ was not subject to the rulemaking and the public notice
■ and comment process, although the original one was put
■ out, and there was a comment period that the
■ corporation chose to do. And again, with the revisions
■ to it, that was discussed in open session, and the
■ revisions were duly adopted and published for notice.

■ CHAIRMAN MEITES: Can you make sure that the
■ members of this committee get a copy of the present --

■ of that protocol?

■ MS. CONDRAV: Absolutely.

■ MR. FORTUNO: In large part, the reason for
■ the revision in 2002 was that it was learned in the
■ course of the close to two years from when the protocol
■ was originally promulgated to 2002 when it was revised
■ that it was discovered that the cost of having the
■ negotiated rulemaking was significant, and the original
■ protocol provided that negotiated rulemaking would be
■ the default. And it was concern that to have that be
■ the default would essentially result in an unfunded
■ mandate, and that some greater flexibility was
■ necessary, and that's why it was revised. And there
■ wasn't the notice and comment because of the protocol,
■ because it doesn't impose a requirement on the
■ grantees. What it does is it's an internal process.

■ CHAIRMAN MEITES: Good thinking.

■ MR. FORTUNO: Unless there are further
■ questions, I think that covers the short summary that
■ we were hoping to present.

■ CHAIRMAN MEITES: Well, I have one. No, that

will be fine. Let's leave that one until later.

The next item on our -- that was item number 2. Item 3 is consider and act on grant assurances for 2004. Now, we have been provided with two documents, I believe, with regard to this agenda item. First is a memo dated June 17, 2003, from Randi Youells to the LSC Board, and the second is a document that was just passed out this afternoon, I believe, which is the current version of the proposed document entitled Grant Assurances; is that right?

MS. YOUELLS: That's correct. And the only change between the two documents is writing the grant assurances is sometimes like making sausage. And we realized this morning that there was a duplication between 9 and 10 on the document that was sent out to you on June 17th. And so we have simply passed out a new document to you that takes out what was formerly Section 9, and then moves everything up a number. Other than that, they are identical.

CHAIRMAN MEITES: All right. I'm open to how you all think we should proceed. But my sense is we

■ should go through the changes paragraph-by-paragraph.

■ Does that make sense?

■ MS. YOUELLS: That would be fine.

■ CHAIRMAN MEITES: Why don't you go ahead, on
■ that basis?

■ MS. YOUELLS: I'd like to give you some
■ background just so that you understand the context of
■ the grant assurances. Each year -- and currently, we
■ are in the competition process. Each year, we go
■ through a competition process, and we award grants to
■ programs who are in competition for that particular
■ year. So right now, we're in competition for the 2004
■ grant year that begins January 1. Not all grantees are
■ in competition at this time. Because when we give
■ grants, we make grant awards to our grantees, they
■ range from one to three years. So not all of our
■ grantees are currently in competition for 2004.

■ When the competition ends and we make a
■ determination as to who will provide legal services in
■ the particular service area in competition, then the
■ grant assurances are provided to the applicant, who

■ becomes the grantee. And in exchange for signature of
■ those grant assurances, and, of course, for providing
■ high-quality legal services, then we make the grant
■ award for, again, one to two to three years.

■ Normally, the grant assurances historically
■ have not been brought before the Board. But last year,
■ a member of the prior Board became very interested in
■ the grant assurances, and he asked that grant
■ assurances be presented to this Board on an annual
■ basis for review.

■ That is the reason that they're being
■ presented to you now, because of that motion. And I do
■ apologize for the fact that this early in your tenure,
■ something of this magnitude is being put in front of
■ you. But I will now go through the prospective
■ changes, and if you have any questions, please feel
■ free to ask.

■ CHAIRMAN MEITES: Before you start, is it the
■ staff's aim that at the end of this presentation, our
■ committee take some action with regard to this?

■ MS. YOUELLS: That would be my hope, yes.

CHAIRMAN MEITES: What action would you like us to take?

MS. YOUELLS: That you would consider and act on these, or that you would make changes and consider and act on those changes. You would tell us that these are either approved, or that you want changes in these grant assurances so that we can move forward. We have grantees in competition at the time.

CHAIRMAN MEITES: If our committee this afternoon approves these changes, is our approval then submitted to the Board, or is our approval the final step?

MS. YOUELLS: Your approval is submitted -- your recommendation to approve is submitted to the Board tomorrow, and they're considered at that time.

CHAIRMAN MEITES: Thank you.

MS. YOUELLS: I would like to -- and I apologize for this. I am being joined at the table by Mike Genz, who is the director of the Office of Program Performance, and Cindy Schneider, who is the deputy director of the Office of Program Performance. It is

■ the Office of Program Performance that manages the
■ production of these grant assurances, but virtually all
■ offices and all individuals who want to be involved in
■ grant assurances in LSC are involved.

■ So Cindy shepherds a process where when we
■ begin the discussion of grant assurances, all vice
■ presidents and the president are informed as to the
■ fact that we're considering them. They're asked as to
■ what changes they would like to proceed to make or
■ recommend for the next grant year. And then those
■ changes are considered and talked about internally.
■ And what is in front of you today was approved by
■ President Erlenborn to put in front of you today. So
■ there is incredible discussion and debate about these
■ particular grant assurances.

■ And I say that as a prelude to the fact that
■ if you ask me questions about certain grant assurances,
■ I might not be the appropriate person to answer them.
■ Some of the changes were recommended by other vice
■ presidents, and at that time, I will bring them to the
■ table.

Following the memo dated June 17, 2003 -- but I'm going to, as I said, up it so that you actually will be working from the document I pass out today -- the first thing that the memo points out is many of the changes were minor word changes. The second change that was made is I had also sent out to you the grant assurances for 2003.

And referring to 2003, what we call "old paragraph 10" of 2003, the grant assurances that were sent out to you, has been revised by the Office of the Inspector General and the Office of Legal Affairs, and has been divided into three paragraphs -- 10, 11, and 12 -- for clarity. So what previously was one entire humongous paragraph has simply been divided out, and now it is 10, 11, and 12. And these are some of the grant assurances that Board members often care most about, because they do involve access to records by LSC and our various provisions to records and other documents maintained by our Board.

What is now paragraph 10 in the document that I distributed to you this morning actually removes a

■ provision from the 2003 grant assurances. This
■ provision allowed LSC to collect attorney's fees from a
■ recipient that "unreasonably denied LSC access to
■ records when LSC is successful in litigating the
■ release of those records."

■ That was the subject of some intense
■ discussion and debate at LSC. And we decided to remove
■ that, because there was a question as to what
■ "unreasonable" would mean, and if LSC would be the
■ appropriate party to decide whether or not a grantee
■ had unreasonably withheld access to those records.

■ CHAIRMAN MEITES: Has the provision in its
■ present or prior form ever been used? Has the
■ corporation ever sought to recover attorney's fees?

■ MS. YOUELLS: I have been there three years.
■ Not in my history. But unless -- Cindy and Mike have
■ just shook their head no. Not that I -- certainly not
■ in the most recent past.

■ Moving on, paragraph 16 now contains a new
■ provision. That provision was suggested by the Office
■ of Legal Affairs, and it deals with derivative income

■ after a program ceases being a recipient. And that
■ grant assurance was made because we are now, as you
■ know, in a period of reconfiguration and change. And
■ we have a number of recipients who ceased being
■ recipients, and it has to do with derivative income
■ that they actually inured to their benefit at the time
■ that they were a recipient. So that is a new change
■ proposed by the Office of Legal Affairs.

■ CHAIRMAN MEITES: What do you mean by
■ "derivative income"?

■ MS. YOUELLS: For example, attorneys' fees
■ would be one derivative income. Victor, did you want
■ to add anything else?

■ MR. FORTUNO: Attorneys' fees would be the
■ most significant. But, for example, that could also be
■ interest on LSC grant funds. In some cases, there may
■ be income. And the publications were generated with
■ LSC grant funds and had sold. The profit, if there is
■ any, that's made on the sale of those publications
■ would be, again, derivative income.

■ CHAIRMAN MEITES: And which subpart of

■ paragraph 16, new paragraph 16, deals with derivative
■ income?

■ MR. FORTUNO: Sixteen or seventeen?

■ CHAIRMAN MEITES: I'm sorry. Seventeen.

■ MS. SCHNEIDER: Derivative income is now
■ contained in new paragraph 16(g). And by "new," I mean
■ the one that was distributed today to you.

■ CHAIRMAN MEITES: Okay. Thank you.

■ MS. YOUELLS: Other changes in what we call
■ new paragraph 16 were made to accurately incorporate
■ provisions from LSC's Property and Acquisition
■ Management Manual. The Property Acquisition and
■ Management Manual, which we refer to the acronym PAMM,
■ was previously adopted by the prior Board of Directors,
■ and we are now folding the requirements of the PAMM
■ into the grant assurances and correcting the grant
■ assurances to reflect that manual.

■ CHAIRMAN MEITES: And which subparagraph of
■ new paragraph 16 is that reflected in?

■ MS. SCHNEIDER: That's in -- and I'm sorry for
■ this. That is in paragraph 16(b)(5).

CHAIRMAN MEITES: I see.

MS. SCHNEIDER: On page 5.

CHAIRMAN MEITES: And that's Roman numeral small "iv"; is that correct?

MS. SCHNEIDER: Yes.

MS. YOUELLS: Paragraph 22 contains changes suggested by the Office of Program Performances Technology Initiative Grant Team that deal with the basic level of technology that recipients must have. It just updates it. This has been a grant assurance for some time, and it just updates it to reflect what we expect our grantees to have. That would be 22(a).

New paragraph 23 is a new provision dealing with the maintenance of statewide web sites. I think you are all aware that through our technology initiative grants over the last several years, we have given most states up to \$50,000 to help subsidize the cost of statewide web sites in order to put community legal education and processing materials on the web site, and not have duplicative web sites. And this is a provision that deals with the maintenance of those

web sites and sets out our expectation that in those areas where we have more than one grantee in the state, all grantees will be cooperating with that statewide web site.

CHAIRMAN MEITES: So, for example, recently in New Mexico, there were still a number of grantees in New Mexico. This provision would expect the various New Mexico entities to cooperate together in one statewide web site?

MS. YOUELLS: Yes. Right now, it is a recent change. There is one grantee, a legal services grantee, in New Mexico. But there were prior programs.

And one of the reasons this provision was put in, in most of our states, our grantees do cooperate, but there are some states where some grantees may feel that they are taking on more of a burden in terms of maintaining the statewide web site, and another grantee may be taking a pass. So it's an expectation that now applies to multiple grantees within a state and sets out expectations for statewide grantees in terms of maintenance of that statewide web site.

■ And as I said, we do give grants to our states
■ for statewide web sites. And we'll be talking about
■ that a little more this afternoon when we talk about
■ the Technology Initiative Grant Program.

■ New paragraph 26 is a new provision dealing
■ with the recipient's involvement in state planning.
■ And we have pursued state planning in the formation of
■ state justice communities since 1998. For some reason
■ -- and it was just an oversight -- I was surprised to
■ learn that we had never put anything in a grant
■ assurance that actually signals our grantees that part
■ of their obligation is to continue to work to implement
■ and develop coordinated comprehensive legal services
■ delivery systems. So we added that in this year.

■ New paragraph 27 contains a new provision
■ dealing with the maintenance of records when programs
■ merge. Again, that is a fairly new problem in the life
■ span of LSC, because we have -- it's only been in
■ recent years we've had a number of programs merging,
■ and this provision was suggested by the Office of Legal
■ Affairs. Other than that, the grant assurances are

■ identical to 2003.

■ I will give you one other just point of
■ interest. All grantees, in exchange for receiving
■ these funds, sign these grant assurances. There are
■ some grantees that get, in addition, grant conditions,
■ but those have to do with performance problems that
■ surface during the competition process. So you might
■ have, in addition to grant assurances, one or more
■ grantees that might have a particular grant condition
■ that places a requirement on them. But those are not
■ standard, and they are always targeted to a particular
■ problem.

■ CHAIRMAN MEITES: And those -- or you've now
■ summarized or gone through each of the non-minor word
■ changes; is that right?

■ MS. YOUELLS: If you would like me to do that.

■ CHAIRMAN MEITES: No, no, I would not. I just
■ wanted to make sure we've completed the list.

■ MS. YOUELLS: I've completed it.

■ CHAIRMAN MEITES: Lillian?

■ MS. BEVIER: I do have a question about a

■ couple of these, Randi. And mostly, I think this is a
■ question to provide some history. And in part, I'm
■ moved to ask this question by something that I see in
■ John Erlenborn's memo to us having to do with access to
■ information in grantees' files. And I'm looking at new
■ 10 and new 11, and then you reference the provision
■ that has been taken out.

■ And as a novice here to this program, you
■ know, and in terms of how the oversight works, it
■ strikes me as -- well, I'm surprised that you made one
■ of the longest paragraphs that will permit LSC to have
■ access so that it could engage in oversight and assure
■ compliance with the regulations of this Board pursuant
■ to what Congress has done.

■ So I wonder if you can tell me a little bit
■ about this background, and what's happened in the past.

■ MS. YOUELLS: I'm probably not the best person
■ to talk about that. That's why I'm going to turn to
■ both Victor and John Eidleman. But I could start. And
■ I can say that the one reason that I think there is
■ such detail is certainly, there is a difficult issue.

■ And it's a difficult issue for a lot of different
■ reasons.

■ And I was reminded through something that
■ happened yesterday that access is not easy. Because on
■ the one hand, you do have the responsibility of LSC to
■ ensure that their funds are being used effectively,
■ efficiently, and that they comply with all applicable
■ laws and statutes.

■ On the other hand, there are certain pieces of
■ information that at times a grantee may feel come under
■ the attorney/client privilege, or come under state
■ ethics requirements. And the one reason these have
■ become so long is to try to spell out with as much
■ clarity as we can what LSC feels that it is entitled
■ to, and what LSC believes that its grantees are
■ responsible for providing to us by also trying to
■ acknowledge -- and that's why we make some reference to
■ the requirement not applying to materials that may be
■ properly withheld through the applicable rules of
■ attorney/client privilege, applicable rules of
■ professional responsibility, and so on in paragraph 10.

■ So certainly, there have been -- this is one
■ of those issues in which feelings have run fairly high.

■ And again, I have always been the person who thinks
■ that that's totally understandable. Because at times,
■ you have these competing interests. You have the
■ interests of LSC to insure and guarantee efficiency and
■ effectiveness, and you have our grantees who are
■ providing on a day-to-day basis legal services and are
■ subject to the attorney/client privilege.

■ So I agree with you. This is long and
■ involved and complicated, and, in fact, the Office of
■ Legal Affairs and the OIG suggested that we bifurcate
■ them and make them just to spell it out.

■ In terms of access problems, I guess John
■ Eidleman or the Office of the Inspector General would
■ probably be best equipped to answer those, if that's
■ what you'd like to have us discuss.

■ MS. BEVIER: Yeah. I mean, my understanding,
■ I mean, I thought that what we're not entitled to ask
■ access for is attorney/client matters that are covered
■ by the attorney/client privilege, and that everything

else, we are entitled to have access for. And so there's a lot of detail in here explaining or describing things that I don't know.

MS. YOUELLS: Sure, I understand.

MS. BEVIER: I mean, they might not need to be described. I mean, I could see a one-sentence provision.

MR. FORTUNO: I think one of the problems is that people that are agreeing to this are not in all cases attorneys. And to spell out the details, I think, is an advantage to them at the local level to understand what their obligations are.

MS. MERCADO: And this is particularly true when Congress decided that a significant amount of the oversight and compliance was going to be transferred over to the Office of Inspector General, which is not necessarily made up of lawyers. And we've gotten into a lot of litigation with different states and programs about what is or isn't attorney/client privilege -- are or not available for their review.

Because again, you don't necessarily have

■ people who are practicing attorneys that are doing that
■ work, and -- difference of opinions. And so maybe
■ we're erring more on the side of being more detailed.
■ And I'm sure there will be others that will come up
■ that we haven't thought about that are covered in that
■ area. And so because you have auditors that are not
■ necessarily -- that you would think would automatically
■ want attorney/client privileges that don't.

■ MS. BEVIER: Right.

■ MR. FORTUNO: I think that -- and we're
■ looking at paragraphs 9 and 10.

■ MS. BEVIER: Yeah.

■ MR. FORTUNO: I think paragraph 9 reflects
■ the --

■ CHAIRMAN MEITES: Actually, Victor, I believe
■ it's now paragraph 10. Or have I lost the numbering --

■ MR. FORTUNO: Well, we're just looking at the
■ one paragraph, paragraph 10.

■ MS. BEVIER: Paragraph 10, and maybe 11, which
■ implies that there has been some retaliation taken by
■ grantees for the release of information by --

CHAIRMAN MEITES: Well, it appears number 9 deals with financial records. Well, no. They seem to -- let's take a step back. The only paragraph that was mentioned as having a change was what was referred to as old paragraph 10, which has now, we understand, become paragraph 10, 11, and 12. But as I look at this area of the grant assurance, paragraph 9 also deals with this area. So I think that if I can expand Lillian's inquiry into paragraph 9, 10, and 11. So feel free to comment on any of those three.

MR. FORTUNO: I think what we were focused on at the outset -- and this is the work of a combination of offices, and that's why I thought it would be helpful to have it written up here. What we were focused on at the outset -- that is, for years -- prior to '96 was the LSC Act, the couple of provisions in the LSC Act, that talked about, essentially, respecting not just attorney/client privilege, but client confidences and secrets.

In '96, we had a change in that the Appropriations Act included a provision which has been

■ included in each subsequent appropriation, generally
■ referred to by its section number, which is 509(h),
■ which goes beyond the two provisions in the LSC Act and
■ says that "grantees must provide access to," and then
■ it lists a number of specific documents I don't think
■ to mean all-inclusive. But then it says, "Subject,
■ however, to the attorney/client privilege." And I
■ think what that does is eliminates the issue of
■ confidence and secret, but still maintains the
■ proscription against accessing privileged information.

■ And the area has proven to be a difficult one
■ for lawyers, let alone, I think, other board members
■ have explained that there are others involved in this
■ process that are not lawyers. But it's proven to be a
■ difficult area of the law for lawyers and non-lawyers
■ alike, of course. And the effort here was to -- it
■ would seem easiest to have a one-sentence paragraph, or
■ one sentence or one paragraph that addressed it.

■ But I think that history -- and maybe John can
■ address it better than I -- history has proven that
■ some elaboration was helpful to clarify for folks what

■ they're signing up for. And this calls their attention
■ to it at a critical time where they're about to sign
■ off on this where they say they agree to these things.

■ I think that much of this found its way here
■ because of the work of Compliance and Enforcement,
■ feeling that it would be helpful to them in their
■ efforts to insure compliance, that it be spelled out
■ here and actually signed off on by grantees -- the
■ executive director and the Board chair of each grantee
■ actually certifying to these assurances. John?

■ MR. EIDLEMAN: I really don't have anything to
■ add to that, other than saying that there certainly has
■ been a lot of confusion in this area. We are
■ attempting to clarify it. And I think this confusion
■ will continue, because, obviously, programs are very
■ passionate about their techniques concerning the
■ attorney/client privileges.

■ And I think in interpreting that, very often,
■ they need to be aware of what the case law is, and at
■ times, they raise issues of -- obligations from state
■ to state. We're trying to clear up that area as much

■ as possible.

■ MR. FORTUNO: I should add also that with
■ respect to paragraph 11 -- I think it's new 11 -- the
■ non-retaliation provision. I don't know that that
■ necessarily means that there have been instances of
■ retaliation. I think that a large consideration is
■ what's in the minds of people who may be giving you
■ information. And it may be helpful to have a provision
■ that can be referred to that makes clear what the
■ program should not be doing -- that is, retaliating
■ against employees or others who are providing
■ information.

■ So that doesn't necessarily mean that, in
■ fact, there have been instances of retaliation, but
■ simply it's in there to help promote cooperation and
■ dispel the fear on the part of many that there could
■ conceivably be some retaliation. Because it's spelled
■ out in black and white, and it's agreed to by the
■ grantees.

■ MR. EIDLEMAN: I think it's very important for
■ us to have that. Because if you're on site doing

interviews -- and as Victor said, I don't know of any circumstances where there has been retaliation, but the staff would feel freer to be able to express their point of view if they feel they have protection.

MS. BEVIER: Right. And I take it the staff has access to this, and they read it and so forth, rather than just the executive director and the assistant, because --

MR. EIDLEMAN: That is the case.

MS. BEVIER: Is it just attorney/client privilege that has been the source of most of these disputes, or is there a -- you've mentioned ethical issues, and I guess I need some clarification about what the Act says about that and what LSC policy is with respect to state bar ethics rules and so on in terms of access to the records.

MR. FORTUNO: Before I address that, I should note one other point -- that is, that paragraph 11 was originally part of one long paragraph, an even longer paragraph. By having it appended to the one long paragraph, it gave the appearance that the protection

■ against retaliation was limited to those cooperating
■ with a request for access to information. And it was
■ separated out to make clear that the grantee should not
■ be retaliating against any employee for cooperating
■ with any investigation, whether or not it involves
■ access to documents.

■ So it was separated out just to show that --
■ to make clear that the protection against retaliation
■ was broader than limited to just access to documents.
■ But I think that it has proven to be -- the question of
■ access has proven to be a difficult one. Reasonable
■ minds differ.

■ There are actually a couple of provisions of
■ the LSC Act that address the question of access and an
■ attorney's professional responsibility. The state law
■ provides in each jurisdiction what an attorney's
■ responsibilities are, and it protects confidential and
■ privileged information, treating the two differently,
■ because they are different.

■ We at LSC had focused on those two, as I said
■ before, for the longest time, and then in '96 had yet

■ another provision added, a kind of an overlay, which in
■ some respects complicated it a little more.

■ Our position is that when it comes to the
■ materials that are listed in 509(h), that the
■ corporation is entitled to anything and everything, so
■ long as it doesn't violate the attorney/client
■ privilege.

■ MS. BEVIER: Right. And that's really what
■ this reg is supposed to do, to essentially give
■ grantees notice of that by listing the details.

■ MR. FORTUNO: Yes.

■ MS. BEVIER: Okay.

■ MR. FORTUNO: And the IG's counsel is here
■ because I know they have, certainly, an interest in
■ this, and they've had considerable experience with it.

■ So I thought if the IG's counsel wanted to address any
■ of the issues up here, they're available to do so.

■ MS. BEVIER: Right. And I'm sorry to be so
■ thick about this.

■ MR. FORTUNO: Oh, no.

■ MS. BEVIER: But is the issue that arises in

■ these cases an issue of attorney/client privilege?

■ MR. FORTUNO: Yeah.

■ MS. BEVIER: And that's what it is that has to
■ be resolved in each one.

■ MR. FORTUNO: I wouldn't say in each of these
■ cases. But in many, probably most of these cases,
■ where -- and I don't mean to suggest that there were a
■ great many. But there's certainly enough, and they're
■ troublesome enough, that we've had to grapple with, and
■ we're trying to address in the grant assurances. The
■ parties will generally agree that if it's subject to
■ the attorney/client privilege, it's not accessible.

■ MS. BEVIER: Right.

■ MR. FORTUNO: The issue becomes whether a
■ particular piece of information is subject to the
■ attorney/client privilege, and that's what this dispute
■ revolves around. It's the application of the privilege
■ in a specific case, I think.

■ MS. TARANTOWICZ: Laurie Tarantowicz, Counsel
■ to the OIG. I'm not sure if I've heard your question
■ correctly. But I think what you were getting at was

■ the distinction between when the attorney/client
■ privilege applies alone, and then this sort of murkier
■ area of when there are state or other ethical rules
■ that attorneys working for our grantees might feel to
■ provide information would violate those rules, and
■ would not violate the attorney/client privilege. And
■ that, I think, is an area where we've had some
■ confusion and some problems.

■ And I understand your question, because this
■ really is long, and in some respects, perhaps
■ convoluted. It comes out of a long and difficult
■ history where access is concerned. And I think even
■ within the corporation, when we're presented with an
■ access problem, either the compliance folks or the OIG,
■ there's even differences of opinion of attorneys within
■ the corporation as to whether accesses are appropriate
■ or not.

■ MS. BEVIER: Right.

■ CHAIRMAN MEITES: Lillian, is that --

■ MS. BEVIER: Yes, that's fine. I appreciate
■ that.

MR. FORTUNO: The provision has, in its implementation and its application, proven to be, although a relevant provision, difficult. And that's why I suggested at the outset that reasonable minds can, in fact, differ.

MS. BEVIER: Right.

MR. FORTUNO: And what we're trying to do, with everyone's input -- that is, Legal Affairs, the Inspector General's Office, Compliance and Enforcement, Program Performance -- is to approach it in a way that will simplify it for the corporation, but also help inform -- as to what their obligations are so that they're clear up front. And we're less likely to have problems further down the line than if we don't clarify up front, and then --

MS. BEVIER: May I just offer a rather gratuitous suggestion? And this may end up -- I hope it doesn't involve -- never mind. I'll just offer the suggestion, and you can sort of see -- not now, but think about it.

You might consider preparing a booklet or a

■ pamphlet that -- sort of Q&A following kinds of
■ situations do not do, do not do, where you've had
■ recurring -- you've probably had recurring kinds of
■ controversies about particular things. And that would
■ give you, in a sense, maybe a bit of precedent that
■ could be easily applied by lay people to some of the
■ issues that are relatively clear.

■ Because my guess is that not all of them are
■ contentious, but you can make an officially apparently
■ okay claim of privilege to something that really isn't,
■ and would easily be covered, and eliminate sort of
■ dispute that way. That's just a thought that you might
■ consider.

■ CHAIRMAN MEITES: Thank you. Just to make
■ sure that I'm clear, 9, new 10, and 11 are, in
■ substance, the same provisions that were in effect in
■ the grant assurance document last year.

■ MR. FORTUNO: Yes. I think that for clarity,
■ it has been broken out into three sections. But I
■ think it's, sum and substance, what was there before,
■ just in a different format.

CHAIRMAN MEITES: So at least we're not asked to make any changes in substance with regard to the present form. Though Lillian's point is very well taken. I litigate all the time, and I can assure you that every attorney in my office -- and we're all on the same side -- understands attorney/client privilege differently. I think we're on the same side.

MS. BEVIER: You hope.

CHAIRMAN MEITES: Okay. Any other comments or questions from the members of the Board with regard to proposed Form C?

(No response.)

CHAIRMAN MEITES: Well, if not, Lillian, are we prepared to vote to recommend this to the full Board tomorrow, or is there more deliberation that you think we should undertake?

MS. BEVIER: No. I'm prepared. I'm a little bit uneasy, but I don't have any grounds to say -- uneasy just because I'm so new at this. But I have no grounds to object to it. And it seems to be thorough and represents their wisdom, and I'm prepared to

recommend it to the Board.

CHAIRMAN MEITES: My sense is the same as far as we have ascertained this is business as usual. This marks no major change. I think for this year, at least, I feel comfortable recommending it, although maybe between now and next year, we'll have a chance to look at it.

If that is where we're at, I will -- Mr. Chair, I'll ask your help. When a committee acts, do we pass a motion? Do we do it by --

MR. STRICKLAND: I think so.

M O T I O N

CHAIRMAN MEITES: Okay. Then I will move that our committee recommend this to the full Board for approval.

MS. BEVIER: And I'll second.

CHAIRMAN MEITES: And it is by acclamation, then.

MS. BEVIER: Right.

CHAIRMAN MEITES: Thank you. The next item on the agenda is consider and act on future activities for

the committee. And can I ask which staff member is going to report on that? Victor? We're kind of running late, so we should move as quickly as we can.

MR. FORTUNO: Actually, there's not a great deal to be said here. This was simply an item put on the agenda for purposes of allowing you to take up the issue of what you want to do after this.

So that if there's something you would like the direct staff to provide, whether it's updates or a status report on any existing rulemaking, whether you're asking for recommendations, or whether you're asking for copies of some background on work that has been done. There was a task force established to study rulemakings, rules, and what needed to be done, and in what order they should be taken up -- that is, prioritizing of the rulemaking that it was anticipated would be taken up by the Board -- we could provide all that kind of background at some future time.

But this is just ask what the committee would like to have done. And that's all it is.

CHAIRMAN MEITES: Well, what I would like --

■ VOICE: Excuse me. Mr. David Hall has joined
■ us.

■ MS. BEVIER: Hi, David.

■ CHAIRMAN MEITES: Are you there?

■ MR. HALL: Hello.

■ CHAIRMAN MEITES: Hi, David. This is Tom
■ Meites speaking. We are in the middle of the committee
■ meeting of the Operations and Regulations Committee.
■ Actually, we're towards the end of that.

■ MR. HALL: I was calling -- I thought the
■ Provisions was starting at 4:30, so I apologize.

■ CHAIRMAN MEITES: It is supposed to.

■ What I would ask the staff to provide before
■ our next Board meeting to our committee is a status
■ report on all pending regulatory efforts -- that is,
■ everything that's in the hopper -- with a chronology of
■ the history of that proposed rule, and whatever the
■ current draft is, if there is one, of the current rule.

■ Lillian --

■ MS. BEVIER: I was going to ask for exactly
■ the same thing, but that doesn't mean we need two

■ copies.

■ (Laughter.)

■ CHAIRMAN MEITES: Does anyone on the Board
■ have any other matters they'd like to ask the staff to
■ undertake in this area?

■ (No response.)

■ CHAIRMAN MEITES: Well, that should keep you
■ busy. "Consider and act on other business." Is there
■ any other business for our committee? Lillian, I have
■ none. Do you have anything else?

■ MS. BEVIER: No.

■ CHAIRMAN MEITES: Any member of the Board?

■ (No response.)

■ CHAIRMAN MEITES: All right. I'll open the
■ matter up for public comments. If there's anyone who
■ would like to address our committee at this time, we
■ will hear them.

■ (No response.)

■ CHAIRMAN MEITES: No one stepping forward, I
■ will adjourn our committee meeting. Thank you.

■ (Whereupon, at 4:30 p.m., the Operations and

■ Regulations Committee meeting was concluded.)

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