

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE

OPEN SESSION

Friday, December 13, 1996

10:18 a.m.

Legal Services Corporation
10th Floor Conference Room
750 First Street, N.E.
Washington, D.C.

COMMITTEE MEMBERS PRESENT:

LaVeeda M. Battle, Chair
F. William McCalpin
Ernestine P. Watlington

BOARD MEMBERS PRESENT:

Hulett "Bucky" Askew
Thomas F. Smegal, Jr.
Maria Luisa Mercado

STAFF PRESENT:

Suzanne Glasow, Office of General Counsel
John Tull, Director of Office of Program Operations
Martha Bergmark, Executive Vice President
Laurie Tarantowicz, Office of Inspector General

OTHER PARTICIPANTS:

Linda Perle, Center for Law and Social Policy
Alan W. Houseman, Center for Law and Social Policy
Rick Teitelman, Legal Services of Eastern Missouri

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C O N T E N T S

| | PAGE |
|---|------|
| Approval of Agenda | 4 |
| Consider and act on draft interim revisions to 45 C.F.R. Part 1612, the Corporation's regulation restricting lobbying and certain other activities by grantees | 4 |
| Approval for the committee of minutes of September 29, 1996 joint Operations and Regulations Committee and Provision for the Delivery of Legal Services Committee meeting | 92 |
| Consider and act on draft interim revisions to 45 C.F.R. Part 1620, the Corporation's regulation on priorities in the allocation of resources | 95 |
| Consider and act on draft interim revisions to 45 C.F.R. Part 1627, the Corporation's regulation on subgrants, fees and dues | 113 |
| Consider and act on a draft interim regulation (to be codified as 45 C.F.R. Part 1636) on disclosure of plaintiff identity and statement of facts | 124 |
| Consider and act on a draft interim regulation (to be codified as C.F.R. Part 1637) restricting grantees' participation in litigation on prisoners | 190 |
| Consider and act on a draft interim regulation (to be codified as 45 C.F.R. Part 1638) restricting solicitation of clients by grantees | 198 |
| Consider and act on a draft interim regulation (to be codified as 45 C.F.R. Part 1640) applying federal waste, fraud and abuse law to LSC funds | 213 |
| Consider and act on a draft interim regulation (to be codified as 45 C.F.R. Part 1939) proscribing grantees' involvement in challenges to welfare reform | 263 |
| MOTIONS: pages 3, 94, 112, 124, 189, 198. | |

P R O C E E D I N G S

1
2 MS. BATTLE: I'm going to go ahead and call
3 the meeting to order. We've now been called to order.
4 I'd like to welcome everyone here to this meeting of
5 the Operations and Regulations Committee of the Board
6 of Directors, Legal Services Corporation on this
7 December 13, Friday the 13th, 1996.

8 We are in a new facility here on the 10th
9 floor, as opposed to the 11th floor. I do know that
10 we've got people that have asked to participate that
11 will be coming in. I hope we have adequate space to
12 accommodate the public here. I understand that we have
13 another room that we'll have the opportunity to use
14 when we meet again, so I'm looking forward to those
15 accommodations when they're available.

16 You should have before you a copy of the
17 agenda that has been published for this meeting.
18 Before we approve the agenda, it's my understanding
19 that the minutes of our previous meeting on September
20 29 have been boxed away because of the move and will be
21 made available to us later. So I'd like to defer that
22 item that is listed as number 2, right after approval

1 of the agenda.

2

APPROVAL OF AGENDA

3

4

5

MS. BATTLE: Are there any questions about the agenda? I'll entertain a motion to approve the agenda, as written, with the one exception that I've noted.

6

M O T I O N

7

MR. MCCALPIN: So moved.

8

MS. WATLINGTON: Second.

9

10

11

MS. BATTLE: It's been properly moved and seconded that the agenda be approved with the one exception mentioned. All in favor?

12

(Chorus of ayes.)

13

MS. BATTLE: All opposed?

14

(No response.)

15

MS. BATTLE: Motion carries.

16

17

18

19

CONSIDER AND ACT ON DRAFT INTERIM REVISIONS TO
45 C.F.R. PART 1612, THE CORPORATION'S REGULATION
RESTRICTING LOBBYING AND CERTAIN OTHER ACTIVITIES
BY GRANTEES

20

21

22

MS. BATTLE: We will then take up the first regulation identified in item 3, which is consider and act on draft interim revisions to Part 1612, the

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1 Corporation's regulation restricting lobbying and
2 certain other activities by grantees.

3 Now, I understand that management has
4 summarized, to some extent, the comments that we have
5 received. We received a binder with comments on
6 interim and proposed regulations which contained the
7 regulations -- the commentary that we had received up
8 through November 8, 1996.

9 Subsequent thereto, there have been some
10 additional comments that were submitted and today we
11 have received a supplement which contains those
12 additional comments that were submitted to the
13 Corporation after the time frame has passed for our
14 review.

15 And in addition to the secondary supplemental
16 green binder that you should have before you are some
17 additional faxed comments that we got as late as
18 yesterday that should be in packets that you have
19 before you today.

20 I think all of the members of the committee
21 and the board have been mailed copies of the comments
22 on interim and proposed regulations, proposed rules,

1 dated November 8, 1996, so you should have had an
2 opportunity to review those.

3 The management comments I had a chance to look
4 at last night and I know that the other committee
5 members have not. The proposed changes to the regs are
6 bolded. So to facilitate our discussion today, I would
7 like to begin by having the analysis by management of
8 the comments. Then we can hear from committee members
9 their concerns or perceptions about the comments and
10 then we can undertake the proposed changes, if there
11 are any proposed by management, with any commentary we
12 might have from CLASP or anyone else in the public.
13 Let's take that order as we go through each of them,
14 okay?

15 Starting with 1612, can we first hear from
16 management? As I understand it, there were principally
17 three issues on 1612 that were identified and you can
18 tell us about those.

19 MS. GLASOW: On each of these summaries I've
20 mentioned how many comments we received on this
21 particular rule and I put -- for this one it was eight
22 timely comments and when I say "timely," that means the

1 ones, you got in the big November 8 binder. Everything
2 after that is considered too late to go in that binder
3 and we didn't want to have to keep recounting them, so
4 that's what that means.

5 The first issue on 1612 is confusion about the
6 use of the term "fund-raising." Comments were
7 concerned that it suggested that recipients could not
8 engage in resource development and indeed, that's not
9 we intended by the use of the term. We intended the
10 term to mean self-interest lobbying where you would go
11 and lobby to get funds from a governmental entity to
12 continue your activities, and which would be
13 legislative or other types of lobbying.

14 So we wanted to clarify that and we made a
15 change in the rule. We dropped the use of the term
16 under the purpose section to clarify that.

17 MR. SMEGAL: It appears --

18 MS. GLASOW: In Section 5(c)(1). It is
19 revised to clarify that the recipient may apply for
20 governmental contracts and grants. So we affirmatively
21 said that this rule would allow that type of activity.
22 That's on page 10 in the package you have, right at the

1 top.

2 MS. BATTLE: Now, the purpose section is on
3 page 5 in the materials that you have, 5 and 6, I
4 believe, at the top of the page. Under Section 1612.1,
5 the purpose has been amended and the language should be
6 in bold at the top of page 6.

7 MS. GLASOW: Crossed out.

8 MS. BATTLE: The new language then would read,
9 "The rule also provides guidance on when recipients may
10 use non-LSC funds to participate in public rulemaking
11 or in efforts to encourage state or local governments
12 to make funds available to support recipient
13 activities." And the remaining portion of that
14 sentence remains the same -- "and when they may respond
15 to requests of legislative and administrative
16 officials." And "using non-LSC funds" has been
17 stricken and moved to another portion of the sentence.

18 Does everyone see that?

19 Any questions about the proposed change to
20 1612.1?

21 MR. SMEGAL: I have a question. Maybe I'm
22 just dumb this morning. LSC funds can be used to

1 obtain other government funds, though, can't they? I
2 mean, you're not making the distinction here that the
3 only way a program can go out and try to get more
4 funding is with non-LSC funds? Is that what you're
5 saying, John? That's what this says. "The rule also
6 provides guidance on when a recipient may use non-LSC
7 funds."

8 MR. McCALPIN: You've got to go to .5 to
9 answer your question on the bottom of page 9.

10 MS. GLASOW: Right.

11 MR. TULL: This relates to interaction with
12 the legislative body around funds, as opposed to
13 seeking funds from a variety of other places that would
14 involve any activity that would be implicated.

15 MR. SMEGAL: But the language you have there
16 is broader than that because the second part you've
17 added, "or in efforts to encourage state or local
18 governments to make funds available."

19 MS. GLASOW: This would be an effort to go
20 before a state or a federal or local government to
21 lobby and say, "We want you to pass an appropriation or
22 a law that would allow us to get more funds," as

1 opposed to responding to an RFP put out by a
2 governmental entity saying, "We want people in the
3 public or groups in the public to apply for this grant
4 or contract." That's where we're making the
5 distinction.

6 MR. McCALPIN: You're not saying that they
7 can't respond to an RFP, are you?

8 MS. GLASOW: No, we're saying they can. The
9 language on the top of page 6 is only saying you can't
10 lobby to get federal appropriations or state
11 appropriations or local.

12 MS. BATTLE: The language really says that
13 this rule gives guidance on when you may use the funds
14 in these kinds of efforts. So the purpose section
15 really doesn't give you any clarity on the issue of
16 when you can or cannot.

17 In order to gain that clarity, you have to go
18 to Section 1612.5(c), which reads, "Nothing in this
19 part is intended to prohibit a recipient from" and then
20 1 is the change to language: "Seeking funding from a
21 governmental entity in response to a contract
22 solicitation or request for proposal from the agency or

1 body."

2 Now, the question becomes does that respond to
3 Tom's concern?

4 MR. SMEGAL: Well, maybe my concern is not as
5 clear as it might have been. I'm looking at the
6 purpose here and I see two sentences. The first
7 sentence has not been changed and it doesn't talk about
8 LSC funds or non-LSC funds. Then I go to a second
9 sentence and the only thing I see in there is a
10 reference to non-LSC funds.

11 The first thing that comes to my mind is not
12 the purpose of 1612 to cover -- I mean, it looks like a
13 gap to me in the purpose because you jump from no
14 reference at all to funds to non-LSC funds. What
15 happened to LSC funds? Is the purpose of this that you
16 can't use LSC funds for anything? There seems to be a
17 hole here.

18 MS. GLASOW: Right.

19 MR. SMEGAL: Now, maybe I'm just not reading
20 it correctly.

21 MS. GLASOW: The reason the second sentence is
22 here is because we have an exception in the

1 appropriations to use non-LSC funds for certain types
2 of self interest lobbying, and maybe we need another
3 sentence in there to deal with something else, with the
4 LSC funds generally.

5 MR. SMEGAL: See, you've gone from a broad
6 general purpose in the first sentence to non-LSC funds.

7 MR. HOUSEMAN: Although it was in there
8 before.

9 MS. PERLE: Except that 1612.5 says
10 "permissible activities using any funds."

11 MR. SMEGAL: No, I understand that when you
12 get into other sections you get all kinds of things
13 going on, but the purpose -- it would seem to me if I
14 read .1, I would expect to have an overview of what I'm
15 going to read about.

16 And the first thing that occurs to me is
17 there's no reference to LSC funds. I assume when I
18 read the rest of it there's a prohibition against using
19 LSC funds for anything, the way I read this. There's
20 an exception for non-LSC funds provided in the second
21 sentence of the purpose. Now, maybe it was just a word
22 or two.

1 MS. BATTLE: Does the rule provide guidance
2 which delineates the use of LSC funds and non-LSC
3 funds? And, if so, can we then amend the purpose to
4 include both of those?

5 MR. HOUSEMAN: Except it would be a fairly
6 lengthy sentence if you get specific.

7 MS. BATTLE: Yes. "The rule also provides
8 guidance on when recipients may use non-LSC funds or
9 LSC funds to participate in."

10 MS. PERLE: What if you went back to saying
11 "guidance when recipients may participate in public
12 rulemaking efforts," because the purpose section is
13 just saying "We're giving guidance on when you can do
14 it," and then later on it says with LSC funds or any
15 funds or non-LSC funds.

16 MS. GLASOW: I think we'd be better, like
17 Linda said, to go back to a more general statement.

18 MS. BATTLE: And you're suggesting, Linda,
19 "The rule also provides guidance on when recipients may
20 participate in public rulemaking."

21 MS. PERLE: Mm-hmm.

22 MS. BATTLE: With no reference --

1 MS. PERLE: To the funds.

2 MS. BATTLE: -- to the funds issue in the
3 purpose.

4 MS. PERLE: And then the reference would go
5 later in the rule.

6 MS. BATTLE: Okay. Does that fix your
7 concern?

8 MR. SMEGAL: Yes, I think so, yes.

9 MS. BATTLE: All right, why don't we do that?
10 Are there any other concerns about this? The
11 issue of fund-raising --

12 MR. SMEGAL: So what you've done, LaVeeda, is
13 just take out "use non-LSC funds to."

14 MS. BATTLE: Mm-hmm.

15 MR. SMEGAL: So it's "may participate."

16 MS. BATTLE: Mm-hmm.

17 MR. HOUSEMAN: The rule tells you when you can
18 and cannot do that.

19 MR. SMEGAL: Everything is here. It's just
20 that the first couple of sentences didn't seem to
21 track.

22 MS. BATTLE: That's a good point.

1 Tell me how this change addresses the fund-
2 raising issue more clearly.

3 MS. PERLE: It's an issue that I raised. The
4 problem was when you say fund-raising, which you used
5 to say in the purpose section, it suggests something
6 other than what the rule was intended to address, which
7 is lobbying efforts or administrative advocacy efforts.
8 And it also suggested that there's something wrong with
9 fund-raising from private entities. It's just the
10 word.

11 MS. BATTLE: Okay.

12 MS. GLASOW: That is what we meant by fund-
13 raising, and now we had to say it more specifically.

14 MS. BATTLE: There were two other issues.

15 MR. HOUSEMAN: And then the change on the top
16 of page 10, which was to clarify that this thing
17 doesn't prohibit programs from seeking funding, to
18 respond to an RFP or like the Older Americans Act or it
19 could be local funding, local governmental funding,
20 state governmental funding or federal governmental
21 funding, where there's already appropriation.

22 MS. BATTLE: Right.

1 MR. HOUSEMAN: And the program is just
2 responding to an effort to get that money.

3 MS. BATTLE: Okay.

4 MR. HOUSEMAN: They're not lobbying to get the
5 money in the first place. They're responding to after
6 the money is available, the process to get the money.

7 MR. McCALPIN: Are you to the top of page 10
8 yet?

9 MS. BATTLE: Yes.

10 MR. McCALPIN: Then I think that the sentence
11 c(1) at the top of 10 is more restrictive than required
12 because I do not think it has to be in response to a
13 solicitation or so on, because 509(b) says "Nothing in
14 this act shall be construed to prohibit a recipient
15 from using funds from a source other than the
16 Corporation for the purpose of contacting,
17 communicating with or responding to a request."

18 So my question was may a program not use funds
19 to initiate a request for funding to a legislative
20 body? And I think that that would be permitted by
21 509(b).

22 MR. HOUSEMAN: Yes, but that's covered later,

1 Bill.

2 MR. McCALPIN: Where?

3 MS. GLASOW: 509 language is dealing with a
4 different type of request.

5 MR. HOUSEMAN: It's covered in the section
6 1612.6, if you look at page 12, at the top of page 12,
7 which is the 509 language.

8 MR. TULL: That's non-LSC. Your question was
9 regarding LSC; is that correct?

10 MR. McCALPIN: Anything. Yes, a source other
11 than LSC. It says, in 509(b), and that's what it says
12 at the top of 12. My point is is this sentence at the
13 top of 10 confusing or appear to be somewhat
14 contradictory to the sentence at the top of 12?

15 MR. HOUSEMAN: Well, maybe it is. We are the
16 ones that suggested this. We suggested it as, in part,
17 what Linda said. People said, "Wait a minute. You're
18 saying we can't use LSC funds?"

19 There is nothing in the reg that said you
20 could use LSC funds to respond to a request from a
21 governmental agency or a legislative body or to seek
22 funds from a legislative body or governmental agency

1 where there was already an established program, which
2 normally happens in response to a request for
3 something.

4 So that's why that was put in there, to
5 clarify that this didn't prohibit programs from using
6 LSC funds to seek funding from governmental entities,
7 not to lobby the entity to get the funds available in
8 the first place, but once the funds are available, to
9 have a chance to get those funds.

10 So there's a distinction between, let's say,
11 the individual activities of a program to seek funds
12 that are already made available, which is what this was
13 trying to make sure everybody understood they could do,
14 and activities of a program that are legislative or
15 administrative rulemaking in nature to create funds in
16 the first place. That, you can only use non-LSC funds
17 for, and only at the state or local level.

18 MR. McCALPIN: To a certain extent F, at the
19 top of 12, covers the same area.

20 MR. HOUSEMAN: No, it's --

21 MS. GLASOW: Perhaps the language on the top
22 of 10 should read something more like "apply for a

1 governmental grant or contract."

2 MS. BATTLE: That's probably clearer.

3 MR. SMEGAL: To distinguish from legislative
4 activities that are different than what Alan is saying.

5 MS. GLASOW: You're being the grantee instead
6 of asking money to be a grantor.

7 MS. BATTLE: Could you repeat that language?

8 MS. GLASOW: Apply for a governmental grant or
9 contract.

10 MR. HOUSEMAN: That's fine.

11 MR. SMEGAL: And then would you leave it in
12 response to contract --

13 MS. GLASOW: No, it wouldn't be necessary.
14 And I think that language, which tends to be similar to
15 the other language, is what's confusing the issue.
16 We're trying to clarify something and we almost muddied
17 it up.

18 MS. BATTLE: Okay.

19 MR. HOUSEMAN: I think that's a better
20 solution. I like it better than our proposed language.

21 MS. BATTLE: Apply for a governmental grant or
22 contract is now the language. Does that satisfy the

1 concern that you've raised, Bill, about the scope of
2 what is contained in the non-LSC funds permissible
3 activities provision in .6?

4 MR. McCALPIN: Yes, I guess so. Obviously, I
5 don't know what the comment is going to say. It may be
6 that it's covered by the title to 1612.5, which says
7 "permissible activities using any funds," which, of
8 course, would include LSC funds. And then, top of page
9 12, it's specifically non-LSC funds.

10 MS. BATTLE: That's right.

11 Tom has suggested that the end of that new
12 language that we use in 1 should read "apply for a
13 governmental grant or contract for funding.

14 Is there anything else that we need to address
15 under the issue of clarifying this issue of fund-
16 raising?

17 MR. TULL: Isn't it apply for governmental
18 funding through a grant or contract?

19 MR. SMEGAL: Somewhere funding should appear
20 in there.

21 MR. HOUSEMAN: Apply for funding under a
22 government contract.

1 MS. BATTLE: Under a governmental grant or
2 contract.

3 MR. HOUSEMAN: Correct.

4 MS. BATTLE: All right. Now, we've got two
5 other issues here. One relates to bar association
6 activities, concerns raised about that by comments that
7 we've received.

8 MR. TULL: We received, with regard to what is
9 now number 1612.5(c)(5), which is participation in bar
10 associations, a number of comments were submitted which
11 raised the concern that it could be read to prohibit
12 participation in a committee if an incidental activity
13 of that committee was something related to a prohibited
14 activity, the principal concern being some bar
15 committees do, as a part of their normal activity,
16 react to, comment on, participate in the legislative
17 process.

18 The intent of the committee when we discussed
19 this last time and, if you will recall, had a very
20 lengthy conversation about this issue, we understood to
21 be that such incidental involvement would not be
22 prohibited by it and there was an effort to craft

1 language which would distinguish between where a
2 committee was acting principally or solely with regard
3 to the legislative activity, in which case
4 participation using program resources and participating
5 on the time of the program would be prohibited.

6 But where a committee, as a part of its
7 activities, incidentally does touch upon or engage in
8 an activity which itself is prohibited, that the intent
9 was not to say in that circumstance that a person could
10 not do that on program time or that the use of a small
11 amount of program resource, such as faxing notices of
12 meetings if a person were a committee chair or using a
13 telephone to call and set up the committee, that that
14 kind of user resources would not be prohibited where it
15 involves incidental touching upon prohibited
16 activities, not where it's the sole principal purpose.

17 There was some language suggested to try to
18 accommodate that and our thought, as we wrestled with
19 the language, is that the better way to address the
20 problem was to leave the language as it was because it
21 was the committee's intent not to prohibit such
22 incidental involvement and to clarify in the commentary

1 that intent by being much clearer than we were in the
2 initial draft.

3 MS. BATTLE: Let me just react and then I'm
4 going to hear from Bill. There is some real concern
5 because you do move into a grey area, it seems to me,
6 in practicality, in the implementation of this
7 provision, because when you have language that says in
8 the regulation, "No recipient resources can be used to
9 support these prohibited activities" and you have the
10 reality of how bar associations interact, it leaves
11 room for some interpretation and I think what we've got
12 is a situation where our recipients want some clarity
13 as to how they can march through this and stay true to
14 their responsibilities to their bar associations and
15 stay true to the restrictions that now apply.

16 One concern that I raised this morning about
17 this when we talked was likewise, the issue that
18 intersects with this and what we just covered about
19 lobbying efforts, if you're on a committee of the bar
20 association that does self-policing kinds of things,
21 that issues disciplinary rules or regulations within
22 the association that have the force ultimately of law

1 in that you can ultimately decide if someone violates
2 one of those disciplinary rules, that they get kicked
3 out of the practice of law, whether it was the intent
4 of Congress to prohibit Legal Services lawyers from
5 being able to participate in that kind of activity.

6 MR. McCALPIN: Maria just arrived.

7 MS. BATTLE: Great. Pull in another chair and
8 make room. We have just had another board member to
9 arrive. We are just graced this morning with
10 participation.

11 MR. McCALPIN: I guess we're now subject to
12 the Government in the Sunshine Act. We have a majority
13 of the board.

14 MS. BATTLE: We were subject to sunshine
15 already.

16 MR. McCALPIN: But only committee members can
17 vote.

18 MS. BATTLE: That's right.

19 While Maria is getting ready, we discussed
20 this a little bit this morning and I had some concerns
21 that I raised about that.

22 MR. McCALPIN: Can I raise another aspect of

1 it?

2 MS. BATTLE: Is it the same issue, so we
3 can --

4 MR. McCALPIN: Yes.

5 MS. BATTLE: Okay.

6 MR. McCALPIN: At least one of the comments
7 raised an issue personified by a recent attendee and
8 that is a person in the program serving as an officer,
9 particularly as president of a bar association, and we
10 have a program director here who was president of the
11 local bar association.

12 Does that mean, for instance, that if a matter
13 comes before the governing body of the bar association,
14 that the president may not preside as president?

15 MS. BATTLE: Well, that gets to some of the
16 issues, I think, that I'm raising, as well. The
17 question becomes whether that can be done while that
18 person is using recipient resources or whether that has
19 to be done while that person is not using recipient
20 resources.

21 MR. TULL: I think there are two issues. One
22 is resources, and then time. And the distinction that

1 I believe the committee strove to frame before was that
2 if a committee is meeting the person as the president
3 of the bar association, for instance, is providing over
4 a discussion of legislation and that is the sole
5 purpose of it, that that person should take time off in
6 order to participate in that and should not use program
7 resources to set up a meeting like that.

8 As distinguished from if that is, and I
9 recognize we're starting to dance on the head of a pin
10 here but I think we're talking about providing guidance
11 in an area which is complicated but where we do have a
12 clear prohibition, the importance of which is deeply
13 held on the part of Congress, that where a committee or
14 the bar association, as part of a whole array of
15 activities, for instance, presiding over an entire
16 convention which a president of a bar would do if it
17 were the president of a state bar or a full-day
18 meeting, a part of which is a committee which considers
19 legislation or that on the agenda is an item which
20 covers that, that that connection with that prohibited
21 activity is sufficiently incidental or not exclusive
22 that, in that circumstance, that it would be

1 appropriate to, assuming that the board of directors of
2 the program has agreed that the director should spend
3 his time that way or her time that way, that that
4 person could preside over that particular proceeding on
5 program time without violating this particular
6 provision and without violating --

7 MS. BATTLE: I think we have to get to what
8 fundamental tenets of our relationship with the private
9 bar will be, as part of how we resolve this issue
10 because I know that in some of our other regulations,
11 we're going to come back to this issue of our
12 relationship with the bar associations, as well as our
13 relationship with Congress.

14 It seems to me that it's one of our
15 fundamental policy determinations that it is good for
16 our recipients to have good relationships with their
17 local bar association and in many states it is
18 mandatory that they be members of their state bar
19 association, at least the licensing entity, and that we
20 have to breathe into what Congress has given us on this
21 the reality of what it takes for us to stay true to the
22 spirit of what Congress intended, which is to not

1 utilize a bar association in order to do things that
2 would be prohibited otherwise but, at the same time, to
3 give our lawyers who work for these programs the
4 opportunity to fully participate in the bar association
5 so that they can maintain good relationships with their
6 local bar associations.

7 Part of our rules require that we have members
8 from local bar associations serve on the boards as part
9 of the responsibility for us to keep a close
10 relationship with the local bar association.

11 So I think as we look at this and as we try to
12 construct comments around this issue, we have to be
13 mindful of making sure that we're real clear that
14 lawyers cannot use local bar associations to do what
15 would be prohibited in any other forum but, at the same
16 time, be able to protect and honor this relationship
17 that is revered in many of our other regulations
18 between the local bar associations and our lawyers.

19 And how you do that in language in number 5,
20 I'm not sure but I just do think that when you start to
21 split hairs and you've got someone who's the president
22 of an association sitting there presiding over a

1 meeting who has to think, "Well, let's see; I need to
2 take about 15 minutes of leave so that we can discuss
3 this issue and then I've got to go back on the clock.
4 So let's take a break so I can go call my office and
5 tell them I'm on leave and then come back and
6 finish" --

7 MR. TULL: I think the recommendation that
8 we're putting forward -- I agree that this language may
9 not do it and that's the struggle but the example that
10 you just gave is one in which I think our position
11 would be a person would not, for that five minutes in
12 which that issue comes up or those 15 minutes --

13 MS. BATTLE: It may turn out to be a half
14 hour.

15 MR. TULL: They do not have to take leave for
16 that.

17 MR. McCALPIN: Well, I would point out to you
18 also that 5 only deals with committees and not officers
19 of associations, which is a different level of activity
20 and responsibility.

21 MS. BATTLE: Well, it says participating in
22 meetings and serving on committees of bars. So the

1 association itself either meets or it has committee
2 meetings.

3 MR. McCALPIN: It seems to me one of the
4 comments also raised the question, what about the
5 program employee who is the president of the bar
6 association serving as the spokesperson for the barr
7 association, or responding to media requests and that
8 sort of thing?

9 So it's not necessarily only in meetings, and
10 I think that's an inadequate way of picking up serving
11 as an officer.

12 MS. BATTLE: Clearly there needs to be some --
13 I can understand the position that the staff has taken
14 and that I agree with, that fundamentally, what the
15 appropriations act directs us to do, we must do, which
16 is we cannot use our resources to do things through bar
17 associations that we cannot do otherwise.

18 MS. GLASOW: What if we found a way to include
19 some language in this --

20 MR. McCALPIN: I can't hear you, Suzanne.

21 MS. GLASOW: What if we found a way to include
22 a provision, a clause in this provision that prohibits

1 activities in meetings or whatever when the principal
2 focus is on prohibited activities? We'd have to work
3 it in here but the idea would be if it's incidental, if
4 it's like one workshop in a whole series of three days
5 of a conference or if it's --

6 MR. McCALPIN: Suppose it's one of the four
7 items on the agenda of the meeting of the governing
8 body?

9 MS. GLASOW: If one of four items is a very
10 strong advocacy item, that might be a problem.

11 MS. BATTLE: Clearly, people are going to have
12 to make judgment calls as to whether or not it
13 fundamentally becomes a use of the recipient's
14 resources to get something done that can't be done
15 otherwise. But I think that focussing the way that the
16 language is constructed so that it is real clear that
17 fundamentally Congress has said you cannot use Legal
18 Services funds to do certain things and you can't do it
19 through bar associations either is one way to get at
20 it, with -- I think the commentary should express what
21 I've said at the onset, which is our basic tenet that
22 we should have good relationships with the bar

1 associations and how that is made clear through various
2 regulations, through things that are in our act,
3 through some of the concerns that we've got about some
4 of the other issues that we're going to deal with, as a
5 premise.

6 Then get at this fundamental issue when we
7 handle how we give guidance to recipients as to how to
8 cut that because there's no way that we can draw
9 language that's going to cut it clearly for everybody,
10 but we do have to make it clear how it ought to be cut.

11 Maria?

12 MS. MERCADO: I think that one way that we can
13 handle the issue, for example, if you have one item on
14 the agenda, is the manner in which board members who
15 generally have a conflict in a particular area on any
16 kind of board, you know, will say I'm recusing myself
17 from this particular issue since it's one that I can't
18 work with, that I have a conflict.

19 In this case it's recusing yourself as a Legal
20 Services member of that committee or as an officer of
21 the governing body, to not deal with that issue because
22 it is in conflict with what your regulations under LSC

1 allows you to do or not do.

2 So you're putting the onus that they're not
3 totally prohibited from participating, but it's no
4 different than if a corporate member has some interest
5 in a particular business or whatever will say, you
6 know, "I can't vote on this issue. I can't really
7 comment on this issue because it would be a conflict of
8 interest" or there's a perceived personal advantage to
9 that particular corporate board member.

10 And it's true in any other organization. I
11 mean, just like when Nancy, when we deal with law
12 schools or whatever, you know, she doesn't deal with
13 those issues. And I don't see why we couldn't have
14 that sort of advice or at least when we're looking at
15 the comments, that it could just happen to be something
16 that is a prohibition under the regulations, that you
17 don't totally throw out that Legal Services person from
18 the committee, from participating in the bar, but other
19 than when it deals with that particular item, they
20 recuse themselves.

21 MR. TULL: Although isn't the problem that --
22 the problem is the amount of resources because if that

1 person -- there's not a prohibition against the person
2 participating in that discussion. There's a
3 prohibition against a program's resources being used to
4 support a lobbying activity or another prohibited
5 activity.

6 A president of a bar, for example, may be the
7 person whose responsibility it is to make the
8 presentation or to be the advocate and that person may,
9 in terms of their professional stature, be the best
10 person to make that case.

11 So I think we are talking about trying to find
12 language which answers your question, provides guidance
13 about the answer to that question. Is it 25 percent of
14 an item? Is it 10 percent? Is it 1 percent? Is it
15 half?

16 MS. MERCADO: But I'm just saying if that
17 individual is there not clocked on their own time but
18 that they're actually there doing the work and
19 participating in the bar function on the committee,
20 that technically you are using resources in the sense
21 that that person is being paid by Legal Services.

22 So one way of making that very clear is that

1 that person recuses themselves from dealing with that
2 particular issue, which is a prohibited activity under
3 the regulations. I'm just looking at that.

4 MS. BATTLE: Tom?

5 MR. SMEGAL: Let me just inquire, is
6 "resources" defined somewhere?

7 MR. TULL: Right.

8 MR. SMEGAL: It seems to me with respect to
9 Bill's earlier issue, the language "in meetings or
10 serving on committees of" is really not broad enough.
11 We talk, in the ABA, about local and state bar
12 associations and it seems to me what that should be --
13 it's only a suggestion -- is participating as an active
14 member. That's much broader than going to meetings or
15 serving but I think it covers all these kinds of
16 activities -- "participating as an active member of
17 local and state bar associations."

18 I think that's what Legal Services lawyers
19 should be permitted to do, as all lawyers, active
20 membership. That covers if you're the president, if
21 you're on a committee, if you're involved in a seminar,
22 whatever you're doing.

1 MR. HOUSEMAN: The only problem with that
2 language is we do have some members who participate on
3 key committees of the ABA. We have Legal Services
4 people on SCLAID, as you know.

5 MR. SMEGAL: Oh, sure. I didn't mean to leave
6 out the ABA.

7 MR. HOUSEMAN: Okay, local and state, though.

8 MR. TULL: Would it do better just to say
9 "participating in bar activities"? Because I think
10 when you say "active member," it immediately raises the
11 question, well, is an officer participating as a
12 member? Your intent is to use the word "member"
13 broadly but in some areas it is as distinguished from
14 officers and it might be better just to say
15 "participating in bar activities."

16 MS. PERLE: There's also a term of art here,
17 for example. You can be an active member or an
18 inactive member.

19 MR. McCALPIN: Right.

20 MS. PERLE: It means something different.

21 MR. SMEGAL: Participating is fine. I can buy
22 into that. But is bar association broad enough? I

1 mean, that is not --

2 MS. BATTLE: We've not defined bar
3 associations, have we in this?

4 MR. McCALPIN: Not here. We did someplace.

5 MS. BATTLE: If we have --

6 MR. HOUSEMAN: Governing body.

7 MS. BATTLE: Governing body? Is that where
8 we've defined it?

9 MR. SMEGAL: Limited to governing bodies.

10 MS. PERLE: In 1610.

11 MR. McCALPIN: Tom, I think the distinction
12 being made between active member and bar association
13 activities is a valid one because you've got this
14 question, is he an active or inactive member and that
15 sort of thing. What you're really talking about is
16 participating in bar association activities.

17 MR. SMEGAL: That's fine. Maybe that's the
18 answer.

19 MS. BATTLE: So if we use the term
20 "participating in bar association activities," does
21 that cover everything?

22 MR. HOUSEMAN: Yes, it does.

1 MR. TULL: It doesn't answer our question.

2 MR. HOUSEMAN: It doesn't answer our question.

3 MR. SMEGAL: But it's the first step in the
4 process. The second part is how do you define
5 resources? And if you limit resources to expenditure
6 of money, that if somebody shows up and spends some
7 time in a meeting that isn't a resource. I do it on my
8 lunch hour, it's not a resource of a recipient. Either
9 you've got to define "resource" or you've got to change
10 the word.

11 MS. BATTLE: Can we borrow here, for purposes
12 of breathing some clarity into this concept, from the
13 way that we have approached this resource issue in our
14 lobbying reg, which talks about the use of resources
15 for all these things?

16 MR. McCALPIN: This is the lobbying reg.

17 MS. BATTLE: Well, I'm saying in other places.

18 MR. TULL: Actually, this issue, I think, I
19 don't know that it helps us answer the question but the
20 place where resources and time is most directly
21 addressed, I think, is in prohibited activities, where
22 there's all kinds of convoluted requirements around

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1 "while engaged in provision of legal assistance
2 activities" and "while employed as."

3 MS. BATTLE: What about "No funds made
4 available by the Corporation shall be used to pay for
5 any of the prohibited acts as it relates to bar
6 associations," or something that really focusses not as
7 much on an attorney attending a bar association meeting
8 but the Corporation itself funding some activity that
9 is prohibited?

10 MR. HOUSEMAN: What if you travel -- the
11 problem I have is what if you travel -- let's say
12 you're on the state bar of California governing body
13 and you live in L.A. and they meet in San Francisco?
14 They don't pay -- I don't know if they do --

15 MR. SMEGAL: They do pay but let's continue.

16 MR. HOUSEMAN: Well, let's assume they don't
17 pay for the sake of this, because there are some bar
18 associations that don't. They don't pay for your
19 travel and --

20 MS. BATTLE: Well, if you're traveling to
21 participate in a restricted activity, then no, LSC
22 should not pay for your travel. If you're traveling

1 but you're not going to participate in a restricted
2 activity, then I don't think there's a problem if
3 you're traveling.

4 MS. PERLE: What if there's one issue on the
5 agenda?

6 MR. TULL: That gets us back to the second
7 question.

8 MR. HOUSEMAN: There's one issue on the agenda
9 and assuming you took Maria's approach, could you still
10 spend the money?

11 We're struggling with this. I just want to
12 point out, although somewhat inconsistent with what
13 John and I talked about a while back, but the old rule
14 that we're working from which, in the context of the
15 old rule, was there was an absolute prohibition, I will
16 remind you all, an absolute prohibition on self-help
17 lobbying and an absolute prohibition on legislative
18 activities that would be covered by this.

19 And the old rule said basically you can, as it
20 said, participate in meetings or serve on committees of
21 bar associations, so long as you didn't engage in
22 grassroots lobbying. That is, you can use that forum

1 to stir up.

2 Now, everybody, other than me, everybody was
3 uncomfortable with that on the staff the last time we
4 raised this. Now, that's fairly bright line. Maybe it
5 goes too far.

6 I was trying to come up, in our comment, with
7 something that didn't go that far but gave enough
8 flexibility so that you didn't have to bounce around in
9 the middle of a meeting and say, "Well, now I'm taking
10 off one hat and I'm putting on my other hat," or get
11 hung up about whether you could travel to a bar
12 association meeting or not if one item on the agenda
13 was --

14 MS. BATTLE: How does that language do that,
15 though? I'm trying to understand. If you took what
16 you're proposing, how does that provide the bright line
17 distinction?

18 MR. TULL: I think the bar may be meeting to
19 discuss setting up a campaign to educate people about
20 the difficulties in some proposed legislation involving
21 judicial appointments and the intent is grassroots
22 lobbying of the bar.

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1 So you end up back, I think, at the same
2 conundrum, which is if that's 10 percent of the agenda
3 of a bar meeting, does that mean because there's some
4 engagement that the bar intends -- not you, not the
5 employee but the bar intends and the person is an
6 officer, does that mean they can't go?

7 MR. HOUSEMAN: No, no, you couldn't
8 participate in that. You couldn't participate in the
9 grassroots activity.

10 MS. BATTLE: It doesn't mean you couldn't go
11 to the meeting.

12 MR. HOUSEMAN: The only thing I'll say is we
13 had that rule in effect in 1986 until 1996 and
14 everybody seemed to know how to work with it and there
15 was a similar prohibition, at least on LSC funds and
16 private.

17 Now, I'm not saying we should go back to that
18 but I'm just saying there was a bright line and
19 everybody sort of understood how to deal with it.

20 MS. BATTLE: I guess the question I'm asking
21 is if we've got 10 years of history, then help illumine
22 us as to how that 10 years might help us in

1 constructing an appropriate rule around the issue we've
2 got right here.

3 MR. HOUSEMAN: Well, the 10 years -- what
4 people did was they didn't become the spokespersons for
5 the bar publicly; that is, they didn't go on TV; they
6 didn't write op-eds; they didn't take lead positions
7 that were efforts to stir the public up. They
8 participated on committees or they were part of a
9 committee but they weren't the spokesperson for that
10 committee. That's how they sort of drew the line.

11 Now, we never ran into the presidential
12 problem directly. I don't know what Rick did when he
13 was president of the St. Louis bar. He may have used
14 non-LSC funds and, of course, that changes --

15 MR. McCALPIN: You have Charlie Dorsey, too.

16 MR. HOUSEMAN: And we have Charlie Dorsey.

17 MS. BATTLE: Maybe Rick can help us with that
18 because we're really trying to deal with two different
19 levels of involvement, one being a participant and the
20 other being a leader. And I think we really value the
21 ability of a Legal Services employee being to take
22 leadership positions, and we want that to be able to

1 continue.

2 So if you've got some light that you could
3 shed on this issue I think, Rick, it'll be real helpful
4 to us, as to how you, given the fact that we did have
5 this grassroots lobbying prohibition in existence
6 during the time that you served on that board, how did
7 you address that?

8 MR. TEITELMAN: As Alan says, the system
9 worked for 10 years and really worked very effectively.
10 What I did as president of the bar, there was a certain
11 controversial issue before the ABA while I was
12 president of the St. Louis bar and I basically
13 abstained from that discussion.

14 All our meetings are at lunch. In the local
15 bar, the meetings often are at lunch, so it's not like
16 there's that much -- I usually eat lunch, as you can
17 tell, but most of those meetings are at lunch. So I
18 abstained from the discussion and when it came time for
19 someone to take a position for the St. Louis bar
20 regarding a very controversial issue which everyone
21 knows about in the ABA, I did not take that position
22 for the bar. The president-elect took the position for

1 the bar.

2 MS. BATTLE: Okay. I'll tell you where I'm
3 coming out and then I'd like to hear from other board
4 members and this committee.

5 I tend to think that 10 years of experience on
6 the grassroots lobbying is instructive to us. I think
7 it's important. I think we have to make sure that we
8 send the message to Congress that we're real clear that
9 recipients and their employees cannot engage in
10 anything with bar associations that are one of these
11 prohibited acts, and grassroots lobbying is one of
12 them -- any kind of lobbying; lobbying Congress is one
13 of them.

14 But at the same time, we truly do value the
15 relationships that our recipients have with local bar
16 associations.

17 So I'd like to see if there's a way to bring
18 the 10 years of experience with the way that that
19 provision worked in the past and particularly because
20 people already have experience with it, into this new
21 environment where we've got specific appropriations
22 relating to bar dues and to bar membership

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1 participation.

2 I don't know what language created that
3 environment. We could go back and look at that and see
4 if that will work for finding the right mix for today.
5 It becomes circuitous because it really, truly is going
6 to require significant judgment calls on the part of
7 people involved in bar activities to determine when
8 it's gotten to the point that they can just simply
9 recuse themselves and when it's gotten to the point
10 that they cannot participate at all and don't need to
11 go to a particular meeting, given the various issues
12 that will come up over time.

13 But I think we need to preserve the
14 opportunity for our employees of programs to be able to
15 take leadership roles and active participation roles
16 and we need to draw this line in such a way that we
17 don't undercut or dissuade people from being able to do
18 that.

19 MR. McCALPIN: Two things. Alan, can you
20 point me to the old provision that was in effect for 10
21 years? I have old 1612 in front of me and I'll quickly
22 find it but while you're looking, LaVeeda, I have a

1 pretty strong feeling that the statement you made at
2 the beginning of this discussion, which is kind of an
3 underlying and overriding principle that our intent is
4 that bar associations and bar association activities
5 are not to be used to subvert the restrictions placed
6 by Congress on programs.

7 MS. BATTLE: Right.

8 MR. McCALPIN: I think that needs to be said.

9 MS. BATTLE: Yes, I do, too. I think a couple
10 of things about how it's said. I mean, we could say it
11 in the commentary. We could say it in the rule. But I
12 think if we say that and, at the same time, make some
13 statements about the value of our relationship with bar
14 associations, then we have met the specific concern
15 that Congress has raised with this particular
16 appropriations restriction.

17 MR. McCALPIN: We've shown fidelity to their
18 restriction.

19 MS. BATTLE: Exactly. And once we do that,
20 then the 10 years of history that we have around this
21 issue, because we've had people participating with bar
22 associations but not able to engage in grassroots

1 lobbying for the last 10 years, will also be
2 instructive to people as to how in this new environment
3 they can act.

4 Now, if there is something about this new
5 environment that's different from the old, then we need
6 to talk about that now so we can make sure that we take
7 that into account. Suzanne?

8 MS. GLASOW: The point I'd like to make is
9 that 10 years experience was dealing with a different
10 set of restrictions on lobbying and we're now facing
11 stricter restrictions on lobbying in some areas. I'm
12 not sure that really solves the problem of we're trying
13 to draw this fine line of making sure we're not using
14 bar associations to engage in prohibited activities.

15 I think what the committee is asking is how
16 can we draft some language that draws that fine line,
17 give better guidance.

18 MS. BATTLE: There's an underlying intent
19 issue. It seems to me that the standard ought to be
20 can someone look at this person's activities and say,
21 "Aha, the intent of this person's involvement here is
22 to lobby in a way that is restricted by the act"? Or

1 can that person's involvement be construed as, "This
2 person is just on this committee. There's no way that
3 you can construe their participation in this committee
4 as their actually attempting to subvert the lobbying
5 restrictions."

6 MS. MERCADO: It gets to be real subjective.

7 MR. McCALPIN: Alan, what's the section?

8 MR. HOUSEMAN: Well, the old section, and I'm
9 not suggesting -- the old section was 1612.5(h)(4),
10 which was right above 1612.6.

11 MR. McCALPIN: I see it.

12 MS. BATTLE: Can you read it for us?

13 MR. HOUSEMAN: This may not go far enough for
14 you. I understand. I wasn't trying to say this is the
15 only approach but maybe if we said something like
16 "provided participation does not include direct or
17 grassroots lobbying," or something like that, you'd get
18 at it. Or "direct or grassroots lobbying on
19 rulemaking."

20 MS. BATTLE: To support prohibited legislative
21 rulemaking or grassroots lobbying.

22 MR. TULL: I think the problem is it still

1 doesn't answer the question that we're wrestling with
2 because if the dilemma we're facing is the circumstance
3 in which the committee of which the person is a member
4 or the chair is doing that, the question is then what?
5 Then does the person have to take time off or recuse
6 themselves, and what is the point at which that
7 triggers?

8 I don't have a quarrel with adding the
9 language, but I don't think it solves the problem. I
10 think we're stuck with having, either in the commentary
11 or in the text, and I think there are some risks in
12 putting it in the text but in addressing the issue from
13 the standpoint of either defining the amount of time or
14 defining the amount of resources, and it has to be
15 related to some standard that it is insubstantial.

16 I think insubstantial is a term or substantial
17 is a term that is used related to lobbying and other
18 circumstances and 25 percent is, in fact --

19 MR. McCALPIN: We had 10 percent requirements
20 some years ago.

21 MR. TULL: We may be faced with just simply
22 biting the bullet and actually just saying that and

1 having some actual figure. I think it should not be in
2 the text. I think the problem with putting it in the
3 text is I think that having a rule in which the board
4 says that it is okay to use insubstantial resources to
5 engage in prohibited activities is not going to read
6 well.

7 MS. BATTLE: No, it's not.

8 MR. TULL: And we don't want to say that.

9 MS. BATTLE: I agree.

10 MR. TULL: That is the practical reality that
11 we're trying to address and it isn't going to go away
12 because we can't talk about it.

13 MS. BATTLE: Tom?

14 MR. SMEGAL: It seems to me that we're trying
15 to dot too many i's and cross too many t's. And this,
16 incidentally, is directed at recipient. Now, I guess
17 if the term "recipient" means individuals who work for
18 a recipient, I guess this is appropriate. But why not
19 have sort of a broader catch-up?

20 For example, "participating in bar association
21 activities other than those prohibited for recipients
22 by these regulations"? Why do we have to get into all

1 these little details in this particular subsection?
2 There's all kinds of prohibitions in here about
3 lobbying and everything else and just say you can
4 participate in bar association activities other than
5 those prohibited.

6 Then if you want to comment on it --

7 MS. GLASOW: Because the comments raise the
8 issue that when we're participating, these things
9 happen and what are we going to do? So we're trying to
10 respond to that.

11 MR. SMEGAL: And if you're on one of those
12 committees and some prohibited activity comes up, you
13 sit down on your hands. What's the problem?

14 MS. MERCADO: This is what every corporate
15 board does.

16 MR. SMEGAL: Yes. You recuse yourself. You
17 do whatever you're going to do. Lawyers know what to
18 do.

19 MR. HOUSEMAN: I think that's a very good way
20 of handling it. I think we've either got to change the
21 language or we've got to spell it out. One of the
22 problems I'm worried about is if you don't have

1 something in the language and you just have commentary,
2 people forget the commentary and only look at the
3 language. There's that problem.

4 MS. BATTLE: Okay. I think what Tom is
5 suggesting is setting out a provision in the regulation
6 that speaks directly to what Congress told us to do and
7 then, in the commentary, we can talk about some of
8 these knottier issues.

9 So if someone, as you've suggested, forgets,
10 there's always the commentary there, which will address
11 some of these more specific things.

12 I tend to agree with you that the broader we
13 state it, the better we give people the opportunity to
14 use good judgment. And if we give examples of good
15 judgment in our comments, then that gives people
16 guidance as to how to draw that line, rather than
17 getting down to saying 10 percent or 15 percent because
18 when you walk in a meeting, you don't have a clue.

19 You're putting everybody in a position so that
20 I've got an agenda that says I'm going to be dealing
21 with the issue of legal services in this community and
22 all of a sudden the whole day turns to issues that

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1 could be those that are prohibited. And you've got to
2 determine, "Let's see; was it 10 percent of our
3 discussion today or was it 15 or was it 12 percent and
4 do I have to take leave?"

5 I think that that's going to cause greater
6 problems than if it's real clear from the onset what
7 you've got to do and we have examples in the commentary
8 about it.

9 Rick, I know you had your hand up.

10 MR. TEITELMAN: We don't want people with bad
11 judgment involved in bar activities anyway. If we have
12 people exercising good judgment it'll increase our good
13 relationship with the bar. So I think that giving the
14 examples and, like we said earlier, basically saying --
15 like he said earlier -- basically saying some of the
16 cautions but saying the law says you can't do this. So
17 they'll have the context in which they need to deal.

18 MS. BATTLE: I do have an appreciation for
19 what both John and Suzanne have raised as to the new
20 environment with stricter standards and restrictions
21 that we have to honor in this and I think we have to
22 give some mention in the commentary to how that's going

1 to play out.

2 But set out simply, you can participate in bar
3 activities, other than these prohibited things.

4 MR. TEITELMAN: And you can recuse, you can
5 use your own time. You can give the different ways
6 they can --

7 MS. BATTLE: Right, get out of actual
8 participation in these prohibited things.

9 MR. HOUSEMAN: So move away from the notion of
10 resources entirely.

11 MS. BATTLE: Yes.

12 MR. HOUSEMAN: That may be better.

13 MS. BATTLE: And it's an issue of
14 participation, not of resources.

15 All right, does that help to --

16 MR. HOUSEMAN: I think we can work on trying
17 to draft something.

18 MR. TULL: And Rick's suggestion was
19 participation by people of good judgment in bar
20 association activities?

21 (Laughter.)

22 MS. BATTLE: Okay. Now, we've got a third

1 issue in 1612, which was a technical issue, as I
2 recall. Was it training programs?

3 MR. SMEGAL: Yes, it is.

4 MS. BATTLE: Tell me what that's all about.

5 MR. McCALPIN: You do have a change at the
6 bottom of page 11.

7 MS. GLASOW: That's just a stylistic change.

8 MR. McCALPIN: Pardon?

9 MS. GLASOW: That's just a stylistic change.

10 MS. BATTLE: It says "using non-LSC funds" at
11 the end of the sentence and it's been moved up, so
12 that's not a major piece.

13 Now, what about the training issue?

14 MS. GLASOW: Okay. The training issue, the
15 language for it is reflected on page 13, at the bottom.
16 And the comments were concerned that they may go to
17 educational programs, CLE courses or whatever, that may
18 incidentally touch on an area that's prohibited to
19 Corporation grantees. For instance, they may be
20 talking about consumer law and part of the CLE course
21 talks about using class actions. We can't use class
22 actions. It's really incidental to the whole area of

1 being educated in that area of law.

2 So we added language saying "except that
3 recipient staff may use recipient funds to participate
4 in training programs in which training on prohibited
5 activities is only incidental to the overall training
6 program" and explain in the commentary what we're
7 talking about.

8 MS. BATTLE: Bill?

9 MR. McCALPIN: As I recall, there was one
10 comment which raised the situation where the program
11 employee is a presenter on the training program, rather
12 than just a recipient, and suggested that that would be
13 permissible, as long as the program employee did not
14 him or herself present the prohibited portion of the
15 program.

16 There may be other elements of the program
17 which are prohibited. The program employee
18 participates only in a permitted part of the program.
19 I'm not sure this language gets to that situation.

20 MR. SMEGAL: But do you even have to get
21 there? This is couched in terms of no funds and I
22 would understand that trainer probably to be there

1 without having to pay a fee to get there. You can ask
2 somebody to run a seminar; you don't usually charge
3 them to go.

4 MR. MCCALPIN: No, but he may be there on LSC
5 time. He may be there on LSC expenses. He may pay his
6 own way to the training session. I think the NLADA
7 trainers, by and large, pay their own way to the NLADA
8 conferences.

9 MS. BATTLE: Did this new law raise this issue
10 of training as it relates to this?

11 MR. HOUSEMAN: C is an addition. This is not
12 in the law. There's nothing in the law that says you
13 can't do this in the first place. The judgment -- the
14 law says you can't -- everything above C is what the
15 law says.

16 MS. BATTLE: Right.

17 MR. HOUSEMAN: Essentially. And then the
18 question was what about if you're asked to train on
19 prohibited activities? That issue has come up.

20 So this was an effort by all of us who were
21 engaged in this discussion to try to come to some
22 resolution of that question.

1 MS. BATTLE: I've got a certain level of not
2 being at ease with this incidental language,
3 particularly when in all other instances we're saying
4 either you can or cannot. And I think potentially this
5 issue, particularly since the law does not require it,
6 can be handled in the commentary, from the standpoint
7 of saying, "Now, we understand that people do
8 training."

9 For example, if someone has handled the last
10 class action in housing in a particular state, we can't
11 do it any more but other people are saying, "But we'd
12 like to learn how to do it. We've got to pick up on
13 how to do this and you're the only one with any
14 expertise on how to do this. Will you do a seminar so
15 that private bar can now take over this responsibility
16 of doing class actions in this area?"

17 If the law itself does not prohibit it, I have
18 some concern about first of all, you're going to cover
19 housing, you're going to cover all the basic issues,
20 and at some point you're going to talk about those Rule
21 23 -- or whatever the number -- certification
22 requirements are for a class and how you handle some of

1 those other issues in that presentation.

2 Are we talking the prospect that that might
3 happen and giving it now some legal consequence here,
4 whereas we could give guidance in the commentary and
5 cover it?

6 MS. MERCADO: Is it really the intent of
7 Congress to keep you from saying anything like that
8 when you're not going to be using your resources to do
9 class actions? I mean, their intent was that they
10 didn't want class actions being done. I don't know
11 that --

12 MS. BATTLE: If they're saying I can't tell
13 you how to do class actions. In other words, I guess
14 what Congress is saying is we cannot handle class
15 actions. Is Congress also saying, "And now that you
16 can't and you're the only one who's done it, you can't
17 tell other people how to do it so that they can go do
18 it."

19 MS. MERCADO: I think we're going much further
20 than the law.

21 MS. BATTLE: I wonder whether we can handle
22 this particular issue, particularly since we're talking

1 about incidental stuff, in a commentary, rather than in
2 our rule.

3 MS. PERLE: Are you suggesting taking out the
4 whole section?

5 MS. BATTLE: The "except" piece, and put it in
6 the commentary itself.

7 MR. HOUSEMAN: Oh, the "except" piece. I
8 thought you were talking about taking out the whole
9 thing.

10 MR. SMEGAL: I'm talking about taking out the
11 whole thing. I hadn't said anything yet.

12 MS. GLASOW: The training restriction doesn't
13 reach paragraph C. That is something the board put in
14 some years ago.

15 MR. SMEGAL: Which board?

16 MR. HOUSEMAN: Your first board.

17 MR. SMEGAL: I move it be taken out.

18 MR. McCALPIN: Were you on the prevailing
19 side?

20 MR. SMEGAL: I voted against it. I can't move
21 to reconsider.

22 MS. GLASOW: Because the training restriction

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1 says you cannot support training programs that advocate
2 particular public policies or encourage or facilitate
3 political activities, et cetera.

4 MR. HOUSEMAN: It doesn't address this issue.
5 Nothing else in the appropriation rider addresses this
6 issue.

7 MS. MERCADO: You're giving them more
8 restrictions than they need to have. Congress did not
9 address this.

10 MR. HOUSEMAN: This really comes out of some
11 history of some of the rules, which is why it's in
12 here. It wasn't put the same way in the other rules.

13 In other words, if you struck C and then had
14 some discussion about this issue in the commentary, you
15 might be able to accomplish what we're all trying to do
16 here.

17 MS. PERLE: There really is an argument in the
18 situation you discussed where you're sending cases to
19 other people and you've got to teach them how to do it
20 and you may have some professional responsibility to do
21 that, when you're turning a case over to somebody else.

22 MS. BATTLE: Yes, that's a specific instance

1 but also there may be a broader issue of whether or
2 not, since you're no longer doing this and you're the
3 only one who's done it, it may not be a specific case
4 but just the private bar, in general, that will be
5 receiving these --

6 MR. HOUSEMAN: That's exactly how this came up
7 in the first place. Some Legal Services attorneys were
8 asked by a bar association CLE program run by the bar,
9 not by the program, and the bar asked them to come and
10 train people on how to do class actions and a bunch of
11 other things. The other things weren't prohibited.

12 Part of the training was on class actions and
13 they wanted those lawyers to participate because they
14 had a training program in federal practice, is what it
15 was, and they wanted the lawyers to participate in the
16 program because they were experts and they had done a
17 lot of federal practice and they had trained before and
18 they got high marks.

19 So then the question was under the new regime,
20 could they go and do that? That's how it came up in
21 the first place.

22 MR. McCALPIN: What was the answer?

1 MR. HOUSEMAN: Well, we didn't have, until
2 this -- this was before this.

3 MS. BATTLE: The incidental issue. And I
4 guess what I'm suggesting --

5 MR. HOUSEMAN: It basically said if it's just
6 a little tiny -- our advice was if it's just a little,
7 tiny part, it's okay.

8 MS. BATTLE: I've got some concern about us,
9 even though I know this was your previous board, Tom,
10 taking out something that's been in there for a long
11 time.

12 MR. HOUSEMAN: It didn't look like this. This
13 is a much different --

14 MS. BATTLE: I prefer -- let's go look at the
15 language that was there before.

16 MR. HOUSEMAN: That's worse.

17 MR. TULL: It's 1612.9 --

18 MR. SMEGAL: What was the basis for the
19 Durant-Wallace-Smegal board putting this in?

20 MR. HOUSEMAN: They wanted to make sure you
21 didn't get around prohibited activities by training.

22 MR. SMEGAL: So there wasn't any specific

1 mandate from Congress to do this.

2 MR. HOUSEMAN: No, no, there wasn't any
3 mandate ever. This language hasn't changed, as a
4 practical matter.

5 MS. MERCADO: But we've had other regulations
6 where Congress has not spoken to a particular issue and
7 we're adding something and we've decided that that's --

8 MS. BATTLE: Well, we're paring back. That
9 was one of the things, when I became chair, in my very
10 first piece that I wrote that Alan and I talked about
11 was fundamentally what we wanted to do. And if there
12 is not a specific requirement that we do that in our
13 act or any other appropriations law or anything else,
14 we're really taking a hard look at it.

15 My concern is because of the nature of this
16 particular issue, I'm not certain that we should pull
17 out what was there before. I just don't think that we
18 ought to clarify it with incidental language in the
19 rule, whatever was there before. We can do that in the
20 commentary.

21 Okay, this is 1612.9, training. The language
22 previously was in I think it's (a) (1).

1 MR. McCALPIN: 9(a), yes.

2 MS. BATTLE: 9(a). "No funds made available
3 by the Corporation or by private entities may be used
4 for the purpose of supporting or conducting training
5 programs that advocate particular public policies or
6 encourage or facilitate political activities or
7 disseminate information about such policies."

8 MR. HOUSEMAN: Go to C, is the one you want.

9 MR. SMEGAL: Yes, all of that is still here.
10 What you just read is 1612.8(a).

11 MR. TULL: C is the one.

12 MS. BATTLE: C is the one. "No funds made
13 available by the Corporation or by private entities may
14 be used to pay for participation by any person or
15 organization in training with regard to political or
16 legislative activities, except for adjudicatory
17 proceedings or with regard to areas in which the
18 program involvement is prohibited pursuant to the
19 provisions of the act, of other applicable federal law
20 or of Corporation regulations, guidelines or
21 instructions."

22 MR. TULL: So the middle piece was taken out

1 and what remains intact is the second part, what comes
2 after the "or."

3 MR. SMEGAL: Let me suggest to you that that
4 same board you're talking about prohibited the
5 redistricting cases and Lowell Jenson, a federal court
6 judge in California, then overturned that regulation.

7 So what's to say this particular regulation is
8 just like that, that Jenson never got to it?

9 MS. BATTLE: If we take out the "except"
10 language and just leave in the "No funds of a recipient
11 shall be used to train participants to engage in
12 activities prohibited by the act," and left that first
13 part, and dealt with the incidental issue in the
14 commentary, would that get us where we need to go?

15 MR. SMEGAL: Well, apparently not because
16 that's why the exception is there.

17 MR. HOUSEMAN: Maybe it would. I have
18 concerns about the commentary. Here's what my concerns
19 are. We had some things in the last commentary that
20 got knocked out and my concerns about the commentary
21 are that somebody will come in who's not sitting in
22 this room and say that we can't say that and it'll get

1 knocked out, to be as blunt as I can be.

2 My only problem with trying to figure out a
3 way to address this in the commentary, if that's where
4 the board is --

5 MR. McCALPIN: Who knocks it out?

6 MR. HOUSEMAN: Well, there are objections made
7 by IG and other people.

8 MR. McCALPIN: But the board is the one that
9 decides whether it's in or out.

10 MR. HOUSEMAN: I understand. So as long as
11 we're going to have some -- as long as it's clear we're
12 going to write something in the commentary that
13 addresses this issue, I think I would be probably more
14 comfortable than not but, in the end, prefer it not be
15 here at all. But if that's the choice, if you want
16 something here and you're worried about this, then the
17 question seems to me let's try to address this concern
18 in the commentary.

19 MR. TULL: I think that's right and I think if
20 you read the language of what is there before you get
21 to the "except," it says, "No funds of a recipient
22 shall be used to train participants." It's active. It

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1 implies the recipient training someone to engage in
2 prohibited activities and I think if the commentary
3 makes it clear that this does not mean to allow someone
4 to attend the training where that's discussed -- if a
5 staff member goes to a training that's about how to
6 lobby, they're not going to do the lobby. If it just
7 happens that that's on the agenda, they're not --

8 MS. BATTLE: If the bar association is
9 sponsoring it, then it seems to me the recipient is not
10 funding it.

11 MR. TULL: Correct.

12 MS. PERLE: But they're paying for them to go.

13 MR. HOUSEMAN: But what John just said means
14 we're taking the position that a Legal Services
15 attorney can't train private lawyers to do something a
16 Legal Services attorney can no longer do.

17 MR. TULL: Using the funds of the recipient.
18 I think that's correct. The person can go and --

19 MR. HOUSEMAN: They can't be a trainer. So
20 their expertise is not going to be available.

21 MR. TULL: They can be a trainer. The program
22 cannot pay them to be a trainer to train someone to

1 do --

2 MS. MERCADO: So therefore you're saying that
3 person has to take leave time?

4 MS. BATTLE: Fifteen minutes worth of leave
5 time to discuss what --

6 MS. MERCADO: They're in a seminar. They may
7 be there half a day or whatever.

8 MR. HOUSEMAN: That's what you are saying.

9 MS. MERCADO: I think that's more restrictive.

10 MR. HOUSEMAN: I think that's the wrong
11 policy, myself. My argument would be nothing in the
12 act prohibits Legal Services lawyers from training
13 other people, who do it all the time and it's been done
14 all the time. We don't want to discourage Legal
15 Services lawyers, who have particular expertise, from
16 being trainers in CLE and bar association training
17 activities, which is exactly what this does.

18 MR. TULL: No, I don't think that's correct.
19 What this does, it says you cannot use program
20 resources for that person to be a trainer. It doesn't
21 say they can't be a trainer.

22 MR. HOUSEMAN: Well, as a practical matter,

1 you're going to spend program -- well, most people are
2 going to spend program money --

3 MS. MERCADO: So you're telling them they have
4 to go on leave.

5 MR. TULL: That individual who is the
6 trainer -- we're talking about the trainer.

7 MR. HOUSEMAN: Let me make it concrete. A
8 trainer goes to a CLE program, is asked to come and
9 train. They're not paid a salary and they're not paid
10 transportation, which most CLE programs that I'm aware
11 of don't pay. They're asked to be the lead trainer in
12 a federal practice training.

13 They sit down with the other trainers and
14 they're the ones that know class actions and the other
15 trainers don't but they say, "I can't do that; sorry."
16 I think that's ridiculous.

17 MR. TULL: No, they say "The program cannot
18 pay my way here and the program cannot pay for my time
19 here."

20 MS. WATLINGTON: As a practical matter in
21 looking at this --

22 MR. HOUSEMAN: That means I'm not going to be

1 the trainer.

2 MS. WATLINGTON: -- specific time to explain
3 it out more.

4 MS. MERCADO: So you're saying that Legal
5 Services lawyers are not going to be able to
6 participate because the bar doesn't have the money to
7 pay them to go to the training and they don't -- since
8 LSC can't pay, then if an LSC attorney really wants to
9 do the training and they're going to do it out of their
10 own pocket to go do the training, basically is what
11 you're saying.

12 MR. TULL: To be the trainer.

13 MR. HOUSEMAN: There are two different
14 positions on this and you need to decide. I think it's
15 a mistake. I don't think anything in the act prohibits
16 this and it's a mistake to say that Legal Services
17 lawyers can't train, in the course of a training event,
18 using program resources, on activities that may involve
19 some prohibited activities.

20 MS. BATTLE: Well, let me test this. My view
21 is that the original reg was there to assure that
22 recipients didn't train people in how to incite riots,

1 how to boycott, how to do grassroots lobbying. Why
2 don't we, for the purposes of this provision, put those
3 original things in and leave the rest of it out? Why
4 don't we put the list of things that were part of the
5 original reg in here and leave out those things that
6 might come up as issues relating to this transfer of
7 what we can now do and what we used to do?

8 Because it seems to me, particularly if the
9 law doesn't prohibit it, that all we're trying to do
10 here is to preserve what was there before and to not
11 expand it. And because we now have new things that are
12 prohibited, the concern is how do we handle those new
13 things when this is a reg put together by an old board
14 that everybody's already aware of?

15 Let's figure out a way to say what used to be
16 the prohibition and leave just that in and nothing more
17 and not add any new restrictions that pertain to this
18 new appropriation. I think that's the -- if there's a
19 way to come up with and construct language that does
20 that, I think that makes sense.

21 MS. WATLINGTON: I agree. The more you're
22 trying to explain more what you can do and how you can

1 do it, the more confusing you're getting it to be.
2 You're highlighting things and it gets more confusing,
3 especially in that training. All that explaining what
4 you can do and how you do it, you're just making it
5 more confusing.

6 MR. TULL: I think the previous prohibition in
7 1612.9(c) isn't just in the area that you describe. It
8 has language about political or legislative activities,
9 which was, I'm sure, taken out in this because it's
10 really surplusage.

11 The full scope of the prohibition was
12 participating in training, and this has now been
13 changed, I think appropriately, to say "used to train
14 participants," which I think does narrow it down to the
15 particular concern that Alan has raised, but it is with
16 regard to areas in which program involvement is
17 prohibited pursuant to the provisions of the act or
18 other applicable federal law.

19 So the old rule, as well as the new, would
20 both prohibit training of others in prohibited
21 activities, including class actions and a variety of
22 other things.

1 I think the problem with trying to narrow it
2 is that there is significant sensitivity on the part of
3 the Congress and others that recipients of the
4 Corporation may be seeking to help others do the work
5 they cannot do. There's enormous focus on that issue
6 and while I think Alan speaks to a narrow circumstances
7 of CLE and you don't want to discourage people from
8 being able to participate in that, that the framing of
9 the exception to allow a person to participate and be
10 paid by recipient funds results in a much broader
11 doorway than is intended by the concern that Alan
12 raised and it is a doorway which will be misread by
13 others as allowing an activity about which there
14 legitimate concern on Congress's part.

15 I think that the cost of keeping it a
16 restriction on use of federal funds, that will affect a
17 very narrow set of circumstances, which Alan describes,
18 but I think it's a very small cost to pay to avoid what
19 would be a much greater and much more significant cost
20 by trying to expand it.

21 MS. GLASOW: Part of the idea, I think, behind
22 this provision originally was the idea that Congress

1 gives us money to do a particular job and part of that
2 job shall not include the following activities; for
3 instance, abortion litigation, redistricting, whatever.

4 So why are you spending the funds we give you
5 to do a job that shouldn't include those activities to
6 train people in those activities? So it was all tied
7 to that idea. As John said, it will be perceived as an
8 attempt to get around the restrictions by training
9 others to do the job we can no longer do.

10 MS. BATTLE: So incidentally -- this is my
11 question. Under the previous law, how did we handle
12 these incidental issues? In other words, you had this
13 no funds restriction. You go to a bar convention. You
14 sit in on CLEs. They do touch on these issues that
15 were incidental. How were they handled in the past?

16 MR. TULL: The prohibition is on training
17 others to do it. It's not a prohibition on being
18 present at a training where those things are discussed.
19 That's an important distinction because that's the
20 concern, that recipient funds be used as an activator
21 of those activities, as opposed to someone else
22 providing --

1 MS. BATTLE: Yes, which is what this is. So
2 it only has to do with trainers. I mean, C only has to
3 do with trainers.

4 MR. TULL: Trainers or paying to create a
5 training or to set it up and hire others to do the
6 training.

7 MS. BATTLE: So if you attend someone else's,
8 C doesn't get involved.

9 MR. TULL: It's not invoked by this language.

10 MR. HOUSEMAN: Let me just say, first of all,
11 the old provision only covered LSC funds in the end,
12 even though it says private funds here but there was an
13 exception in 1612.13 for private funds. So the old
14 provision only covered LSC funds. Here we're talking
15 about all funds. That's number one.

16 And secondly, obviously, we had much fewer
17 restrictions on the kinds of issues that would normally
18 come up in training programs than we do now.

19 MS. BATTLE: Now, how do you say that the old
20 one only covered LSC funds when it says "made available
21 by the Corporation or by private entities"?

22 MR. HOUSEMAN: Because then you've got to look

1 at 1612.13(e).

2 MS. BATTLE: 1612.13(e).

3 MS. GLASOW: It was a very complicated rule.

4 MR. TULL: We don't know who wrote it.

5 MS. BATTLE: You're saying you weren't here
6 then, right?

7 MR. SMEGAL: I voted against it. I lost every
8 vote.

9 MS. BATTLE: It says private funds.

10 MR. HOUSEMAN: I don't think we should look to
11 the past to resolve this issue.

12 MS. MERCADO: You can't because you had the
13 distinction of private funds versus the LSC funds.

14 MS. BATTLE: When you read it you don't see
15 it. It says "Corporation funds and private funds."

16 MR. HOUSEMAN: We had all kinds of problems
17 with that.

18 MS. BATTLE: Okay. Now at least I understand
19 now, because I think we're going to need to wrap up
20 this issue and come to some conclusion from the board's
21 perspective.

22 MR. HOUSEMAN: Let me say one thing before

1 you --

2 MS. BATTLE: Don't let me lose my thought,
3 now, Alan.

4 MR. HOUSEMAN: My proposed language is
5 different from the proposed language that they put in.
6 My proposed language would limit it to continuing legal
7 education or bar association training programs.

8 MR. McCALPIN: Where is your language?

9 MR. HOUSEMAN: Go to our comment.

10 MR. McCALPIN: Page 40 in the big, thick book.

11 MR. HOUSEMAN: I don't know what page it is.

12 You've got to go to the actual language we proposed.

13 MR. McCALPIN: "Recipient staff may use
14 recipient funds to participate in CLE or bar
15 association activities in which training on prohibited
16 activities" --

17 MS. GLASOW: We have a suggestion.

18 MR. McCALPIN: I would not agree to that.

19 MS. BATTLE: Okay. Suzanne, what's your
20 suggestion?

21 MS. GLASOW: Instead of making a new paragraph
22 C, under A, put "A recipient may not support or conduct

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1 training programs that," and after 3 put 4, "to train
2 participants to engage in activities prohibited by the
3 act or federal law, regulations, guidelines or
4 instructions," period.

5 MS. BATTLE: To provide what now?

6 MR. SMEGAL: I have that here.

7 MS. BATTLE: He had just done the same thing.
8 Go ahead. I'm serious. Tell me what your number 4 is.

9 MS. GLASOW: Okay. Number 4 would be "train
10 participants to engage in activities prohibited by the
11 act, other applicable federal law or Corporation
12 regulations, guidelines or instructions."

13 MS. BATTLE: That's it.

14 MS. PERLE: In the commentary you can see it
15 says participation in CLE or other things that are not
16 run by the recipient. Does that help?

17 MS. BATTLE: I think that does because that
18 means you're not a major mover on these prohibited
19 things.

20 MR. TULL: You get a raise.

21 MS. BATTLE: C is stricken, then.

22 MR. HOUSEMAN: It's a different way of doing

1 it, actually.

2 MS. BATTLE: How does everybody feel about
3 that? Does that work? That meets what Ernestine
4 raised. It's clear without being confusing.

5 MR. SMEGAL: I have a question. The stuff
6 that was there, activities prohibited by the act, et
7 cetera, that's different than what we see in 1, 2 and
8 3?

9 MR. HOUSEMAN: Yes.

10 MR. SMEGAL: So then that's consistent with --

11 MR. HOUSEMAN: There's some of it that's
12 incorporated within 1, 2 and 3 but it's not --

13 MR. SMEGAL: So a recipient may not support 1,
14 2 and 3 and, in addition, may not provide funding to do
15 these prohibited acts, like training.

16 MS. GLASOW: Advocate, encourage, disseminate
17 or train.

18 MS. BATTLE: Okay. That does it. C is now
19 stricken and we have a number 4. So the language that
20 Suzanne has just read will come under 1612.8, training,
21 8(a)(4). Good.

22 Okay, there were some technical changes. Are

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1 we ready or are we on break?

2 We have some technical changes. Have we
3 covered those? On 1612 there was a technical change,
4 the last statement, 1612.7(a), recipient resources. I
5 think we talked about that already. It's stylistic.

6 MR. McCALPIN: Yes, you put the word
7 "recipient" in.

8 MS. BATTLE: That's fine. We need to make
9 sure that the references back and forth are correct.

10 MR. McCALPIN: If you say "or while using
11 recipient resources provided by the Corporation or by
12 private entities," are you intending to say all
13 resources? Are you trying to exclude public resources
14 other than from the Corporation?

15 MR. HOUSEMAN: Because this is not a
16 restriction required by the appropriation rider; this
17 comes out of the LSC act, this restriction, and only
18 applies to LSC and private funds.

19 MS. BATTLE: So we need to parrot that here.

20 MR. HOUSEMAN: This doesn't come from the
21 rider. It comes from the act. The act does not
22 restrict these activities with non-LSC public funds.

1 MS. PERLE: Only the ones in A.

2 MR. McCALPIN: I can't hear.

3 MS. PERLE: B covers everything.

4 MS. BATTLE: Go ahead. Let's finish with
5 this.

6 MR. HOUSEMAN: Do you want to look at the act
7 section?

8 MR. McCALPIN: Alan, what about 509(a)(12)?

9 MS. BATTLE: Could you read it into the record
10 so we know what you're referencing?

11 MR. McCALPIN: Well, 509(a) says that you
12 can't fund an entity, 12, "that supports or conducts a
13 training program for the purpose of advocating a
14 particular public policy or encouraging political
15 activity, labor or anti-labor activity, boycott,
16 picketing, strike, demonstration, including the
17 dissemination of information about such a policy or
18 activity, except this paragraph shall not be construed
19 to prohibit the provision of training to an attorney
20 providing assistance and advice to an eligible client."

21 MR. HOUSEMAN: This is training. That's
22 training. The lead-in is you can't run a training

1 program that does that. You're not interpreting that
2 section here. You're interpreting a section of the LSC
3 act, this provision.

4 MR. McCALPIN: Well, basically you're saying
5 you can't train them to do it but you can do it.

6 MS. PERLE: With public funds.

7 MR. HOUSEMAN: With non-LSC funds. That's the
8 way the law stands now. This activity is not a
9 prohibited activity with non-LSC public funds, under
10 anything. We don't need the word "recipient."

11 MS. PERLE: I think the only purpose is that
12 we wanted to make sure that a person was paid by a
13 private entity, not the recipient, to make it clear
14 that if an individual who worked part-time for a
15 recipient got a grant from some foundation that allowed
16 them to participate in public demonstrations --

17 MR. McCALPIN: Basically you're saying you can
18 do this with IOLTA funds.

19 MR. HOUSEMAN: Oh, yes, governmental funds if
20 there's not a restriction.

21 MS. PERLE: There's not a restriction in those
22 funds.

1 MS. BATTLE: Okay. Any other questions about
2 this section? I had a suggested change that now that
3 we've talked about it, I don't know if I want to make
4 the suggestion. In A, to 1612.9, organizing, I know
5 that the language that we have in 1612.9 in organizing
6 under A is the same language that we had in this
7 particular reg. I had a suggestion that we change it
8 to read "Recipients may not use LSC funds or private
9 funds to initiate the formation," da-da-da-da.

10 MS. GLASOW: Which means basically the same
11 thing.

12 MS. BATTLE: Yes.

13 MR. TULL: It's a style change.

14 MS. BATTLE: Yes, it's a style change because
15 no funds, to me, was broader than it needed to be.

16 MR. HOUSEMAN: It's probably not a problem.
17 I'll just point out that this language in 1612.1 tracks
18 the statute, which is the appropriation act again.

19 MS. BATTLE: Tell me what page. I've got the
20 little book you've got. The statute on page --

21 MR. HOUSEMAN: Page 10. Look at the beginning
22 of 10. "No funds made available by the Corporation may

1 be used," and then "to initiate the formation or act as
2 an organizer of any," blah, blah, blah.

3 MS. BATTLE: That's which one under B?

4 MR. HOUSEMAN: You've got to start with B.

5 MS. BATTLE: Right.

6 MR. HOUSEMAN: Go down to 7. It's the "no
7 funds" part. So all that's done here is tracking the
8 statutory language.

9 MS. BATTLE: It's not so strong that --

10 MS. PERLE: But it reads better the way you
11 did it and I don't think there's a substantive change.

12 MS. BATTLE: It reads better because when you
13 read this straight, the way it's written -- no funds --
14 if I give you funds, then is that a restriction on what
15 you can do with those funds? By using "recipient"
16 first, that makes it clear what we're talking about.

17 Anybody else have any thoughts about that?

18 MS. BERGMARK: I would leave it the way it is
19 because we're in the situation where there's great
20 sensitivity. There's no change intended, in fact, and
21 I don't think there has been confusion for people about
22 the application of this section.

1 So simply to change the language -- "Well, why
2 did you change the language, then?"

3 MS. BATTLE: Fine. I'm not real strong on it.
4 I agree, Linda. It does read better and make more
5 sense.

6 MR. HOUSEMAN: I think we're better leaving
7 this one alone.

8 MS. BATTLE: Okay, that's fine.

9 Anything else in 1612?

10 We're now coming up on 12:00 and we have done
11 all of one. We're going to finish all the rest this
12 afternoon so that tomorrow we can dedicate to one or
13 two.

14 MR. McCALPIN: How are we going to tie this
15 up? We usually pass a resolution recommending what we
16 have done to the board for adoption as a final
17 regulation. Are we prepared to do that at this point
18 with this regulation?

19 MS. BATTLE: I think that we will, at our next
20 meeting, revisit this one. What we have done is to
21 give the staff guidance as to how to prepare the final
22 rule. I think at that time, the staff should present

1 to us the final rule and our committee can say this is
2 what we want to present to the board.

3 MS. GLASOW: Is the committee meeting in
4 January?

5 MS. BATTLE: Yes. Will we have time to do
6 that?

7 MR. McCALPIN: Well, the board will not have
8 had an opportunity to see it until the day of the
9 meeting.

10 MS. BATTLE: Well, we will get this before the
11 meeting. Shouldn't we and all the board members get a
12 copy of this before --

13 MR. McCALPIN: The fifth of January.

14 MS. BATTLE: Yes, before the fifth of January.

15 MS. GLASOW: We can have a new text relatively
16 quickly.

17 MS. BATTLE: Yes, we're agreeing on specific
18 text changes at this meeting.

19 Now, to make it easier what Bill is suggesting
20 is that we now say "so moved" based on what it is that
21 we have recommended today and that you provide us with
22 what it is we've recommended today so that when you get

1 it to the board, we don't have to revisit this. We can
2 only revisit those that we still have problems, and
3 we're saying, "Bring this back; we're not ready to
4 recommend it."

5 MR. McCALPIN: Well, I don't know. I'm not so
6 sure we don't want to revisit this on the fifth of
7 January when we see -- because I'm a little unclear
8 precisely how some of these issues that we've talked
9 about today are ultimately going to be handled.

10 MS. BATTLE: Okay. Then why don't we do this?
11 To the extent that members of the committee still want
12 to see the language before we take that motion, we'll
13 do that. There may be some that we cover today that we
14 finalize and for those, we'll go ahead and move today
15 and get them finalized.

16 MR. McCALPIN: Right.

17 MS. BATTLE: Do I hear a motion now on this
18 first reg, 1612?

19 MR. SMEGAL: Couldn't you approve it, subject
20 to confirmation of that approval at your next meeting?
21 I think that's what Bill is asking for.

22 MR. McCALPIN: I'm not sure what that

1 accomplishes.

2 MR. SMEGAL: It takes it off the table.

3 MR. TULL: I think the actual language, and
4 maybe I'm wrong but --

5 (Simultaneous conversation.)

6 MR. McCALPIN: The bar association area is a
7 little fuzzy in my mind -- what we're going to do, how
8 we're going to handle it. One of the problems is, as
9 LaVeeda says, we may very well not have commentary by
10 the fifth of January and I think the commentary is
11 going to be significant in this one.

12 MS. BATTLE: Why don't we reserve?

13 MS. BATTLE: They are yeomen and women but not
14 quite yo-yo. That's too much to require. We will
15 probably, at the end of this meeting, revisit the issue
16 as to whether there's a need for us to get back
17 together or how we're going to handle the commentary,
18 but I'm not expecting, in large measure, that we'll
19 have commentary by the fifth and sixth.

20 MR. McCALPIN: And I'm a little reluctant to
21 recommend it to the board in the absence of knowing
22 what's in the commentary.

1 MS. BATTLE: Well, we have, in the past, done
2 the rule to the board and we have to look at this from
3 a resource standpoint, too. It may be because the
4 commentary does not have to be passed off on by the
5 board that we could recommend the finality of a rule
6 and, if need be, either meet or review as a committee
7 the commentary and pass on the commentary ourselves.

8 MR. McCALPIN: Before publication?

9 MS. BATTLE: Before publication, yes.

10 MS. GLASOW: The board did not vote on
11 commentary for the last four rules. They only adopted
12 the text because the commentary wasn't prepared.

13 MR. McCALPIN: In some areas I won't have the
14 same concern about the commentary but this one, it
15 seems to me we've shifted some things from the rule to
16 the commentary and we've talked about putting something
17 in the commentary that isn't in the rule or wasn't
18 there before, so I'm a little more concerned about the
19 commentary on this one than I will be on many of the
20 others today.

21 MS. BATTLE: Well, if I don't hear a motion,
22 I'm going to consider this one tabled for

1 reconsideration by the staff to make the changes that
2 have been proposed at this meeting and we will revisit
3 this particular reg at our next meeting, just prior to
4 the board meeting.

5 But I do hope that the staff will make this
6 available to all board members in a package prior to
7 the board meeting.

8 Okay now, do we have lunch on-site? Is it a
9 12:00 lunch?

10 MS. BERGMARK: It's going to be just around
11 the corner.

12 MS. BATTLE: Do we have the minutes? If
13 everyone has the minutes, while we're waiting for
14 Martha to get back, let's take a look at those joint
15 committee minutes that have been passed out to all the
16 members and review them to determine whether or not
17 they're to be approved.

18 APPROVAL FOR THE COMMITTEE OF MINUTES OF
19 SEPTEMBER 29, 1996 JOINT OPERATIONS AND REGULATIONS
20 COMMITTEE AND PROVISION FOR THE
21 DELIVERY OF LEGAL SERVICES COMMITTEE MEETING

22 MS. BATTLE: These are joint committee meeting

1 minutes for September 29, 1996, a joint meeting of the
2 Operations and Regulations Committee and the Provisions
3 Committee. Did we get a final?

4 We don't have Joan here. On this frequent
5 flier policy, did we ever get a final on that?

6 MS. MERCADO: Yes.

7 MS. BATTLE: We made a decision. I just
8 didn't see the final reg.

9 MS. MERCADO: I know I got it in the mail. It
10 was in the inspector general's report, also.

11 MR. McCALPIN: LaVeeda, look at, and I may be
12 reading this too fast, but there's a page that looks
13 like this. In terms of consideration 4, interim rules,
14 32, 33, 17 and 10, recommended -- oh, I see. The
15 motion at the bottom is just 32. Then I moved 33.

16 Somewhere along the line did we move the
17 others?

18 MR. SMEGAL: 10 and 17.

19 MS. BATTLE: I thought we did. There's 10.
20 We go on down and 17 -- it's two pages later, after the
21 IG report.

22 MR. McCALPIN: I see. Okay, later on.

1 MR. SMEGAL: You get credit every time. You
2 even moved to adjourn.

3 MS. BATTLE: Has the committee had an
4 opportunity to review the draft minutes? Are there any
5 corrections, additions, deletions to the minutes?

6 (No response.)

7 MS. BATTLE: If not, I'll entertain a motion.

8 M O T I O N

9 MS. WATLINGTON: I so move.

10 MR. McCALPIN: Second.

11 MS. BATTLE: It's been properly moved and
12 seconded. All in favor?

13 (Chorus of ayes.)

14 MS. BATTLE: All opposed?

15 (No response.)

16 MS. BATTLE: The motion carries.

17 Okay, we've got some more time before lunch
18 and what I would propose that we do is to move on to
19 the next regulation, priorities in the use of
20 resources.

21 MR. HOUSEMAN: Can I ask one thing off the
22 record?

1 MS. BATTLE: Yes.

2 (Discussion off the record.)

3 CONSIDER AND ACT ON DRAFT INTERIM REVISIONS TO
4 45 C.F.R. PART 1620, THE CORPORATION'S REGULATION
5 ON PRIORITIES IN THE ALLOCATION OF RESOURCES

6 MS. BATTLE: We have 15 minutes. We have
7 approved the minutes. Let's move on to 1620,
8 priorities in the use of resources. We have gotten in
9 some comments on this particular reg and management has
10 some recommendations along certain lines pertaining to
11 this.

12 There were several issues. Not all of the
13 issues, as I understand it based on the management
14 recommendation, not everything about this can be
15 handled now but we need to finalize what we do have
16 before us. Is that right, on 1620, priorities in use
17 of resources?

18 There were, I guess, three or four major
19 issues that you gleaned from the comments and there may
20 have been others that came in with the commentary that
21 we just recently received, but if you could give us
22 just a summary of your view of the critical issues that

1 you gleaned from the commentary, I think that would
2 help to set the stage for our discussion of 1620.

3 MS. GLASOW: The issue on entitlement to
4 representation, comments were concerned that an
5 applicant could come into an office and say, "This area
6 of law is in your priorities; therefore I have an
7 entitlement to representation because my case falls
8 into that area."

9 We're not inclined to change the rule to deal
10 with that. Legal Services has never been an
11 entitlement program and we don't see there's really an
12 issue. All this rule is telling the recipients to
13 do -- it's a management tool to establish priorities
14 and determine how best to use their resources by
15 determining what the needs are in the area, where their
16 expertise is -- it's a variety of factors that they
17 look at and then determine that but nothing in the rule
18 establishes an entitlement to any particular person for
19 legal services.

20 MS. BATTLE: So there really are no changes.
21 This was an issue raised.

22 MS. GLASOW: Correct.

1 MS. BATTLE: And the example that I shared
2 with you this morning was, for example, if a program
3 decides to do divorces. Someone comes in, they qualify
4 for the services but you still don't choose to do that
5 particular person's divorce. Can that person come back
6 and say, "Wait a minute; I'm the next person out the
7 hopper asking for this. Why aren't you doing it?"

8 And we're saying the program still has the
9 discretion, even among those things that they consider
10 to be priorities, to choose which cases within that
11 priority to take.

12 MR. TULL: And we would propose saying that in
13 the commentary.

14 MS. BATTLE: Okay.

15 MR. TULL: That it was raised as a concern but
16 rather than state it in the rule, where adding language
17 about whether this is an entitlement or not and that
18 sort of thing, which is a term of art in many other
19 areas, that it really is not necessary to do it and may
20 cause problems.

21 MS. GLASOW: Linda just raised a fix that
22 doesn't have to get into the entitlement issue but may

1 clarify it. It's on page 5, Section 3, paragraph A,
2 last line of that paragraph says, "which are to be
3 undertaken by the recipient," and she would change that
4 to "which may be undertaken by the recipient." I don't
5 have any problem with that.

6 MS. BATTLE: Okay. Maria?

7 MS. MERCADO: I would assume, Suzanne, I would
8 assume that in the commentary on the entitlement issue
9 that the client community at some point has to deal
10 with the issue that even though that may be a priority
11 case, even though it may be an emergency case or
12 whatever, resource-wise -- meaning, if you only have
13 three lawyers in that office and you've got hundreds of
14 cases come in, they can only take so much without
15 committing malpractice or not being able to handle the
16 work.

17 So even though it's a case, is there any
18 language that deals with the fact that it's also in
19 line with the resources and the capabilities of that
20 office?

21 MS. BATTLE: So you want resources considered.

22 MS. MERCADO: I'm just wondering if it's in

1 there somewhere. I don't remember.

2 MS. BATTLE: The resources of the recipient is
3 number 4. That's really C, factors in considering, in
4 establishing the priorities, but that's in the
5 establishment, not the selection of cases.

6 MR. McCALPIN: Where are you?

7 MS. BATTLE: I am on page 6, which continues
8 subsection C under 1620.3, establishing priorities, and
9 sets out the resources as number 4. You've got the
10 resources of the recipient as one of the things you can
11 consider as a factor in setting up the resources, your
12 priorities.

13 MS. MERCADO: What I was thinking of, LaVeeda,
14 was that lately there have been a lot of complaints by
15 client communities, either to the state bar or judges
16 or whatever, "Well, I want legal services to do my
17 divorce" and it was an emergency and yet when people
18 were downsized, to have the lawyer they had or
19 whatever, they just can't handle it. They're trying to
20 handle all those other cases that they were doing with
21 the lawyers that were terminated.

22 I'm just saying that there has to be some way

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1 of at least having on there -- I mean, obviously the
2 client community is not going to read it but if they
3 get some attorney that decides that they're entitled to
4 that and they ought to do something, that that's a
5 factor that ought to be considered, that resources of
6 the recipient is one of the other factors as to why the
7 case may not be taken, aside from the fact that it is
8 within the priorities.

9 MS. WATLINGTON: Number 6 addresses that, too,
10 the availability of resources in the community.

11 MR. McCALPIN: Did I understand you to say
12 that you're going to take up the entitlement issue in
13 the commentary?

14 MR. TULL: Well, addressing this issue, that
15 the fact of adopting priorities does not entitle a
16 client to representation in that area, that they may be
17 turned away.

18 MR. McCALPIN: I think it's important to deal
19 with that issue for two reasons. Remember, during the
20 years we were in the wilderness, there was a consistent
21 theme stated at meetings of this board and others that
22 legal services ought to be on a first come/fist served

1 basis, so as long as you had resources and somebody
2 showed up, you ought to serve that person. That was
3 the philosophy of many of the people on the board and
4 who appeared before the board at the time, and I think
5 it may be important to negate that.

6 Secondly, I think it may be important to
7 understand that if you set out a list of priorities,
8 you don't have to exhaust everything in the first
9 priority before you go to the second. In other words,
10 the priorities are not mutually exclusive but they're
11 co-extensive. They can all exist together.

12 As Maria says, the availability of resources
13 depends on which priority you go into at what
14 particular time. I think it may be important to lay
15 some of this out in the commentary.

16 MS. BATTLE: You may have, for example, a
17 program where housing is your number one priority but
18 you can quickly do divorces or something else. So the
19 number of cases you have that are divorces may exceed
20 the number of cases that you actually have that are
21 housing cases, even though housing is your number one
22 priority.

1 MR. TULL: This is probably an appropriate
2 time to let the committee know that one of the things
3 that we anticipate coming back to the committee and the
4 board with is a complete relook at what is now in
5 1620.3 and 5. Because this was adopted as an interim
6 regulation to put into effect the requirement in the
7 appropriation that cases only be taken within
8 priorities, we did not look at the entire regulation.

9 We're now in a system of competition where the
10 setting of priorities and how we look in competition at
11 the question of how a program determines how to use its
12 resources, which is one of the principal criteria we
13 use in deciding among competitors, to make certain that
14 the various factors that we need to look at there and
15 the various factors that are expressed in the
16 procedures that are described about how to go about
17 setting priorities are consistent with each other, that
18 we have -- one of the projects that we've taken on at
19 the staff level is to step back and take a serious look
20 at all of the issues that are involved in that in order
21 to come back to you all with a set of possible proposed
22 changes in those two areas.

1 That will provide a vehicle for addressing in
2 full the questions that you raised, Bill.

3 MS. BATTLE: Okay, Bill.

4 MR. McCALPIN: If you look at on page 30 of
5 the thick book and the paragraph that says emergencies,
6 number 2, there's a suggestion there that if you take
7 an emergency, you don't have to require the statement
8 of facts or a retainer agreement. When I looked at
9 that I was rather struck by that because I didn't think
10 I had seen that anyplace else and it seemed to me that
11 at least the statement of facts and the identity and so
12 on was a statutory requirement elsewhere and I wasn't
13 sure it could be waived in an emergency situation.

14 MR. TULL: When we get to that regulation, I
15 think it's not waived. I think it is --

16 MS. BATTLE: This is a recommendation from
17 NLADA.

18 MR. McCALPIN: No, it's from CLASP.

19 MS. PERLE: It's not waived. It says that if
20 you need to take action before you can get it, then you
21 can do that but then you get it as soon as possible
22 thereafter.

1 MR. TULL: It's 1636.2(c) and it's as Linda
2 describes it. It means you can proceed, but it ends
3 with "provided the statement is signed as soon as
4 possible thereafter." So it means you're not
5 proscribed from providing assistance if you have to
6 move but it doesn't waive the provision.

7 MS. BATTLE: That's what I recall about the
8 way that's written.

9 MS. GLASOW: That comment was basically trying
10 to distinguish between emergencies and that kind of
11 particular situation versus what we're talking about in
12 Part 1620.

13 MS. BATTLE: Am I hearing from you, John, that
14 1620.3 has a listing that at some point the staff wants
15 to go back and see if that mirrors the expectation
16 we're giving to people who are developing their grant
17 proposals and to existing programs, so that we're
18 making the same assessment as to how you go about
19 establishing priorities in all of those various areas?

20 MR. TULL: That's a significant part of it,
21 yes.

22 MS. BATTLE: Okay.

1 MS. GLASOW: We are not, however, suggesting
2 that we not go forward with finalizing this interim
3 rule because of the new statutory law we're trying to
4 implement. We would come back to you with a new
5 proposed rule at that point, with changes to those
6 sections.

7 MS. BATTLE: There are no inconsistencies, are
8 there, in what we've got before us today? That's the
9 only question I've got. I know that you may want to
10 fine-tune it. I just want to make sure that what we're
11 putting in the reg is not inconsistent with our
12 communications on other fronts.

13 MR. TULL: That's correct. I thought for a
14 minute you were going to ask for an assertion that
15 there are no inconsistencies anywhere in this
16 regulation.

17 MS. BATTLE: No.

18 MR. McCALPIN: LaVeeda, I think we need to be
19 sensitive to the comment that we heard from the OIG
20 earlier on, and that is the difficulty of engaging in
21 compliance monitoring if you change the rules during
22 the period to be monitored.

1 I wonder, are you thinking about changing this
2 during the course of 1997 so that there would be two
3 different rules that would have to be monitored? Or
4 are you talking about perhaps bringing this to us a
5 year from now?

6 MR. TULL: We discussed that precise issue
7 with the inspector general's office and the
8 procedure -- the sections that we're wanting to take
9 another look at are ones which provide guidance to
10 programs as to the processes that they should be
11 engaged in to set priorities. They involve processes
12 and time frames which are two and three and four years
13 long and will not -- won't, because of their particular
14 nature, won't involve the problem that the inspector
15 general has raised in other areas, which is will an
16 auditor go in and have different rules apply to
17 different sections of the year?

18 The actual impact of changing these, and we
19 haven't gone through the process of thinking what we
20 might recommend, but the impact of the change is not
21 something that would show up for a year or two years or
22 three years because it has to do with now what is

1 required is a needs assessment and then treatment of
2 that needs assessment and reports to us. The
3 creation -- the design, implementation and follow-up of
4 a needs assessment is something which is a very long
5 process. It is not required annually already.

6 MR. McCALPIN: Laurie, is the OIG satisfied
7 with that?

8 MS. TARANTOWICZ: Yes, that's fine.

9 MS. BATTLE: Is there anything else on this
10 initial issue or can we move on now to some of the
11 other issues that have been raised by the commentary?

12 We've got applicability to transfer recipient
13 funds as another major issue. There's some interplay
14 between Part 1627 and this part. Suzanne, can you
15 illumine where we are on that?

16 MS. GLASOW: Part 1610 talked about use of
17 funds in establishing priorities when we were talking
18 about transfers of funds. We suggest not dealing
19 with -- basically, the comment was asking that this
20 rule refer to 1610.

21 However, we are planning to come before the
22 committee in the near future with revisions to Part

1 1727 subgrant sections that will deal with transfers of
2 funds, and at that point we may be also suggesting that
3 we transfer the provisions in 1610 that deal with
4 transfers of funds to 1627. We haven't made that
5 decision but we're working on it, which would make any
6 citation in this rule to that obsolete almost
7 immediately.

8 MS. BATTLE: But what you're proposing to do
9 to 1627 is not with what we've got today; is that
10 right? You don't have that done just yet.

11 MS. GLASOW: That's correct.

12 MS. BATTLE: What you're proposing to do, in
13 terms of the changes to 1627, are not part of to
14 package today.

15 MS. GLASOW: It's not necessary. It would be
16 a helpful reference but because we foresee in the near
17 future that that reference will become obsolete, we
18 don't recommend doing that.

19 MR. McCALPIN: Are you talking about making
20 recommendations other than the next item on our agenda?

21 MS. BATTLE: Later, yes.

22 MR. McCALPIN: 1627 is the next thing we're

1 going to take up.

2 MS. GLASOW: It's the whole section on
3 subgrants. We only change the section on fees in 1627.

4 MS. PERLE: Fees and dues.

5 MS. BATTLE: Fees and dues. Remember there
6 are only specific changes. There is an entire section
7 that has not been touched by this review. And I think
8 what I'm hearing Suzanne say is the rest that has not
9 been touched will be touched later. And when we touch
10 it, it will have an impact on this.

11 Now, tell me this. Will it then require us to
12 revisit what we're doing now in 1620 at all, to make
13 any changes or any references in 1620?

14 MS. GLASOW: No.

15 MS. BATTLE: So when we finish our work on
16 this, we can put it aside. The concerns that were
17 raised by that comment will be addressed when we
18 revisit sections of 1627 that we do not have on the
19 table now.

20 MS. GLASOW: That's correct.

21 MS. BATTLE: Any other questions about that?

22 All right, so that addresses the transfer of

1 recipient, funds. What about emergencies?

2 MS. GLASOW: We already briefly touched on
3 that in response to Bill's question. Basically, the
4 comment was concerned that dealing with emergencies in
5 this rule would be confused with dealing with
6 emergencies in a recipient's priorities that are inside
7 their priorities area, and we don't suggest dealing
8 with that in this rule.

9 Oh, I'm sorry. Clarifying language in 1625(a)
10 and (b)(4). Sorry.

11 MS. BATTLE: It says nonpriority. There's a
12 change in A. 1620.5 annual review, A, the last portion
13 has been changed so that it now reads, "Priorities
14 shall be set periodically and shall be reviewed by the
15 governing body of the recipient annually or more
16 frequently if the recipient has accepted a significant
17 number of emergency cases outside of its priorities."

18 Okay, the second change pertains to the
19 language in (b)(4).

20 MS. GLASOW: The volume of nonpriority
21 emergency cases.

22 MS. PERLE: These changes respond to the

1 concern that was raised, just to make it clear that if
2 it's an emergency cases within your priorities, this
3 doesn't apply.

4 MS. BATTLE: Okay. So that just gives further
5 clarity based on the comment.

6 Were there any other comments that any other
7 members of the committee or the board observed that we
8 need to consider in reviewing this particular reg?
9 Bill?

10 MR. McCALPIN: We say that the priorities set
11 and reviewed if the recipient has accepted a
12 significant number of emergency cases outside of its
13 priorities but we don't, in the next section, list that
14 as a consideration to be taken account of in the
15 review.

16 MR. TULL: Isn't that what 4 is?

17 MR. McCALPIN: Oh, yes, I see. "Outside of
18 its priorities." Since you added the "outside of its
19 priorities," okay.

20 MS. BATTLE: Okay, anything else? We have
21 then, it seems to me, made it through 1620.

22 (Discussion off the record.)

M O T I O N

1
2 MR. McCALPIN: On the record, I would move
3 that the committee approve 1620 in the form before us
4 and as modified here today, recommended to the board
5 for adoption as a final rule.

6 MS. WATLINGTON: Second.

7 MS. BATTLE: It's been properly moved and
8 seconded that we recommend the adoption of 1620 to the
9 board. All in favor?

10 (Chorus of ayes.)

11 MS. BATTLE: All opposed?

12 (No response.)

13 MS. BATTLE: The motion carries. 1620 is
14 done.

15 We are right at 12:30. I think lunch is
16 ready. I am real happy that we finished at least two
17 out of our ten this morning.

18 (Whereupon, at 12:28 p.m., the committee
19 recessed for lunch.)

AFTERNOON SESSION

(1:22 p.m.)

1
2
3 MS. BATTLE: I'd like for us to go back on the
4 record. We're five minutes shy of a one-hour lunch
5 recess.

6 I think it was helpful to us. My goal for
7 this afternoon is for us to complete the next five
8 regulations if we can. We do have scheduled time to
9 continue this agenda on tomorrow. We do have some
10 weighty regulations where we expect that we will have
11 commentary from the public on some of them tomorrow.
12 So to the extent that we can get through our schedule
13 today, that would be good.

14 So that's one of the reasons I wanted us to
15 get back together, to get started.

16 CONSIDER AND ACT ON DRAFT INTERIM REVISIONS
17 TO 45 C.F.R. PART 1627, THE CORPORATION'S
18 REGULATION ON SUBGRANTS, FEES AND DUES

19 MS. BATTLE: The next reg that we have to
20 address on our agenda today is 1627, subgrants and
21 dues.

22 As I understand it, there are no changes that

1 are being proposed to the portions of 1627 that we have
2 before us. There were some concerns that were raised
3 by the commentary and I'd like to just hear from the
4 staff about those concerns and how they recommend we
5 should address them.

6 MS. GLASOW: 1627?

7 MS. BATTLE: Right.

8 MS. GLASOW: Okay. We received four timely
9 comments on this rule and I will again reiterate that
10 the provisions we changed in this rule were the ones
11 that dealt with fees and dues and we changed it to just
12 dues. We made the revisions to implement Section 505
13 of the Appropriations Act on the use of funds for dues.

14 The first issue raised in the comments was on
15 the subgrant provisions. These comments urged the
16 Corporation to make revisions to the sections dealing
17 with subgrants, especially in light of the recent
18 revisions we did on the transfer of funds in Part 1610.

19 As I mentioned on an earlier rule, we're
20 currently working on those revisions and plan to
21 present a new rule, a draft proposed rule to the
22 Corporation on to subgrant issue in the near future.

1 We don't recommend waiting for those revisions for the
2 ones we present to you today, in essence.

3 MS. BATTLE: Okay, bar associations?

4 MS. GLASOW: The comments on the interim rule
5 were generally favorable on the provisions dealing with
6 bar associations. One LSC recipient was pleased
7 because of some conflicts it would have raised with his
8 union contracts. Other bars noted, however, that
9 because their bars do not require membership in order
10 to practice their profession in that state, they
11 wouldn't be able to take advantage of that provision.

12 However, we feel that we can't change -- I
13 mean, the committee made the decision that it would
14 only apply to a bar association acting in a
15 governmental capacity and we didn't suggest any changes
16 to that.

17 MS. BATTLE: Do we know how many bar
18 associations there are out there that are the statewide
19 bars that do not have a mandatory association dues in
20 order to maintain their practice?

21 MS. PERLE: I used to know that number but I'm
22 not sure. I think it's somewhat over half are

1 mandatory bars but not the vast majority.

2 MS. GLASOW: Actually, the comment pretty much
3 recognized that and just urged the Corporation to seek
4 a legislative change.

5 MS. BATTLE: All right. Pre-1996 funds; this
6 really gets to an accounting issue of what should
7 occur, particularly in this first year that audits are
8 going to be done on compliance. Can you address that?

9 MS. GLASOW: The rule states that Corporation
10 funds may not be used. Of course, the provision was
11 passed in the Corporation's fiscal year 1996
12 appropriations and was included in the '97
13 appropriations by reference.

14 Some of the programs had used '95 funds to pay
15 dues prior to passage of the law and implementation of
16 the rule and they were concerned that they would be
17 sanctioned for noncompliance because the rule itself
18 says no funds.

19 We don't feel we need to treat it in the rule
20 but we will not treat it as an issue of noncompliance
21 because the law was not in effect at that time and it
22 simply wouldn't be fair to treat it as an issue of

1 noncompliance.

2 MS. BATTLE: Okay. Are there any other issues
3 that spring from this accounting concern that we at
4 least have here as it relates to the payment of dues?
5 In other words, are there any other activities for
6 which we need to make some comment on audit treatment?
7 Linda?

8 MS. PERLE: I've been asked by Harrison McIver
9 from PAG to just raise the issue about whether the
10 board would be willing to change the rule. Clearly,
11 the appropriations bill applies to the '96
12 appropriation and now the '97 appropriation.

13 So arguably, the rule as it's stated here,
14 which says "Corporation funds," which includes all
15 Corporation funds, goes beyond what's required in the
16 appropriations act.

17 I was asked to raise the question about
18 whether the board would be willing to change 1627.4 to
19 say "Corporation funds under the FY '96 and subsequent
20 appropriations may not be used." In other words, to
21 say that if you still have carryover funds from prior
22 years, that they could be used to pay dues.

1 MR. McCALPIN: Isn't that what they're going
2 to do in the commentary?

3 MS. PERLE: No. What the commentary says
4 is -- since the rule says -- the rule was put into
5 effect on August 29 and the rule says "Corporation
6 funds." So it covers all funds that came from the
7 Corporation, regardless of when they were received.

8 What they're saying is if you pay dues with
9 '95 carryover funds before August 29 it's okay, but not
10 after August 29. In other words, there are programs
11 that still have '95 carryover funds.

12 MR. McCALPIN: Aren't we going to say in the
13 commentary that you can use '95 funds any time to pay
14 dues?

15 MS. PERLE: Well, that's what Harrison would
16 like to have done but if you do that, you also have to
17 change the language of the reg itself.

18 MS. BATTLE: I think that Bill raises a point,
19 at least regarding the retroactivity effect of an
20 appropriation of funds from Congress for specific
21 purposes and then a subsequent appropriation that puts
22 restrictions on the use of the funds and whether or not

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1 that restriction from a subsequent appropriation ought
2 to have any impact on the previous appropriation.

3 MS. PERLE: That's the issue.

4 MR. McCALPIN: Why should it?

5 MR. TULL: It does now.

6 MR. McCALPIN: What?

7 MR. TULL: It does now for virtually every
8 other prohibition because all other prohibitions are
9 "no funds may be used to engage in any activity." So
10 no '95 carryover funds can be used for any of the
11 504 --

12 MS. PERLE: But it doesn't talk about funds.
13 They talk about entities that engage in activities but
14 the language of this rule is different.

15 MS. BATTLE: What does 504 say on the specific
16 issue of bar dues, so that we can be clear about we
17 need to carefully draft this provision?

18 MS. PERLE: It says "None of the funds
19 appropriated in this act to the Legal Services
20 Corporation or provided by the Corporation to any
21 entity or person may be used to pay membership dues to
22 any private or nonprivate organization."

1 And I would read that "None of the funds
2 appropriated in this act provided by the Corporation to
3 any entity or person may be used to pay membership dues
4 to any private or nonprivate organization."

5 So you could certainly read it to say it only
6 covers funds appropriated in the '96 and '97
7 appropriation acts.

8 MR. TULL: We're talking about two
9 distinctions as to how this would apply. I think
10 staff's recommendation is different from and we would
11 not recommend adopting what was proposed on behalf of
12 PAG by Linda and I'll explain why in a moment.

13 The difference is the regulation as it now
14 reads does say "no funds" and would include carryover
15 funds. It was not effective until August 29 and the
16 language which Linda just read, which is from 505,
17 could be read -- I think the first blush reading of it
18 sounds like it means all funds -- it could be read to
19 mean just funds appropriated in 1996.

20 The board, in the interim rule and what we're
21 proposing now, prohibited the use of all funds,
22 including carryover funds. So the initial concern

1 raised with us was in light of the fact that before
2 August 29 some programs may have used, may have been
3 led to use '95 carryover funds, would we make it clear
4 and ask the OIG to make it clear to auditors that for
5 expenditures during that time period, that would not be
6 a violation of the act itself.

7 The audit guide -- we're talking about
8 actually a very minor difference in reality because the
9 audit guide requires, I believe, and we're just
10 checking that this is true, that LSC funds -- current
11 Corporation policy is that funds have to be spent on a
12 first in/first out basis.

13 So a program can't legally hold out for five,
14 ten years its 1995 in order to pay dues for the bar
15 association. They've got to have expended those funds
16 first, as an accounting matter, so that we're talking
17 about only funds which are used this year. So we're
18 talking about a fairly narrow period of time that will
19 be affected by this.

20 In terms of whether it is useful to change the
21 regulation to refer to the funds appropriated in this
22 act, the risk of that is, in terms of appearances, that

1 the fine distinctions between funds from prior years
2 has been a concern -- it was a concern of Congress; it
3 was a concern of the prior board when it adopted the
4 first in/first out restriction, and it really puts the
5 board on record as embracing that, even though the
6 impact of it is only probably a two-month difference.

7 And we believe we can, in the commentary,
8 address the --

9 MS. PERLE: I just want to make it clear that
10 I was very pleased with what the staff indicated they
11 would do in the commentary. I'm raising this because I
12 was asked specifically by Harrison to raise it.

13 If the board decides to adopt what the staff
14 has done, I'm not going to have any objections to that.

15 MS. BATTLE: Ernestine?

16 MS. WATLINGTON: We're so close to '97; I'm
17 aware of that based on being chairman of a legal
18 services program. This has always been a problem with
19 those carryover funds. It's always been a concern how
20 those are looked at. So I think we should leave it.

21 MS. BATTLE: I really do understand what John
22 has explained to me from a number of standpoints. One,

1 I think it does make sense that we be consistent in
2 expressing to the programs once this appropriations act
3 was entered and everybody's on notice, this is the way
4 things are, but not to tag them for what they could not
5 have known was going to be a requirement prior to that
6 specific date.

7 I think what we've done is to split it in a
8 way that's fair to the programs, which allows them not
9 to be penalized for having taken an action that was
10 consistent with the law as it was at that time, and, at
11 the same time, not split hairs on the language in the
12 actual appropriations act in such a way that it doesn't
13 meet the spirit. And the spirit is from this point
14 forward, you can't use LSC funds to pay dues, in the
15 context of this rule.

16 So if I've heard from -- Bill, do you have
17 anything else to offer on this?

18 MR. McCALPIN: No.

19 MS. BATTLE: Then I think there's no further
20 problem with that.

21 Are there any other issues relating to dues?

22 (No response.)

1 MS. BATTLE: Now, if we can do them all in 15
2 minutes --

3 (Laughter.)

4 MS. BATTLE: I'm willing to entertain a motion
5 to the effect that particularly since there are no
6 changes being proposed to 1627, that we recommend to
7 the board at its next meeting the adoption of this
8 rule.

9 M O T I O N

10 MS. WATLINGTON: I so move.

11 MR. McCALPIN: Second.

12 MS. BATTLE: It's been properly moved and
13 seconded. All in favor?

14 (Chorus of ayes.)

15 MS. BATTLE: All opposed?

16 (No response.)

17 MS. BATTLE: The motion carries.

18 CONSIDER AND ACT ON A DRAFT INTERIM REGULATION
19 (TO BE CODIFIED AS 45 C.F.R. PART 1636) ON
20 DISCLOSURE OF PLAINTIFF IDENTITY AND STATEMENT OF FACTS

21 MS. BATTLE: We're now on to 1636, client
22 identity and statement of facts. There were some

1 significant comments that we received on this in a
2 number of various areas and I think the staff has
3 reviewed the comments and come up with some issue areas
4 for our discussion today.

5 The first area has to do with notice of the
6 identity of the plaintiffs and to whom notice goes. I
7 think that some of the comments pointed out some real
8 concerns about the potential overbreadth of the way we
9 had constructed the original provision relating to this
10 notice requirement.

11 Suzanne and John, can you enlighten the
12 committee on that?

13 MS. GLASOW: On the first issue, the notice of
14 identity of plaintiffs, comments pointed out that there
15 are types of cases and situations where the identities
16 of plaintiffs should not be disclosed to the public at
17 large because either state law, court rules would
18 preclude that or public disclosure would just cause
19 great embarrassment and humiliation. They gave a lot
20 of examples in the comments.

21 The comments also interpreted that the section
22 we gave for getting a court order on probable serious

1 harm would not meet those situations.

2 We looked at the legislative restriction and
3 determined that what Congress was really trying to
4 reach there is that the defendant in the cases would be
5 able to defend against the charges and know the
6 identity of the plaintiff and the person bringing the
7 charges.

8 So we recommend revising the rule to be
9 consistent with the purpose of that statute and --

10 MS. BATTLE: Can you tell us specifically
11 where that amendment is?

12 MS. GLASOW: It's 1636(2)(a).

13 MS. WATLINGTON: Before we go any further
14 there, on the commentary, instead of investigating, is
15 it instigating?

16 MS. MERCADO: Instigating.

17 MS. GLASOW: Actually it appears first in the
18 purpose section. The last line of the purpose section,
19 we added the words "to the defendant."

20 MS. BATTLE: Does everyone see that? 1636.1,
21 the purpose section, the last sentence has been revised
22 to read "represents to the defendant."

1 MS. GLASOW: And we suggest changing "assures"
2 to "insures," not for that reason but as a stylistic
3 change.

4 MS. BATTLE: This is still page 5 in the
5 purpose section, 1636.1.

6 MS. GLASOW: Then in Section 2(a), the third
7 line, we added the words "with a prospective
8 defendant." And in 2(a)(1) the bolding starts at the
9 end of page 5 "or in a separate notice provided to the
10 defendant against whom the complaint is filed where
11 disclosure in the complaint would be contrary to state
12 law or local court rules or would unduly prejudice the
13 client." We added those words.

14 MS. BATTLE: Now, by adding this language, are
15 we putting in additional restrictions on how an
16 attorney makes a determination as to whether to
17 disclose the names of the plaintiffs or are we
18 attempting to embody our view of what state law is with
19 regard to the disclosure of plaintiffs?

20 In other words, you say you've got to provide
21 this to the defendant if the name is not in the
22 complaint for these particular reasons. I'm wondering

1 if all we need to do is to say you have to provide it
2 if the name is not in the complaint, period, without
3 saying the name is not in the complaint because it's
4 contrary to state law, local court rules or would be
5 prejudicial.

6 Are we giving further definition to the reason
7 why it's in the complaint, unnecessarily?

8 MR. TULL: The restriction itself is framed in
9 terms of naming the plaintiff in the complaint. I
10 think this answers your question. So our view was we
11 do have a potential conflict here where a state law or
12 a local rule, in order to protect someone because of
13 age or whatever, itself makes it improper to name that
14 person in the complaint, that in those circumstances
15 we've carved out what is an exception to the expressed
16 language of the appropriation in order to not require a
17 person to violate state law to do that.

18 We've created a separate procedure they can
19 then use but the intent is that it should be used only
20 in very narrow circumstances where it, in fact, under
21 state law they can't do it.

22 MS. BATTLE: It also adds a standard that a

1 plaintiff -- the unduly prejudice to the client piece
2 is a requirement that goes beyond state law.

3 MR. TULL: I think that's right.

4 MS. PERLE: Where are we?

5 MS. GLASOW: We're not sure we're happy with
6 the "unduly prejudice the client" language.

7 MR. TULL: I think the "unduly prejudice"
8 language is addressed in the exception of getting a
9 court order in the event that disclosure would unduly
10 prejudice the client, isn't it?

11 MS. PERLE: Well, I think it's also probably
12 maybe to address the situation where there's nothing in
13 state law or local court rules that requires you to
14 keep the name of the plaintiff secret but both parties
15 have agreed. You know, if both parties have agreed,
16 you don't have to name the plaintiff, right?

17 MR. TULL: Right.

18 MS. GLASOW: That's much broader than that,
19 though.

20 MS. PERLE: I think that maybe was --

21 MR. TULL: We know --

22 MS. BATTLE: We need to have a trigger beyond

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1 state law because state law may not cover everything.

2 MS. PERLE: Right.

3 MS. BATTLE: We're trying to figure out what
4 kind of handle do you put on that additional trigger to
5 make it appropriate for --

6 MS. PERLE: Maybe where the parties have
7 agreed. There is the other process, you know, that's
8 in the law.

9 MR. TULL: Right.

10 MR. McCALPIN: You know, may I suggest that
11 you look at the amendment proposed at the bottom of
12 page 110 by the Northwest Justice people in the thick
13 comments?

14 MS. PERLE: I don't think that that really
15 deals with it, either, Bill. It says it's expressly
16 required by law or practice in the jurisdiction and
17 we're talking about situations where it's not expressly
18 required by law or practice, right?

19 MR. McCALPIN: Well, but then you're in the
20 prejudice where it requires a court order.

21 MS. PERLE: No, what I'm saying is that there
22 may be situations where both the plaintiffs and the

1 defendants -- the defendant knows who the plaintiff is ;
2 but they've both agreed, for a variety of reasons of
3 privacy or whatever, that they're not going to reveal
4 publicly the name of the plaintiff.

5 MR. McCALPIN: What you're suggesting is that
6 counsel, by agreement, can avoid the requirement of the
7 statute.

8 MS. PERLE: No, no. What we're saying is that
9 what we think the requirement in the statute is is that
10 you reveal the identity to the defendant.

11 MR. TULL: But it says in the complaint. I
12 think the problem we have is I think we believe we
13 understand what Congress intended here and that is
14 defendants know who is suing them.

15 MS. PERLE: Right.

16 MR. TULL: They use language which proscribes
17 how that is to be said and it creates a problem where
18 using that particular device, which is naming the
19 person, may itself be violative of the law. I'm not
20 sure, the undue prejudice, I'm not sure what the basis
21 for an undue prejudice exception would be. It's not
22 prejudice as to --

1 MS. BATTLE: Legally permissible grounds?

2 MR. TULL: I think it's other legally required
3 grounds.

4 MS. PERLE: Couldn't the defendant, by
5 agreeing not to reveal it in the complaint, evade the
6 requirement?

7 MR. TULL: I don't believe it's --

8 MS. GLASOW: The requirement is not put on --
9 it's not a discretionary thing for the defendant.

10 MS. PERLE: But the purpose of it is to
11 protect the defendant.

12 MR. McCALPIN: The provision is for the
13 benefit --

14 MS. PERLE: For the benefit of the defendant.
15 If the defendant agrees that they're not harmed by not
16 putting it in the complaint, because they know who the
17 plaintiff is, no harm, no foul.

18 MR. McCALPIN: What would Jennifer say to
19 that?

20 MS. BATTLE: Other legal grounds -- when you
21 say legal grounds, you're really talking about law.

22 MR. TULL: I think any time that we, in the

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1 rule, add exceptions that are not absolutely mandated,
2 we run the risk of having to explain why.

3 MS. PERLE: But I don't think this is a
4 difficult thing to explain.

5 MR. TULL: Well, the statute says what it says
6 and I think it is true that it's not likely that
7 someone is going to complain if they've agreed that
8 they don't need to have it in the complaint but in
9 terms of others looking at our rules and saying what is
10 the basis for this particular exception, unless we have
11 a very clear case that --

12 MS. PERLE: What if we say specifically,
13 instead of "unduly prejudice," why don't we say "if the
14 defendant agrees"?

15 MR. McCALPIN: I'm just sitting here thinking.
16 Is this statutory provision possibly intended for the
17 benefit of a wider class than just the defendant? Can
18 the Congress say, "We wanted that in there not just for
19 the defendant but so that the other people in the
20 community and other people who hear about this may know
21 what you're doing and take counsel as a result"?

22 I'm just not 100 percent sure that this

1 provision is solely for the benefit of the defendant in
2 the action.

3 MS. MERCADO: Since we're not doing class
4 actions, it doesn't matter. It's not like we're going
5 to be benefitting a whole bunch of other people.

6 MS. PERLE: Look at the history of where this
7 emerges. Where this emerges is clearly from the
8 situation with migrant farmworker cases where the
9 accusation is that programs will contact a farmer and
10 say, "You didn't pay your farmworkers and I'm not going
11 to tell you who they are because of retaliation. We
12 won't sue you if you pay us \$5,000."

13 MR. McCALPIN: Well, there isn't any question
14 that that's what we hear most about as a basis for this
15 and it's probably McCollum's proposal.

16 MS. PERLE: His original proposal, this was
17 only with regard to farmworkers.

18 MR. McCALPIN: For that very reason. But if
19 we start to create an exception allowing a plaintiff
20 and a defendant to avoid the statute, I'm not sure that
21 we have satisfied everything that the Congress may
22 want.

1 MS. GLASOW: It wsw not a strong legislative
2 history on this point. We're dealing with our
3 knowledge of what's happened over the years and what
4 triggered this, but the legislative history, the formal
5 legislative history, doesn't help a whole lot.

6 We can justify the one, "contrary to state law
7 or court rules," because we're trying to make it
8 consistent with other law.

9 MS. PERLE: What about local practice? There
10 may be, in certain jurisdictions, it's a practice
11 rather than something that's stated in a particular --
12 to not publicize the names of juveniles, maybe by
13 practice, or battered women or cases of sexual
14 harassment.

15 MS. MERCADO: There are children that have
16 been sexually abused.

17 MS. PERLE: Right, but that's probably by
18 statute.

19 MS. GLASOW: That's usually in law.

20 MS. BATTLE: But battered women is one
21 example.

22 MS. MERCADO: Protective orders. They don't

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1 want to give a lot of information because they don't
2 want to let the perpetrator-defendant know.

3 MS. PERLE: That's a situation that you've
4 covered by the second -- you know, where it's sort of a
5 practice not to reveal the name of --

6 MS. BATTLE: Would that be local court rules?

7 MS. PERLE: There might be court rules but it
8 may not be stated.

9 MS. MERCADO: Maybe say "rules or practices."

10 MS. PERLE: That would help.

11 MS. BATTLE: Or other legal grounds.

12 MS. MERCADO: There's a lot of local
13 practices.

14 MS. PERLE: I, for one, feel very comfortable
15 that this was really intended to benefit only the
16 defendant. I don't think there's really anything to
17 suggest anyplace in the legislative history that it was
18 intended to do anything beyond that.

19 MR. TULL: But I think we've run flat into the
20 problem that the language of the statute is absolutely
21 crystal clear. There's no ambiguity that makes us look
22 behind for what the legislative intent is. And I think

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1 Bill is correct that we don't -- the legislative
2 history on this is not very full, for many of the
3 reasons that Linda disclosed, but there's not the range
4 of things that Congress may have had in mind as to why
5 they should be here; it's not clear.

6 MR. McCALPIN: Let me tell you, I don't know
7 what the conference report says but I have sat through
8 a number of congressional hearings where this subject
9 was discussed at very great length, largely in the
10 farmworker context. I remember when what was her name,
11 the tall woman from Florida who got up there with her
12 bag that she used to pick oranges?

13 MS. PERLE: Hazel Florentine.

14 MR. McCALPIN: Yes, Hazel Florentine. Boy,
15 she was incredible.

16 MS. GLASOW: Well, legislative history,
17 December conference report had nothing. The House
18 report had nothing. We have nothing but a floor
19 statement from Senator Gramm, which really didn't touch
20 the issue very much.

21 MS. BATTLE: What about this proposal, that we
22 delete "would unduly prejudice the client" and we add

1 "the disclosure of the complaint would be contrary to
2 state law or local court rules or practices," and leave
3 it at that?

4 MR. McCALPIN: Where are you?

5 MS. BATTLE: I'm at the top of page 6, the
6 second line, "contrary to state law."

7 MR. McCALPIN: "Contrary to --

8 MS. BATTLE: "Contrary to state law or local
9 court rules or practices," and leave it at that and not
10 go beyond that. So we're tying it only to the legal
11 environment in which the complaint is raised and
12 suggesting that those are the only exceptions.

13 MR. ASKEW: That's a court practice you're
14 talking about?

15 MS. BATTLE: When I say "court rules or
16 practices," you know, it could be a particular -- I
17 don't know how all states set out their rules of
18 procedure and practice, whether the court rules have
19 practices in them, as well as -- just put "or
20 practices," so that you can construe it to be state law
21 practices or local court rules or practices.

22 MS. GLASOW: Okay.

1 MS. PERLE: Question. You're not putting in
2 here anything that says explicitly that if both parties
3 agree not to reveal the name --

4 MS. BATTLE: It has only to do with the
5 practice. If that is a local practice that is
6 sanctioned by that particular jurisdiction and it's
7 appropriate, then it will be okay. If it is not
8 sanctioned, then it will not be okay.

9 MS. PERLE: So you won't address that
10 explicitly in the commentary, either?

11 MS. BATTLE: That this issue will be decided
12 based on what the local practice is in the jurisdiction
13 and that Congress's intent was to make the disclosure
14 so that the defendant would know who they're defending
15 against but also consistent with whatever the practices
16 are in their jurisdiction.

17 MS. PERLE: Okay. I don't have a problem if
18 that's the way it's articulated. What I don't want
19 there to be anything in the comment that says that we
20 think that this was intended to be a disclosure broader
21 than to the defendant.

22 MR. McCALPIN: I've got two or three other

1 questions.

2 MS. BATTLE: Do your questions have to do with
3 this initial issue or some of the other issues?

4 MR. McCALPIN: Well, it has to do with this
5 particular section that we're dealing with, 2(a)(1).

6 MS. BATTLE: All right, let's look at 2(a)(1).

7 MR. McCALPIN: Where you just added the words.
8 The Colorado bar, for instance, raises an interesting
9 question of how you get a court of competent
10 jurisdiction to enter an order in anticipation of
11 prefiling conferences. There just isn't any procedure
12 for that sort of thing.

13 MS. BATTLE: That's why local practice, I
14 think, becomes key in this instance because I think
15 you're absolutely right. I think that you have to take
16 this federal statutory requirement and breathe into it
17 what local practices are.

18 MR. TULL: I think you're raising a different
19 issue. You're raising an issue which relates to the
20 second part of that.

21 MR. McCALPIN: That's right.

22 MR. TULL: "And identify each plaintiff it

1 represents unless a court" --

2 MR. McCALPIN: "A court of competent
3 jurisdiction has entered an order protecting the client
4 from such disclosure." And I don't see how you can
5 get, in the Colorado example, how can you get such a
6 court order before engaging in pre -- what did we call
7 it -- precomplaint settlement negotiations?

8 MS. PERLE: I think this actually has an
9 anomalous effect because what it does is that it forces
10 programs to bring suit, rather than negotiate, in the
11 event that they want to withhold the name because if
12 they file suit, then they can get --

13 MR. McCALPIN: Oh, yes.

14 MS. PERLE: And it's an anomalous result
15 because the Congress has encouraged, in a variety of
16 ways, the using of negotiation to settle things, and
17 this cuts against that. But I don't think that there's
18 really anything in here that gives you any authority to
19 do something different.

20 MS. BATTLE: Why not "contrary to state law,
21 local court rules or practices or a court order"?

22 MR. McCALPIN: Well, we've got that. That's

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1 the "unless."

2 MS. PERLE: But you won't be the court order.
3 The point is that in this situation you won't get the
4 court order unless you have a case filed.

5 MR. TULL: The section that Bill's referring
6 to goes to prelitigation settlement negotiations, as
7 opposed to the first, which has to do with whether you
8 can not name the person in a complaint. They're really
9 two different --

10 MS. MERCADO: They're two separate provisions.
11 One is after you've already decided to litigate and
12 there's been a TRO of some form or fashion, because
13 there has to be a show-cause hearing before the court.

14 MS. BATTLE: I've got a problem because when
15 you read A in 504(a)(1)(a), it doesn't distinguish
16 between precomplaint settlement negotiations and the
17 complaint that you file in litigation.

18 It seems to me that because you don't have a
19 complaint if you're negotiating something, that is it
20 possible for us to read that as two separate things?

21 When you look at 8, which says that "files a
22 complaint or otherwise initiates or participates in

1 litigation against the defendant or engages in
2 precomplaint settlement negotiations with the
3 defendants unless a plaintiff has been specifically
4 named in a complaint filed for the purposes of such
5 litigation," and that goes back to the first part of A,
6 or "prior to the precomplaint settlement negotiation."

7 That second part seems to me to hang out there
8 with no tie to what's realistic in precomplaint
9 settlement negotiations. It seems to me what we're
10 trying to do is to figure out how to do the correct mix
11 of disclosure that relates to precomplaint issues, when
12 it's real clear what you do when you've got a
13 complaint. You either put the name in there, in the
14 complaint, or you meet whatever the local law requires
15 you to do.

16 But for precomplaint --

17 MR. McCALPIN: Or get a get order.

18 MS. BATTLE: Or get a court order. But when
19 you're talking precomplaint, the way that A is written
20 as a modifier to 8, it's an either/or. It says you
21 either identify the person or what? What do you do
22 prior to the precomplaint settlement negotiation?

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1 MS. MERCADO: In the second part of that --

2 MS. PERLE: They expect you to get a court
3 reporter because they don't understand that that's not
4 a reality. The people that wrote this weren't lawyers
5 and they didn't understand that that's just not going
6 to happen.

7 MS. MERCADO: You're not going to get a court
8 reporter until you actually have a complaint filed.

9 MS. PERLE: Right.

10 MS. MERCADO: This way it doesn't make sense
11 because the introductory paragraph on A and the first
12 half of 1, where it goes up to where we've cut out the
13 court practices, that makes sense. It's the other part
14 that doesn't make sense because there is no way that
15 you could get those orders unless someone filed a
16 complaint. The court has to have that matter before
17 it.

18 MS. BATTLE: What I'm saying is that it seems
19 to me that the language in the appropriations law is
20 confusing us in terms of how we must interpret it
21 because it tells you what to do if you're filing a
22 complaint and it really doesn't clearly address what

1 you do when you're not filing a complaint.

2 MR. TULL: I think we have presumed what it
3 means is identify to the defendant, which is not said
4 in A. It is said -- there's a reference in 8 to
5 negotiation with a prospective defendant. I think we
6 have read that as that logically they're carrying over,
7 so that --

8 MS. BATTLE: Oh, this is what you do. A is
9 each plaintiff has been specifically identified in a
10 complaint or prior to the precomplaint settlement
11 negotiations. It just says -- if you read that
12 sentence that way, it then makes sense.

13 The question becomes if you're engaging in
14 precomplaint settlement negotiations with a prospective
15 defendant, then each plaintiff has to be identified
16 prior to the precomplaint settlement negotiations.

17 So what's the court order business?

18 MS. PERLE: The problem is that there's a
19 process -- the proviso provides a process for if you
20 don't want to identify your client, if you're concerned
21 about it, but it says that you have to use the same
22 process whether you want to withhold that identity in a

1 complaint or in presettlement negotiations.

2 The point is that you don't have the ability
3 to go to court and ask to withhold that because no
4 court is going to listen to that motion if there's no
5 case filed. I know it's confusing. You understand
6 what I'm saying, don't you?

7 MS. MERCADO: Yes. Procedurally, that second
8 part doesn't make sense.

9 MS. PERLE: It just doesn't make sense but
10 it's clearly what they meant. If you look at the
11 proviso it says that "upon establishment of reasonable
12 cause, the court of competent jurisdiction may enjoin
13 the disclosure after notice, pending the outcome of
14 such litigation or negotiations, after notice and
15 opportunity for a hearing is provided."

16 So they clearly contemplated that this hearing
17 would be before you engaged in --

18 MS. BATTLE: That's not in the appropriations
19 law.

20 MS. PERLE: Yes, it is. It's in the
21 proviso -- Section --

22 MS. BATTLE: Oh, I see, the proviso upon the

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1 establishment of reasonable -- I see.

2 MR. TULL: I don't think we picked up on this
3 the first time we went through this in July. In the
4 regulation we have tied the order protecting the
5 client's name from disclosure to negotiation. In the
6 appropriations act, it actually refers to both because
7 it says "may enjoin disclosure of the identity of any
8 potential plaintiff pending the outcome of such
9 litigation or negotiations after notice and opportunity
10 for a hearing."

11 MS. MERCADO: Now, that would make sense.

12 MR. McCALPIN: John, I was going to raise the
13 question again whether the "unless" clause at the top
14 of page 6 is intended to modify only the prelitigation
15 settlement negotiations or the filing of the complaint.
16 I think the comma means it applies both places.

17 MR. TULL: It needs to in order to carry
18 out the intent but it doesn't read that way, but you
19 think it does.

20 MS. GLASOW: We did mean it to apply to both.

21 MR. TULL: Oh, aren't we smart?

22 MS. GLASOW: I think the comments recognized

1 it as such because they were talking about both
2 situations.

3 MS. PERLE: You might want to work over this
4 to separate -- this is a very long sentence. You might
5 want to make it a couple of sentences to make it clear
6 what each reference is. But that really doesn't
7 address the issue. I think we all understand what it
8 means.

9 The question is is there any way that this
10 board can develop some sort of a response to the notion
11 that you have to go to court if you want to withhold
12 the identity? You can't do it in presettlement
13 negotiations. If you can come up with it, I'd be very
14 happy. I think it's one of those situations that
15 Congress just didn't know what it was doing.

16 MS. GLASOW: I don't know how to get around it
17 at this point. The comments suggested that --
18 commenters said I'm not sure what would be allowed in
19 the various jurisdictions, whether you could go to
20 court just to get a protective order for a case you
21 haven't filed yet.

22 So there's a lot of uncertainty on what is

1 available to attorneys, but I don't know how to get
2 around the language of the appropriations act, which
3 clearly seems to apply it to both. It doesn't make
4 sense because --

5 MS. BATTLE: The reason for presettlement
6 negotiations is so you do not have litigation. Going
7 to court is just completely contrary to that.

8 MS. PERLE: That's what I meant, that it sort
9 of creates an anomaly.

10 MS. MERCADO: And also an assumption that you
11 could get a protective order without having any
12 complaint on file by anyone. The court cannot, on its
13 own motion, do a protective order. Someone needs to
14 file something.

15 MS. BATTLE: I don't know how you resolve this
16 but this is not -- I'm not certain that we've resolved
17 it.

18 MS. PERLE: The advice that we've given to
19 programs is if you have a situation where you want to
20 withhold the identity of the plaintiff, you just need
21 to go right to court.

22 MR. TULL: Sue and get the order.

1 MS. PERLE: I don't know how you get around
2 that. I wish there was a way.

3 MS. MERCADO: Just because you sued does not
4 take away the opportunity to mediate or negotiate.

5 MS. PERLE: Right.

6 MS. BATTLE: But it does complicate it a bit.
7 I think so often, one of the things that you have as
8 leverage with the defendant is the ability to negotiate
9 without having any litigation. And once you start to
10 engage in that, the costs go up for the defendants and
11 I think that's one of the things really that Congress
12 was seeking to avoid, and that was increased costs for
13 defendants around these issues.

14 So it is a tough one. It is one that we may
15 need to just see if there's a way to gain some clarity
16 down the line on. I think that as long as this is the
17 language that we have in our appropriation, we have to
18 leave it be, as it is.

19 Bill?

20 MR. McCALPIN: I have at least two more
21 issues. One, I think it's significant -- I'm not sure
22 whether we need to note it or not but as the Colorado

1 comments suggest, requiring this violates model rule
2 1.6(a) of the Colorado model rules of professional
3 responsibility. And they say the comments acknowledge
4 that this prohibition may come into conflict with other
5 law and that "Whenever another provision of law
6 supersedes 1.6, it is a matter of interpretation beyond
7 the scope of these rules but a presumption should exist
8 against such a supersession."

9 1.6 says "A lawyer shall not reveal
10 information relating to representation of a client
11 unless the client consents after consultation." So it
12 does seem to be squarely in conflict with that. I
13 don't know whether the Colorado rule is exactly the
14 same as the ABA rule or whether they have adopted a
15 somewhat different version, as states do. I don't know
16 whether we need to acknowledge that in the commentary
17 or otherwise, that we may be calling upon lawyers to
18 violate the model rules of responsibility in their
19 state.

20 And, of course, there is a provision in the
21 LSC act which would prohibit that.

22 MS. PERLE: 1006(b)(3) of the LSC act says

1 that the Corporation can't abrogate the authority of
2 the state bar over LSC recipient attorneys.

3 If, in fact, that revealing would violate
4 1.6 -- I'm not sure that it necessarily would -- then I
5 think that's a different set of issues and probably the
6 rule goes beyond what it can do and it's not applicable
7 in that situation.

8 MS. BATTLE: Language here that says
9 "consistent with applicable professional responsibility
10 rules," does that help?

11 MS. PERLE: Yes. I think it flags it.

12 MS. BATTLE: I think that will help to give
13 some measure, given that we've got that authority in
14 our act, to kind of merge what Congress has required
15 here with our other responsibilities.

16 MR. McCALPIN: Okay, let me ask you, a program
17 somewhere in the field calls up the Office of General
18 Counsel and says, "We have this case. We are required
19 by your regulation and 504 whatever to provide a
20 statement of facts and the identity of the client.
21 That is in violation of the model rule of professional
22 responsibility in this state. What do we do?"

1 MS. PERLE: They have a letter from their
2 ethics counsel in their bar.

3 MS. BATTLE: So that's a resolution of a
4 conflict between two federal laws. We have one saying
5 you've got to do this and you've got another, in our
6 original act, that says you've got to do that.

7 MS. PERLE: But the appropriations bill does
8 not abrogate the LSC act except with some very specific
9 provisions on access to records. That specifically
10 says "notwithstanding 1006(b)(3)," but that's not this
11 issue.

12 MS. BATTLE: So I would suggest that we use
13 this "consistent with applicable rules of professional
14 responsibility" language here so that we take into
15 account state law, local court rules and practices and,
16 at the end, after this provision relating to the court
17 of competent jurisdiction being the way that you go
18 about doing this, also add "consistent with applicable
19 rules of professional responsibility" to take into
20 account the fact that there might be the intersection
21 between our obligations under the LSC act with these
22 obligations under this appropriation.

1 MS. GLASOW: Because we realize that in a
2 state that has a rule like that that says you cannot
3 give the identity of the client without the client's
4 permission, then for every client our recipients take
5 in that state, that's a tremendous undercutting of this
6 restriction in our appropriations act.

7 MS. BATTLE: If clients give their consent,
8 maybe you can take the case. If they don't want to
9 give their consent, that has an impact on whether --

10 MR. TULL: Aren't we talking about a fairly
11 small universe of cases?

12 MS. PERLE: Very rare.

13 MR. TULL: It's very difficult to negotiate
14 for a client without identifying who the client is.

15 MS. PERLE: I think the numbers of
16 situations --

17 MR. McCALPIN: But we're also talking about
18 the statement of facts.

19 MR. TULL: Now, the statement of facts is not
20 available to the other party.

21 MR. McCALPIN: It is in discovery.

22 MS. PERLE: No, it's not. This specifically

1 says it's not. I mean, it's only --

2 MR. TULL: Unless it would otherwise be
3 available through discovery, it's not.

4 MR. MCCALPIN: It says in the course of
5 regular discovery, doesn't it?

6 MS. PERLE: But when you read what the rule
7 says, it says that this doesn't create any access to
8 the document. It says that if you could get it under
9 your rules of discovery --

10 MS. BATTLE: That's what you've got to do.
11 You've got to go discover it. We're not giving it to
12 you.

13 MS. PERLE: Right.

14 So you're suggesting, as I understand it, on
15 page 5 --

16 MS. BATTLE: On page 6, at the end, that we
17 add --

18 MS. PERLE: I was thinking you might want to
19 add it, "It shall, consistent with the applicable rules
20 of professional responsibility, 1 and 2."

21 Oh, you're saying it's only applicable to 1?
22 Is that what you're saying?

1 MS. BATTLE: Yes. My suggestion was since we
2 have the proviso in 1 which relates to state law, local
3 courts rules and practices, that we also in 1 add
4 "consistent with applicable rules of professional
5 responsibility" at the end.

6 MR. McCALPIN: No, but what won't do it. I
7 think Linda is right because the Colorado rule would
8 really go more to sub 2 than sub 1, the preparation of
9 the written statement, rather than the identification
10 of the plaintiff, if I understand what they're saying.

11 So it may make more sense to put it --

12 MS. BATTLE: Put it at the top. "Consistent
13 with applicable rules of professional responsibility,
14 it shall."

15 MR. TULL: I'm feeling some discomfort here
16 and I'm not precisely sure why but let me state it. I
17 think any time we say -- I think it's presumed that any
18 program operates and its attorneys operate consistent
19 with the rules of professional responsibility and we
20 have an act which, in fact, requires that we ensure
21 that.

22 So all these regulations have within them a

1 ghost consistent with the rules of professional
2 responsibility and we have chosen, in some
3 circumstances where that has a particular bite, there's
4 a particular importance or there's a particularly
5 difficult issue, to add that language. But each time
6 we add it, it becomes a flag that says we believe there
7 may be significant exceptions to the way this rule may
8 apply because of the particular way the rules impact on
9 whatever the issue is.

10 And I commented earlier that I think we're
11 talking about a very small universe of cases where
12 disclosure of the client's name in the course of
13 negotiations would invoke the rules and I think my
14 discomfort is that this may well be seen, first by
15 programs looking at it, as a flag saying we believe
16 that there's a question whether in negotiations you
17 should disclose the name of your client, which I don't
18 think is correct because it's most often implied in the
19 representation, even if not expressly given.

20 And I think for others, including those who
21 wrote this law, looking at the way we adopt our rules,
22 they will ask the question, "Why did they bother to put

1 this in there? Is there some door that they are trying
2 to open that we do not want to have opened?"

3 And I don't know that it actually adds that
4 much in terms of what we need to accomplish and I
5 fear --

6 MS. GLASOW: Have we decided to keep it out of
7 the prisoners rule, drug addiction, when we did the
8 interim rule, for the reason that we didn't
9 want programs to hook onto it as a broader exception
10 than we intended it to be and just allow us to deal
11 with a case by case basis, on the facts of the case.

12 MR. McCALPIN: John, is a program attorney not
13 entitled to that heads-up, that you ought to have the
14 provisions of the model rules of your state in your
15 mind when you do this?

16 MR. TULL: Well, I think --

17 MR. McCALPIN: And I'm not sure that the
18 average lawyer --

19 MS. BATTLE: Let me tell you the concern I've
20 got. I've got a concern about the intersection between
21 the application of this and a professional rule out
22 there that subjects an attorney to potentially being

1 disciplined for not having -- you've got a client that
2 says, "I don't know if I want this person to have my
3 name. I don't really want this." And he says, "I'm
4 sorry; because I work at Legal Services, I've got to do
5 it.

6 So boom, this happens. And that client then
7 comes back and says, "I never told him to tell these
8 people about my name. And he's subject to discipline
9 for that in his state. Doesn't he need to know that
10 and know that we've taken into account local court
11 rules, practices, state law on all other fronts, in
12 terms of how this particular section will operate and
13 that we're aware that there might be some conflicts
14 between the professional rules and this in practice?

15 MR. TULL: But doesn't that lawyer run into
16 the question about whether she can disclose the
17 client's name well before this rule is invoked? If you
18 come to me as a client and I interview you and I say
19 that I'm in such and such an apartment and the landlord
20 is doing X, Y, Z, if I say I'm going to call him up and
21 have a conversation with your landlord and see what we
22 can work out here --

1 MR. McCALPIN: And the client says, "Don't
2 reveal my name."

3 MR. TULL: If the client says, "Don't reveal
4 my name," I say, "I can't negotiate for you. I've got
5 to tell him what apartment we're talking about. I've
6 got to talk about the lease. I cannot represent you
7 unless I disclose your name, because I can't."

8 MS. PERLE: John, what if it's a situation
9 where it's a big housing unit and three or four people
10 come and say, "This is unsafe. There's no lighting.
11 There's no locks. There's no maintenance. And the
12 whole building is unsafe and there are real security
13 problems and we think that something needs to be done
14 and we'd like you to do it and you can sue him." And
15 yet they say, "I don't want you to tell him it's me"
16 because they're afraid they'll get evicted.

17 MR. McCALPIN: Retaliation.

18 MS. MERCADO: Right. And the thing is that
19 you're assuming that all Legal Services programs have
20 experienced lawyers like you are, that it will
21 automatically pop in their mind.

22 One hopes, now with the lack of training that

1 we have with a lot of our lawyers, but maybe young
2 lawyers that are coming out, I mean, to get all these
3 different things as far as ethics and all this other
4 stuff about if you do or you don't.

5 MS. BERGMARK: This is precisely the
6 conversation that we had with the folks who drafted
7 this legislation as to why this wasn't such a good
8 idea, period. But the fact is we have this legislation
9 and we're now talking about housing project tenants,
10 but this is precisely the conversation that was held in
11 terms of the farmworker clients who were the subject
12 and the reason for this restriction in the first place.

13 So I do worry that -- I think lawyers, our
14 lawyers, our Legal Services lawyers, know that they are
15 governed by the rules of professional responsibility,
16 that that's a fact. We have that in our act, as well.

17 So in terms of, Bill, the heads-up, I don't
18 think we gain much in terms of a heads-up in this
19 regulation that our lawyers don't know anyway.

20 This does create -- I think our experience
21 with this restriction so far is that it's not an
22 impossible restriction to live with, that programs are

1 dealing with it and that we do run the risk of having
2 to explain, "Now, why did you create this potential
3 limiting phrase here when, in fact, this is the
4 requirement that's there?"

5 A lawyer is simply going to have to find a way
6 to reconcile professional responsibility with this
7 restriction and sometimes that's going to create
8 practical problems.

9 MR. McCALPIN: Martha, I agree with you that
10 they all know they're subject to the model rules but
11 I'll bet you none of them could tell you what's in 1.6.

12 MS. BERGMARK: Me neither.

13 MR. TULL: I don't think that's the problem.
14 I think the problem is that by adding the language, the
15 board is making a statement that it believes that the
16 model rule overrides the restriction. Because the
17 example you gave, as this is now stated, it is not
18 enough that that person is fearful that there will be
19 retaliation.

20 Congress has said we understand that and we're
21 telling you that if it's a sufficiently grave problem,
22 they've got to go to court and get an order saying that

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1 and that your remedy is you don't have to violate your
2 ethical responsibility. If that person says, "Do not
3 tell them," then you say that "The procedure I have to
4 follow is to sue immediately, to ask for an order not
5 naming you, and do you want to do that?" And if that
6 person says yes, then you do it.

7 But I think if we say "consistent with model
8 rules," meaning that if your client doesn't want you to
9 disclose it, that becomes an exception to this
10 requirement, we basically have done away with the
11 restriction.

12 MS. BATTLE: I'll take this example just one
13 step further. This is what we're saying will happen.
14 Three or four tenants who qualify for services come to
15 a local office and say, "The stairs are in such bad
16 shape people are falling down; they're hurting
17 themselves. We need help."

18 The lawyer could pick the phone up and say to
19 the landlord, "Look, I've gotten three or four of your
20 tenants to come by. You probably need to do something
21 about those back steps. They're real concerned about
22 it." End of discussion.

1 Now the new scenario. Three or four tenants
2 come by. They're concerned about it. "Please don't
3 tell him. I don't want him to put us out." You say,
4 "Okay, let me go down to the local court, get a
5 restriction and an order that says that I won't say who
6 your names are so I can have this conversation with
7 you."

8 I mean, that's exactly how this is going to
9 work.

10 MS. PERLE: Actually, I think we're getting a
11 little carried away and it's probably my fault because
12 of the example. First of all, we have to be talking
13 about precomplaint settlement negotiations. It's one
14 thing to have these people come into your office. You
15 can pick up the phone and call the landlord. You don't
16 say, "I'm going to sue you." You just say, "I have
17 these complaints. Is there anything you can do? Can
18 we talk about what you can do to remedy the situation?"

19 MR. McCALPIN: Isn't that a settlement
20 negotiation?

21 MS. PERLE: Not according to this because this
22 really talks about when it's in anticipation of

1 litigation.

2 MS. BERGMARK: I don't think this comes into
3 play until you're really at the point that you're going
4 to sue. I think Linda's right. We are not talking
5 about a situation where you cannot pick up the
6 telephone and talk to a landlord in a very preliminary
7 way that says, "I've got a couple of people who are --

8 MS. BATTLE: But Martha, let's take it one
9 step further. Once you pick that phone up and say,
10 "Can you fix those steps?" if he says no, then you turn
11 to those three people and say, "You've got to go get a
12 lawyer somewhere else."

13 MR. TULL: You say, "I've got to disclose your
14 name."

15 MR. McCALPIN: He picks up the phone. He
16 calls the landlord. He says, "I hear about these
17 steps." The landlord says, "Who's complaining about
18 it?" What does he do then?

19 MS. PERLE: He says, "I can't reveal that."
20 So he says, "Fine; I'm not going to talk to you
21 anymore."

22 MR. McCALPIN: Well, if he says, "I can't

1 reveal that," then isn't he in violation of the
2 statute?

3 MS. PERLE: No, because he hasn't given any
4 indication that this is prelitigation.

5 MR. SMEGAL: There's no defendant. The term
6 "defendant" has a specific meaning. It's a party in a
7 lawsuit.

8 MS. BATTLE: The term "prospective defendant"
9 is also used.

10 MR. McCALPIN: This is all prelitigation
11 settlement.

12 MS. PERLE: If you read the commentary to the
13 interim rule, I think it discusses that.

14 MS. BATTLE: Can we put this, "consistent with
15 the applicable rules of professional responsibility" in
16 the comments?

17 MS. PERLE: What I was going to suggest is
18 that first of all, there's nothing in here that
19 responds specifically to the Colorado bar comment. I
20 think when you do the final commentary you do need to
21 kind of respond to that issue.

22 So I think what you should say -- this is what

1 I would recommend, is that you say one comment -- there
2 may be more but one comment suggested that there would
3 be situations that may be inconsistent. Of course,
4 1006(b) requires that things be done consistent with
5 the professional responsibilities, and that's it. You
6 don't put it in the rule. You put it in the
7 commentary.

8 MS. BATTLE: That may be the best way to
9 handle it. That way, that gives clear indication to
10 people that the issue was raised in a comment. This is
11 a legitimate way to address the issue of the Legal
12 Services Act and its provisions relating to
13 professional responsibility and the intersection on
14 this rule.

15 MS. MERCADO: I like Linda's recommendation
16 because it goes back to the act.

17 MR. TULL: Could you repeat it?

18 MS. PERLE: What I said was when you do the
19 commentary you're going to have to address the
20 comments. You'll have to say one comment, or maybe
21 there was more than one, raised this issue. We don't
22 think it's necessary to change the rule because the LSC

1 act has the provision which says everything has to be
2 done consistent with rules of professional
3 responsibility and, of course, everything in this rule
4 has to be consistent with the rules of professional
5 responsibility, period.

6 So you don't put anything in the rule but do
7 state it in the commentary.

8 MS. BATTLE: That's a good way to do it.

9 MS. MERCADO: As long as you cite them to the
10 provision in the statute.

11 MS. BATTLE: Laurie?

12 MS. TARANTOWICZ: I'm not really comfortable
13 with that because as we go on talking about these rules
14 and we decide what to put in the commentary and what to
15 leave out, it's the interpretative guide to the rule.
16 I don't think anybody sees it as that much different
17 than putting it in the rule. This is what we think it
18 means.

19 So we're trying to avoid the issue of putting
20 it in the rule or not putting it in the rule, by
21 putting it in the commentary, which you hope people
22 will look to to interpret the rule.

1 I think this issue is something that at least
2 needs to be looked into much more carefully.

3 MR. TULL: Let me say why I felt comfortable
4 with it, which may satisfy you, although it may not
5 satisfy the committee, which is I think -- first of
6 all, let me say this is not a defense of this rule in
7 the sense that I feel as uncomfortable as anybody in
8 this room with the fact that we have to live under this
9 and what it does to the practice, but it is the rule
10 that Congress has imposed on our recipients.

11 I believe that a lawyer in the scenario which
12 Linda gave can comply with this rule, consistent with
13 the rules of professional responsibility. They have to
14 jump through a hoop in order to do it. They do have to
15 go to court in order to get that order and I understood
16 the chair to state some discomfort with that because
17 there's a much less cost effective way to do it and it
18 does create a higher stake that the client has to be
19 wiling -- a higher risk that the client has to be
20 willing to take on, but that is what Congress has said
21 they intend.

22 But I think a person can, if their client says

1 to them, "I do not want you to tell the possible
2 defendant in this lawsuit who I am," then a person can
3 abide by that requirement. It does mean they've got to
4 jump through some hoops. And I think if we put it in
5 the commentary, we have not deviated from that
6 analysis. I think if we put it in the rule, that by
7 putting it in the rule, we're putting it on an equal
8 level with --

9 MS. BATTLE: With the statute.

10 MR. TULL: -- with the statute and you're
11 saying if the two are in conflict, then the model rule
12 prevails, and I don't believe that's -- I mean,
13 prevails in the sense that you don't have to invoke the
14 procedure of getting a court order, and I don't believe
15 that's correct.

16 MS. BATTLE: Well, the genesis of this really
17 was Bill's having raised this issue from one of our
18 comments. And if we respond to the comment, which is
19 appropriate in the commentary, then I think we've
20 addressed it.

21 MS. GLASOW: That's consistent with what we
22 did on 1637. When you need to get out of

1 representation of a prisoner, what we said was whether
2 the continued representation in such circumstances
3 would be deemed to violate the regulation would be
4 determined on a case by case basis. This is where
5 withdrawal might be refused by a court because of your
6 professional responsibility to your client.

7 So we're looking at that but we're not stating
8 it in such a way in the commentary where it becomes
9 just a big loophole. We're saying we would look at it
10 on a case by case basis. We'll take it into
11 consideration but, as John said, in most cases you're
12 going to still be able to abide by your professional
13 responsibility and still abide by the statutory
14 restriction.

15 MS. BATTLE: Okay. I think we've had
16 sufficient discussion on this one.

17 MR. McCALPIN: Can I ask one other question?

18 MS. BATTLE: Yes.

19 MR. McCALPIN: The answer to this may be self-
20 evident but is it a fact that if a program transfers,
21 delegates a case to a PAI attorney who receives no
22 compensation from the program -- he does it on a purely

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1 pro bono basis -- that this restriction does not apply
2 for that attorney's representation of the client?

3 MR. TULL: Correct.

4 MS. BATTLE: 1636.4 deals with the PAI
5 exception. Actually, what we did, we're going to
6 propose that we change first the title to 1636.4 to
7 nonapplicability to private attorney involvement.
8 That's not in the applicability section. This part
9 shall not apply to cases undertaken by private
10 attorneys pursuant to a recipient's PAI program."

11 MR. McCALPIN: But suppose the PAI program
12 pays a fee to the attorney?

13 MR. TULL: This is a change to expand the
14 exception to cover what you just described.

15 MR. McCALPIN: Could we do that? Can we say
16 that an attorney representing a client referred by the
17 program who is going to receive some compensation from
18 the program does not have to have this identification
19 and statement of facts?

20 MS. GLASOW: On page 3 of the commentary I
21 gave you, the first full paragraph, I'll read that.
22 Section 504(a)(8), which is the statutory restriction,

1 "provides that the Corporation may not provide
2 financial assistance to any recipient that does not
3 comply with the client identity and statement of facts
4 requirement set out therein. Clearly, any cases
5 undertaken directly by a recipient would fall under the
6 provisions requirement.

7 "However, whether this restriction should be
8 extended to private attorneys occasionally providing
9 representation under a program's PAI program is
10 unclear. Because of the unique nature of the PAI
11 program and the difficulty of engaging the private bar
12 in the provision of legal assistance to the poor, the
13 Corporation has, as a matter of policy, made decisions
14 whether to extend restrictions or requirements to PAI
15 work done by private attorneys."

16 And because we see that the impact of this
17 restriction on a particular attorney taking an
18 occasional case under a PAI program would be very
19 extensive and that basically comments are saying
20 they're losing some of their private attorneys over
21 this, we decided, as a matter of policy, that we
22 wouldn't extend that restriction to PAI.

1 MR. McCALPIN: That's a matter of policy
2 which, it seems to me, is contrary to the statute. We
3 have said before that -- in the bar association stuff
4 we talk about if the attorney is receiving pay
5 compensation or that sort of thing for bar association
6 work which is antagonistic to the statute, then they
7 can't do it.

8 I don't see how -- suppose that you have an
9 adjudicare program being run under the PAI auspices,
10 and God knows we have them all over the State of
11 Missouri, and if the PAI attorney who gets the case
12 from the program and is going to receive a fee from the
13 program doesn't have to follow the 1636, you've created
14 an enormous loophole.

15 We have whole programs which are adjudicare,
16 Southeast Missouri. That means that nobody in the
17 Southeast program would have to follow 1636.

18 MR. TULL: That's probably correct. This was
19 in response to --

20 MS. BATTLE: I'd like to look at -- 504(a)(8)
21 says "Financial assistance to recipients that comply."
22 And as I hear what the staff is saying, it's that the

1 language in 504(a)(8) pertains to recipients, not PAI
2 programs.

3 MS. PERLE: PAI attorneys.

4 MS. BERGMARK: I know this is not what's
5 reflected by this proposed change but upon reflection,
6 I have a higher comfort level with the original draft;
7 that is to say, for compensated lawyers. We also are
8 going to have the situation in competition where
9 private attorneys may be eligible for grants from us.

10 So I think it does create a loophole that I
11 just don't see a strong basis for arguing why we should
12 try to create. If an adjudicare lawyer is getting
13 compensation from the program to do a particular kind
14 of cases, then the restriction should apply to that
15 attorney, I think.

16 MS. PERLE: I think that the comments talked
17 about situations that -- in many adjudicare programs,
18 most adjudicare programs, where they're done under PAI,
19 first of all, their fees have to be below 50 percent of
20 the prevailing fees. And most places, the adjudicare
21 program pays attorneys not enough to really say that
22 they're being compensated. They pay them enough to

1 cover maybe their out-of-pocket expenses.

2 Now, maybe that's not true in Southeastern
3 Missouri; I don't know. But I think that at least in
4 those places where adjudicare programs are just sort of
5 add-ons to the regular program and part of PAI --

6 MR. McCALPIN: No funds provided to a
7 recipient. If the recipient is paying \$30 an hour to
8 an adjudicare attorney, you know, whether you consider
9 that to be a fee above cost or not, it's using
10 recipient funds. And I think when you use LSC funds to
11 a recipient, then you've got to follow the statute and
12 have the statement of facts and the identity of the
13 client.

14 Now, I appreciate that it may inhibit your
15 recruiting PAI attorneys, but that's a policy matter,
16 which the statute, I think, overrides.

17 MS. MERCADO: I think part of the comments, I
18 think that the reasoning behind some of these is that,
19 at least with a couple of the comments that I read, the
20 PAI -- there's the concern that the ones that were
21 doing pro bono cases PAI, that we referred them, that
22 Legal Services screens and sends out, as part of our

1 involvement. Maybe they get the filing fees or the
2 costs for the client that might get paid from the
3 program but the lawyers themselves don't get any fees
4 at all.

5 So you're saying you couldn't use any of those
6 funds to do --

7 MR. McCALPIN: No, I'm not particularly
8 concerned if the program pays filing fees, witness
9 fees, expenses of litigation and that sort of thing.
10 I'm talking about where they just pay a sum to a lawyer
11 and he pays everything.

12 MS. MERCADO: Well, see, I think there is a
13 distinction. I think there's different levels.
14 There's adjudicare level. There's a PAI attorney
15 that's actually getting \$30 an hour or whatever and
16 then there's a PAI attorney that's doing it totally pro
17 bono and may be getting the fees and stuff paid by the
18 grantee.

19 So there are different categories and which
20 category is it that we're talking about that has the
21 exception?

22 MS. BATTLE: I think the previous language

1 took what Maria is suggesting on the issue of private
2 attorneys actually themselves being compensated. Once
3 private attorneys themselves are compensated, then it
4 kicks in. For those cases where the attorney is not
5 being compensated and where it's either completely pro
6 bono or just the costs are being covered, then it
7 doesn't kick in.

8 MS. PERLE: I think the point that was made by
9 the comments was that in the situation where it's
10 called an adjudicare program, the attorney is getting
11 \$20, \$25 an hour, that that's not really compensation.
12 They're not being paid for their time. They're just
13 being paid for -- basically they're being paid to pay
14 their secretary for their time.

15 MR. McCALPIN: That's compensation.

16 MR. TULL: But the language isn't
17 compensation. It's financial assistance. 504 language
18 isn't "compensated." It's "used to provide financial
19 assistance to any person that," blah, blah, blah.

20 MS. PERLE: There is a definition, I think, of
21 financial assistance in the LSC act. Do you know what
22 that is?

1 MR. TULL: It's maybe ironic that the comment
2 upon which this change was based, the change would go
3 just to the middle group that you've identified, a PAI
4 attorney, and it raises a question which is not really
5 resolved here as to whether a pure adjudicare program,
6 whether 12.5 percent of those cases are deemed to be
7 PAI or whether all of them are and that's really not
8 been resolved because there's not been a reason to
9 resolve it.

10 We were thinking, I think, in making the
11 recommendation, of the 12.5 percent. It happened to be
12 that the comment came from an adjudicare program, who
13 said it was seeing all of its adjudicare lawyers,
14 across its service areas, starting to withdraw because
15 they didn't want to be bothered with this level of
16 paperwork.

17 But I think Bill's correct that it is
18 difficult to see a basis other than the practical
19 effect is one which is negative and detrimental, but
20 that was true of what we just discussed with regard
21 to --

22 MR. McCALPIN: There are all kinds of things

1 that impede the effectiveness of the program.

2 MR. TULL: If the standard were inconvenience
3 or difficulty, we would probably have --

4 MS. BATTLE: I just recognize that nobody
5 heard you, Rick.

6 MR. TEITELMAN: We run an adjudicare program
7 in Northeast Missouri, in Hannibal, and it is a
8 dedicated group, a pro bono group. But frankly, I
9 can't hardly remember that long ago when I was a young
10 lawyer. You get 50 percent of your fee. It's
11 guaranteed. It's work in progress. You get the money
12 while the case is going on and it's a good bread and
13 butter area for young attorneys starting out in
14 practice.

15 Many of the adjudicare lawyers are young
16 attorneys starting out in practice. Fifty percent of
17 your fee -- the average fee in Hannibal, Missouri is
18 \$80 an hour so we pay, I think, \$35 or \$37 an hour.
19 For a young lawyer who gets 100 cases -- you say it
20 pays the secretary. Well, they may not have a
21 secretary otherwise. This is what helps.

22 MR. TULL: They're learning to be good lawyers

1 and good bureaucrats at the same time.

2 MS. PERLE: This is clearly something I think
3 that's up to the board to decide.

4 MS. BATTLE: This is policy.

5 MS. PERLE: It's a policy issue.

6 MS. BATTLE: If this is a policy issue and it
7 really is going to be up to this board, I'm willing to
8 entertain some thoughts -- Ernestine, any of the board
9 members -- about this and I think we need to make a
10 decision and move on.

11 Initially, my view was with the real push to
12 encourage the relationship between the legal services
13 program recipients and the private bar, that it made
14 sense on this one to show some flexibility. I do have
15 some concern, based on what Bill raised, that the
16 minute you begin to distinguish and breathe flexibility
17 in here, you've got to have justification for it here,
18 as well as anywhere else.

19 So to the extent out of the three groups that
20 Maria mentioned that we have to make the cut, I think
21 that the language that was there before this proposed
22 change, the cut is made accurately, so that you're only

1 dealing with that instance where someone is fully
2 compensated. And if they're compensated at any level
3 under the program, then this ought to apply.

4 MS. PERLE: I would suggest that you explain a
5 little bit in the commentary what you mean by
6 compensation.

7 MS. BATTLE: Yes, we can.

8 MS. PERLE: Because there's some questions
9 that have arisen as to if a person gets reimbursed for
10 expenses, is that compensation? The answer should be
11 no but --

12 MS. BATTLE: We're talking about people
13 getting paid to do legal services work.

14 MS. MERCADO: An hourly fee or whatever.

15 MS. BATTLE: All right. Are there --

16 MR. McCALPIN: So basically what we're going
17 to do is eliminate the new proposal and go back to the
18 old one?

19 MS. BATTLE: That's right. Go back to what
20 was 1636.4 before our change.

21 Anything else in 1636?

22 MS. GLASOW: Yes.

1 MS. BATTLE: All right. What else do we have
2 in 1636?

3 MS. GLASOW: Something we just didn't discuss
4 is the multiple plaintiffs, multiple counsel. We made
5 a change to the bottom of page 5. We just want to
6 clarify that if there's a co-counseling situation going
7 on with one of the counsel being a private attorney and
8 there are different plaintiffs that this requirement
9 only goes to the plaintiff that the recipient
10 represents.

11 MS. BATTLE: You say that's the bottom of page
12 5?

13 MS. GLASOW: The bottom of page 5, number 1,
14 (a)(1), "it represents."

15 MR. McCALPIN: Let's explore that a minute.
16 What you're saying is that if there are multiple
17 plaintiffs and all the plaintiffs are represented by
18 the program and co-counsel, then all the plaintiffs
19 have to be identified.

20 But if you have a case with multiple
21 plaintiffs, some of whom are represented by the program
22 and others of whom are represented by other attorneys,

1 then you only have to identify the plaintiffs
2 represented by the attorney for the program.

3 MS. GLASOW: That's correct.

4 MS. PERLE: I think, in reading over the
5 comments where this issue was raised, now maybe there
6 are different comments that said different things but I
7 know I had one telephone conversation with someone who
8 talked about a situation where there was a group of
9 clients; some were undocumented workers. The legal
10 services program clearly could not represent those
11 people. A group of people -- not CLASP -- a group of
12 people all had the same problems. The program was
13 representing some and co-counsel was representing some
14 of the others.

15 There was concern that if the defendant got
16 client statements from only some and not those that
17 were represented by the co-counsel, that that would
18 show that there was something wrong, that there was a
19 reason why they were being represented by one and not
20 the other and it would reveal their immigration status,
21 or at least raise suspicions about it.

22 I think that was one of the reasons that the

1 comment was made, and I'm not sure that this actually
2 addresses the concern that was raised by the comment.

3 MS. BATTLE: But I don't think there's any
4 other way we can address it. In other words, that
5 concern which stems from the nature of that litigation
6 is one that, in trial strategy and in developing that
7 case, may have to be worked with as between co-counsel.
8 But I don't think that to extend the client identity
9 statement to non-clients of the program would be fair
10 and we cannot exclude them just because of the nature
11 of that litigation.

12 So I think that the cut that has been proposed
13 by the staff is the right cut and I don't know that
14 there's any way to resolve it.

15 MS. PERLE: I don't disagree with that. I'm
16 just saying that I'm not sure that this really
17 addresses the concerns.

18 Now, I think maybe the way to address the
19 concern is by co-counsels all agreeing that they're
20 going to also submit the statement or something like
21 that.

22 MS. BATTLE: They could do that but that would

1 be voluntary on behalf of the co-counsel.

2 Are there other issues in 1636?

3 MS. GLASOW: Did we do the access?

4 MR. McCALPIN: What did you finally decide
5 about the applicable rules of professional
6 responsibility?

7 MS. BATTLE: We're going to respond in the
8 comments to that one comment about it.

9 We're down to access to written statements?

10 MS. GLASOW: Yes. On page 7, the language
11 clarifying who has access to these statements. It
12 says, "This part does not give any party other than
13 those listed in 1636.4(a) any right of access to the
14 plaintiff's written statements of facts, either in the
15 lawsuit or through any other procedure."

16 MR. McCALPIN: What are you reading?

17 MS. BATTLE: Paragraph B to 1636.3 on page 7.
18 We've stricken "does not take" -- did we take "any" out
19 or is "any" in? "Does not give any party, other than
20 those listed in 1636.4(a)" --

21 MS. GLASOW: "Any right of access to the
22 plaintiff's written statement of facts."

1 MS. BATTLE: There is no 1636.4(a).

2 MS. GLASOW: We may have revised that.

3 MS. PERLE: Also, are these parties? Is it
4 appropriate to use -- what I'm saying is that you might
5 not want to say party because that suggests they're
6 parties to the lawsuit.

7 MS. GLASOW: Any person?

8 MS. PERLE: Person or entity.

9 MS. GLASOW: Comments raised that there are
10 other things besides discovery rules we need to reach
11 and so we added "by applicable law."

12 MR. McCALPIN: You know, there was at least
13 one comment that said that these statements ought to be
14 subject to the confidentiality of privileged
15 communication, attorney-client communication. I don't
16 think that we can create that. I suppose that the
17 reference to applicable law does that, assuming -- yes,
18 I'm sure that that does that, although applicable law
19 in this instance certainly has to include attorney-
20 client communications.

21 MR. TULL: We had originally proposed language
22 which said client confidentiality and the privilege,

1 stated more artfully than I just said it, and the
2 inspector general's office suggested this language,
3 pointing out that there may be other -- this may have
4 to do with funds with other agencies, where other
5 auditors may have laws that govern this and therefore
6 we should expand it to this language, which would
7 encompass others, but it was understanding that it
8 included, as you just said, both the rules of
9 confidentiality, as well as --

10 MR. McCALPIN: The law of attorney privilege.

11 MS. BATTLE: Anything else?

12 MS. GLASOW: I think we need to go back to the
13 word "party."

14 MS. PERLE: I think it should be "person or
15 party" because it does refer to the party. It's
16 another party in the lawsuit.

17 MS. BATTLE: Person or party? Person,
18 prelitigation, party after litigation. Person or
19 party.

20 MS. PERLE: Person or party, yes.

21 MS. BATTLE: Anything else? Anything else in
22 1636 whatsoever?

1 (No response.)

2 MS. BATTLE: Okay. Do people need a break?
3 Let's take five minutes.

4 First, does someone want to make a motion to
5 approve this one, the changes we just made?

6 M O T I O N

7 MR. MCCALPIN: Motion that Part 1636, as
8 modified at this meeting, be transmitted to the board
9 with the recommendation that it be adopted as a final
10 regulation.

11 MS. WATLINGTON: Second.

12 MS. BATTLE: It's been properly moved and
13 seconded. All in favor?

14 (Chorus of ayes.)

15 MS. BATTLE: All opposed?

16 (No response.)

17 MS. BATTLE: The motion carries.

18 (Recess.)

19 CONSIDER AND ACT ON A DRAFT INTERIM REGULATION
20 (TO BE CODIFIED AS 45 C.F.R. PART 1637) RESTRICTING
21 GRANTEES' PARTICIPATION IN LITIGATION ON PRISONERS

22 MS. BATTLE: We're going to resume the meeting

1 and begin our discussion of Part 1637, which is the
2 regulation on representation of prisoners.

3 MR. McCALPIN: We could get through this in a
4 hurry if you just take the ABA's recommendation.

5 MS. GLASOW: Page what?

6 MR. McCALPIN: 141. They say it's
7 unconstitutional; don't issue it.

8 MS. GLASOW: That's not the ABA that says it,
9 is it?

10 MR. McCALPIN: It's not?

11 MS. GLASOW: Oh, it is. The ABA said it's
12 questionable, I believe.

13 MR. McCALPIN: At the bottom of page 145.

14 MS. BATTLE: That was to brighten the
15 afternoon.

16 MS. MERCADO: "We do not believe that the law
17 or the regulations drafted will withstand a
18 constitutional challenge by the ABA." They're asking
19 us to seek further clarification from Congress before
20 we actually adopt the regulation. That's what the ABA
21 says.

22 MS. BATTLE: Let's back into the ABA comments

1 to start with, the issue which pertains to the
2 application of this particular regulation beyond penal
3 institutions, which I think was raised by several of
4 the comments, particularly those who deal with people
5 who have been confined because of mental illness.

6 So, Suzanne, can you tell us about those
7 commenters' concerns and what your recommendation is?

8 MS. GLASOW: Yes. We were surprised at the
9 number of comments and strength of the comments on this
10 issue and they really were responding to discussion in
11 the commentary rather than the rule itself. The
12 commentary interpreted the rule as applying to persons
13 incarcerated in mental health facilities if they had
14 been arrested for or convicted of a crime. As a matter
15 of fact, I expected a speaker or two here today but no
16 one seems to be here.

17 We agreed. We looked at the statutory
18 language of the provision and we think clearly that
19 Congress was intending to direct this restriction to
20 persons incarcerated in penal institutions. We
21 basically revised the rule to do that.

22 Other recent legislation passed by Congress,

1 which has been to provide protections for persons with
2 mental illnesses, just a lot of factors convince us
3 that Congress is not concerned with mental health
4 issues in this rule. They're concerned with criminals
5 and they don't want LSC funds to be used for those who
6 are incarcerated in penal institutions.

7 So we added the word "penal" to make that
8 clear, that that is what this rule is reaching. We
9 also made a few changes to clarify the definitions.
10 One comment said that they were circular and redundant.

11 Because the prohibition uses both the words
12 "incarcerated" and "federal, state or local prison," we
13 decided that we didn't need to refer to "facility,"
14 which would mean by federal, state or local prison, in
15 the definition of the word "incarcerated" because it's
16 in the prohibition itself.

17 What we need to do is define the word
18 "incarcerated" for the prohibition, which means
19 involuntary physical restraint of a person who has been
20 arrested for or convicted of a crime. And then
21 "federal, state or local prison" means any penal
22 facility maintained under governmental authority.

1 And then the prohibition, using both those
2 terms, you have to meet all the requirements of the
3 prohibition, so "A recipient may not participate in any
4 civil litigation on behalf of a person who is
5 incarcerated in a federal, state or local prison." And
6 it goes on.

7 So we made those changes in the definitions
8 more to reduce redundancy and circularity, but we did
9 add "penal" for the very purpose of making clear that
10 we're not talking about mental health facilities.

11 MS. BATTLE: Okay, are there any comments from
12 any of the board members about the proposed changes to
13 1637, particularly the definition section?

14 MS. GLASOW: One other small change in the
15 purpose section. We added the word "civil" before
16 "litigation" just to clarify that what the restriction
17 is doing is restricting civil litigation because,
18 except for a couple of tiny little areas, our
19 recipients can't be involved in criminal litigation.

20 MR. McCALPIN: What about administrative
21 matters within a prison dealing with confinement to
22 solitary, withdrawal of privileges, that sort of thing?

1 Is that civil litigation?

2 MS. BATTLE: Yes.

3 MR. McCALPIN: I'm not sure it is.

4 MS. GLASOW: We restricted that in our rule.

5 As a matter of fact, the board went beyond the
6 appropriation act restriction by adding prohibiting --

7 MR. McCALPIN: Administrative proceeding and
8 challenging the conditions of incarceration.

9 MS. GLASOW: Right.

10 MS. BATTLE: We wanted to get at that and I
11 had a conversation with Suzanne about it because it was
12 our view that Congress really was concerned about these
13 actions challenging the conditions of incarceration.
14 So by being explicit in the rule, we're making it clear
15 that this is prohibited.

16 MS. PERLE: I have a question as to whether
17 anybody thinks there needs to be any kind of definition
18 of "penal." Is it clear to everybody what that means?

19 MS. GLASOW: Yes, and that's what the comments
20 suggested we use.

21 MS. WATLINGTON: Also, local prison means --
22 you've got to explain it.

1 MS. BATTLE: Okay, anything else for 1637.2 or
2 1637.3? Tom?

3 MR. SMEGAL: I'm sorry. I apologize for
4 interjecting so late but in 1637.3, I'm rereading it
5 now and I realize without a comma it misreads. Don't
6 you need a comma after "incarcerated person" in the
7 next to the last line? Because the way it reads now,
8 you've got two different things there, it seems to me,
9 the first part of which is "civil litigation on behalf
10 of a person." It sounds like any civil litigation.
11 And the second part is you can't represent them on
12 behalf of an incarcerated person in an administrative
13 proceeding.

14 You need a comma after "such an incarcerated
15 person" so that the first part of it also is modified
16 by "in an administrative proceeding challenging the
17 conditions of incarceration," don't you? No?

18 MS. PERLE: Because it's any civil litigation.
19 In other words, you --

20 MR. SMEGAL: Well, that isn't what 504(a)(15)
21 is, the way I read your remarks up in front. "The rule
22 prohibits any recipient involved in litigation or

1 administrative proceedings challenging the conditions
2 of incarceration." Isn't that what it is? That's what
3 it says, right on your first page.

4 MS. PERLE: Are you talking about the
5 commentary?

6 MS. GLASOW: In the commentary.

7 MR. SMEGAL: Second sentence.

8 MS. GLASOW: Yes, the commentary is incorrect,
9 sorry.

10 MS. PERLE: I thought you were talking about
11 the rule.

12 MR. SMEGAL: Somewhere we need a comma.

13 MS. BATTLE: This is not going to be
14 published. This is to explain to us in short, summary
15 form what we already have read.

16 MS. GLASOW: And I summarized it too briefly.

17 MS. BATTLE: Summarized it after we'd read all
18 the actual comments.

19 MR. SMEGAL: Oh, thank you.

20 MS. BATTLE: Anything else? That takes care
21 of 1637.3. What about 1637.4, change in circumstances?
22 We had quite some discussion as a board about this

1 provision. What was remarkable to me was the fact that
2 there wasn't a lot of comment about this. We certainly
3 had spirited debate as a board about this but not much
4 commentary.

5 There was some mention that we needed to make
6 clear that while that person, even if it is a brief
7 time that they are incarcerated, that no new matters
8 should be undertaken during the incarceration by the
9 lawyer, that if you've got a pending matter that needs
10 to be completed and it appears that the litigation
11 itself is going to continue and the period of
12 incarceration is brief, that you can continue that but
13 you can't take on any new matters while that person is
14 incarcerated.

15 Anything else on that? We've spent some time
16 as a board, I think, discussing that. And the final,
17 1636.5 is our usual recordkeeping. Any changes to
18 that?

19 Any other comments in any other areas?

20 Okay, we can now move from --

21 MS. GLASOW: Do you want a resolution on that?

22 MS. BATTLE: Yeah, I'll take a resolution.

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1 MR. McCALPIN: It's Ernestine's turn.

2 M O T I O N

3 MS. WATLINGTON: I so move.

4 MR. McCALPIN: Second.

5 MS. BATTLE: Okay, that took care of it. All
6 in favor?

7 (Chorus of ayes.)

8 MS. BATTLE: All opposed?

9 (No response.)

10 MS. BATTLE: The motion carries.

11 MS. PERLE: May I ask a question? We're going
12 to do solicitation now. Do you think we will get to
13 the welfare reform provisions after that?

14 MS. BATTLE: Yes.

15 MS. PERLE: I'm going to go out and call Alan
16 and tell him that he should come by.

17 CONSIDER AND ACT ON A DRAFT INTERIM REGULATION

18 (TO BE CODIFIED AS 45 C.F.R. PART 1638)

19 RESTRICTING SOLICITATION OF CLIENTS BY GRANTEEES

20 MS. BATTLE: We're on solicitation, 1638.

21 MR. SMEGAL: You mean you've done five?

22 MS. GLASOW: Most of the comments came on a

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1 few rules.

2 MR. ASKEW: When you're not here we move
3 quickly.

4 MR. SMEGAL: I was going to suggest the fact
5 that I'm here today caused you to move quickly because
6 I've heard in my absence you don't move this quickly.
7 I don't know that that's true, though.

8 MS. MERCADO: Tom, what you don't realize is
9 that we've already gone over these rules in at least
10 two or three other Ops and Regs meetings.

11 MR. SMEGAL: I see.

12 MS. GLASOW: There was only one issue on this
13 rule and those were based on comments by recipients who
14 had grants or contracts for ombudsman programs.

15 MR. TULL: Ombudspersons.

16 MS. BATTLE: Ombudspersons, that's right.

17 MS. GLASOW: These are situations where, under
18 federal or state law, recipients are given grants to
19 deal with situations that are often either mental
20 health facilities or nursing homes, in situations where
21 you have a population of people who are somewhat
22 vulnerable and Congress recognized this.

1 So under these programs, recipients engage in
2 a variety of activities. They are to go in and
3 investigate. They are to offer legal assistance. They
4 are to negotiate. But they're acting in several
5 capacities, so if they go in and investigate and then
6 they turn around and provide legal assistance, they
7 could come in conflict with our solicitation rule.

8 We felt that Congress in the solicitation
9 restriction was basically saying we don't want you to
10 go out there and solicit clients who otherwise would
11 come to you on their own because these are vulnerable
12 populations who cannot do that and they're also
13 programs that federal government has established, so
14 therefore they favor these programs.

15 We decided that there should be an exception
16 for ombudsman programs, although it's not really an
17 exception. We're just saying basically this part is
18 not applicable for those, and that is in Section 4(c)
19 on page 4, which reads, "This part does not prohibit
20 representation or referral of clients pursuant to a
21 federal or state statutory ombudsman program."

22 MR. McCALPIN: Quickly reviewing again the

1 comments at page 60 and page 150 -- these are the New
2 York comments -- I don't find that they use the word
3 "ombudsman" and I'm not sure whether they would
4 characterize the New York program as an ombudsman
5 program. So I'm not sure that this proposed change
6 which you're making covers the New York situation.

7 MS. MERCADO: But New York, the examples they
8 use mention disability --

9 MS. GLASOW: Do they mention the programs that
10 are in the footnote on the bottom of page 1 here?

11 MS. MERCADO: They mention the mental
12 retardation, the developmental disabilities. They
13 mention protection and advocacy of individuals with
14 mental illness.

15 MR. McCALPIN: Are those necessarily
16 characterized as ombudsman programs?

17 MS. MERCADO: I don't know how New York funds
18 them.

19 MS. GLASOW: It depends on whether they're
20 under a federal or state statute.

21 MR. McCALPIN: I'm just --

22 MS. BATTLE: Are you saying you want to use

1 something that defines "ombudsman" rather than the term
2 "ombudsman"?

3 MR. McCALPIN: I'm just suggesting that the
4 use of the word "ombudsman" may be unnecessarily
5 limiting what we're trying to do, that there may be
6 similar programs which do the same thing which are not
7 characterized that way. I don't object to an ombudsman
8 program but I think it may not go far enough.

9 MS. PERLE: Are you objecting to the
10 limitation to statutory programs, as well?

11 MR. McCALPIN: Pardon?

12 MS. PERLE: This also limits it to statutory
13 programs. Is that a problem?

14 MR. McCALPIN: Yeah. I don't know why. You
15 know, most of the nursing care homes that I know of
16 have ombudsmen. I'm not sure that they are all
17 necessarily pursuant to statute.

18 MS. MERCADO: There are also special programs
19 that deal with mentally ill, especially mentally ill
20 children, and they don't necessarily have any kind of
21 state or federal funding; they're totally foundation-
22 funded or corporation-funded. They still have a client

1 population that has that character of having
2 individuals who -- what's the term you used?

3 MS. BATTLE: Mental illness or developmental
4 disabilities.

5 What about, "This part does not provide
6 representation or referral to clients pursuant to a
7 federal or state program which provides for protection
8 and advocacy for persons with mental illnesses"?

9 MR. McCALPIN: What about even a private
10 program?

11 MS. MERCADO: It's not just mental illness.
12 You're talking about elderly people, people who are --
13 maybe it was in the comments that I saw it.

14 MS. GLASOW: We could say a federal or state
15 statutory ombudsman or similar program, and then
16 provide a definition for the type of program that we're
17 talking about. We'd have to come back to you with a
18 definition, I think, that we all agree on.

19 MS. BATTLE: I guess the concern that I hear
20 Bill raising and Maria raising is that the exemption
21 that we're talking about is broader than programs that
22 are statutory, that are term "ombudsman," that we

1 really are going to have to go back and look at this,
2 not just in light of the specific comments that we got
3 but the entire category, and come up with a definition
4 that is inclusive of that full category.

5 MS. MERCADO: Vulnerable populations is what
6 they talk about. That's the word I was looking for.
7 So if somehow in the rules we have that, the vulnerable
8 populations, then it does take it away from solely just
9 ombudsmen.

10 MS. BATTLE: But all of our clients are
11 vulnerable. We'd have to come up with some term of art
12 of --

13 MS. PERLE: It's really not just vulnerable.
14 It's that they're incapacitated. They don't have the
15 ability to advocate for themselves.

16 MS. BATTLE: And it's really more a capacity
17 issue, actually. That's why the advocacy is done this
18 way, because the people --

19 MS. MERCADO: They're retarded or --

20 MS. PERLE: They're elderly, frail.

21 MS. GLASOW: He's getting me a dictionary. I
22 remember reading the definition of "ombudsman." It may

1 provide the kind of framework that we're looking for.

2 MS. PERLE: It could be "This part does
3 prohibit representation or referral of clients pursuant
4 to a federal or state statutory ombudsman program or
5 other similar program designed to provide services for
6 vulnerable, elderly or incapacitated," something like
7 that, "clients," something of that nature. You want to
8 make it a little bit broader.

9 MR. McCALPIN: I think we need to make this a
10 good deal broader than it is.

11 MS. BATTLE: We need to send this particular
12 issue back with the staff and come up with language and
13 to look at it more broadly. Why don't we do that?

14 MR. TULL: This is a very inadequate
15 dictionary. I apologize.

16 MS. BATTLE: Let's get a dictionary definition
17 of "ombudsman."

18 MR. McCALPIN: You've got to get it in
19 Swedish.

20 MR. TULL: "Ombudsman: a governmental
21 official, as in Sweden or New Zealand, appointed to
22 receive and investigate complaints made by individuals

1 against abuses or capricious acts of public officials."
2 That's the first definition. Or two, "one that
3 investigates reported complaints as from students or
4 consumers, reports findings and helps achieve equitable
5 settlements."

6 MS. GLASOW: We don't want the part about
7 suing government.

8 MR. McCALPIN: The problem is I think that
9 that definition is not so well known, as evidenced by
10 the fact that you had to go get a dictionary to find
11 out what it means.

12 MS. MERCADO: And that in effect, most
13 ombudsmen -- I know the ombudsmen in our state --
14 they're the troubleshooter and it is complaints against
15 state agencies and the state government, which is one
16 of the biggies on this welfare reform stuff, suing the
17 government.

18 MS. GLASOW: So we don't want to put that in
19 the rule.

20 MS. MERCADO: So I think there has to be
21 another terminology. We know we mean to be able to
22 help people who cannot help themselves because of their

1 mental or physical incapacity.

2 MS. BATTLE: Can we work on that?

3 MS. GLASOW: We can work on better wording for
4 this, to achieve the same results.

5 MS. BATTLE: We've provided the framework for
6 you. We may need to send this particular rule back for
7 proper wording that really broadens the scope of this
8 exemption to cover everything in that category.

9 MR. McCALPIN: We may be able to do this on
10 January 5.

11 MS. BATTLE: Yes, it's just one issue.

12 MR. ASKEW: Isn't the key here, John, that the
13 program is being specifically funded to provide this
14 service?

15 MR. TULL: I think that is. I think the term
16 actually may be a term of art. It certainly is, I
17 think, in Title III in the Older Americans Act and it
18 may well be in states, as well. It does have the
19 derivation that comes from Sweden, and now we know New
20 Zealand, which we didn't know before, but I think it
21 has been, as a term, it's become a statutory term that
22 refers to specific programs.

1 MS. MERCADO: One of the things that we talk
2 about -- I think you weren't in the room yet -- is the
3 fact that there are a lot of programs that are run for
4 these particular vulnerable populations that may not
5 have any kind of federal or state funding -- there's
6 foundation funding or corporate funding -- for whom we
7 would still wish to be able to have representation of
8 those people who needed to have it.

9 MR. McCALPIN: We would not want this limited
10 to governmental programs.

11 MS. MERCADO: Right.

12 MS. PERLE: I think there are probably
13 hospitals and nursing home associations that give
14 grants to do these because they want to be viewed as
15 good citizens.

16 MR. TULL: This is only an issue if the
17 program itself is functioning as the ombudsman.

18 MS. PERLE: Right.

19 MR. TULL: It's not a referral from an
20 ombudsman in a hospital.

21 MS. PERLE: But I think that programs might be
22 hired, given a contract to provide those services.

1 MR. McCALPIN: I think that's what the New
2 York comments say, that they are hired to do that.
3 Basically what you're saying is that if the program
4 investigates, it can also take the case. Clearly if
5 somebody else investigates and refers, they always can
6 take the case.

7 MS. PERLE: Right. And it's also the notion
8 that if they find out there's a problem and then want
9 to sue on behalf of a person who is incapacitated, that
10 it's not solicitation for them to say to that person,
11 "You have a legal problem; I'd like to help you."

12 MS. BATTLE: We can, as our next rule -- Tom?

13 MR. SMEGAL: I have a question on 1638(4)(a),
14 the last phrase, "giving presentations to groups that
15 request it." Those are permissible activities, down to
16 and including those words.

17 But what about the situation where a Legal
18 Service recipient goes and makes a presentation to a
19 group, whether it's a group of people in a nursing home
20 or just a group of people with the same kind of
21 concerns? It seems to me that that permissible
22 activity is, in fact, impermissible if you read the

1 definitions of 1638.2(a) and (b), the way they're
2 written.

3 First off, it's a room full of people. "In
4 person" means face to face encounter, so you've got a
5 face to face encounter. You're in a room with a bunch
6 of people. B says "Unsolicited advice means advice to
7 obtain counsel or take legal action given by a
8 recipient or its employee to an individual who did not
9 seek the advice or with whom the . . ."

10 You've got a question and answer period.
11 Somebody stands up and asks you a question. You give
12 them advice. It's face to face. It's advice.

13 MS. PERLE: But it's not unsolicited.

14 MR. TULL: It's solicited.

15 MS. PERLE: They ask you a question.

16 MR. SMEGAL: Look what it says here. Read
17 "unsolicited" the way it's defined. "Unsolicited means
18 advice to obtain counsel or to take legal action given
19 by a recipient or its employee to an individual" --
20 now, appreciating that there's an "or" coming up, "to
21 an individual," skipping the next part, "to an
22 individual with whom the recipient does not have an

1 attorney-client relationship." That's prohibited.

2 MS. MERCADO: But it's an "or."

3 MR. SMEGAL: So the first part drops out.

4 MS. MERCADO: "Not seek the advice or."

5 MR. SMEGAL: It should be "and."

6 MS. MERCADO: No, because then you're really
7 going to further restrict it.

8 MR. SMEGAL: Then it reads either way. You're
9 either talking about an individual with whom the
10 recipient does not have an attorney-client relationship
11 or another individual who did not seek the advice.
12 It's not the same person. It's two different
13 circumstances.

14 MR. TULL: That's correct.

15 MS. MERCADO: That's true.

16 MR. SMEGAL: So you don't have, it seems to me
17 the last few words should be prohibited, because of the
18 way you've defined "unsolicited advice."

19 MS. PERLE: It should be "and." He's right.
20 It's a negative.

21 MS. MERCADO: Yes, because we're defining
22 "unsolicited advice."

1 MS. PERLE: In other words, if you'd read it
2 sort of in a positive rather than a negative way, it's
3 not unsolicited if the person seeks the advice or the
4 person is someone with whom you've had an attorney-
5 client relationship. You're absolutely right. Just
6 grammatically, you're absolutely right.

7 MS. MERCADO: I get it now.

8 MR. McCALPIN: So what are you changing?

9 MR. SMEGAL: "Or" to "and."

10 MS. MERCADO: This should be just up your
11 alley, Bill.

12 MS. PERLE: I know I thought about this issue
13 before and I thought we discussed it.

14 MS. GLASOW: We had intended to put "and" in
15 there earlier.

16 MS. BATTLE: Okay, we've got the "and" now.
17 We've got the "and" but we are going to defer 1638.
18 1638, we will hear from you at our next meeting on
19 this.

20 Anything else on 1638?

21 Why don't we do this. We've got two more that
22 we need to cover and I know Alan is on his way. Let's

1 move on to 1640.

2 CONSIDER AND ACT ON A DRAFT INTERIM REGULATION
3 (TO BE CODIFIED AS 45 C.F.R. PART 1640) APPLYING
4 FEDERAL WASTE, FRAUD AND ABUSE LAW TO LSC FUNDS

5 MS. BATTLE: We'll move on to 1640,
6 application of federal law to LSC recipients, and that
7 will give Alan time to get here.

8 MS. GLASOW: I anticipate that this rule will
9 take a long time and Alan is on his way.

10 MS. BATTLE: Alan is on his way and we'll take
11 up welfare reform when he gets here.

12 MS. PERLE: He might have some comments on
13 this, also.

14 MS. BATTLE: Let's get started on 1640.

15 MS. PERLE: This is one he has special
16 concerns about, too.

17 MS. BATTLE: Well, we could start on welfare
18 reform.

19 MR. TULL: No, I think you're correct.

20 MS. BATTLE: This one is going to take some
21 time, so let's get started on it. Let's do 1640 first
22 and we'll take up Alan's concerns when he gets here.

1 MS. PERLE: I may be able to articulate some
2 of them but he's better at these issues than I am.

3 MS. BATTLE: I raised a concern about 1640,
4 just as a preliminary matter, because I felt that we
5 were about to, as a board, pass a regulation which
6 would require all directors to read, understand and
7 know the application of 13 federal laws pertaining to
8 fraud, waste and abuse that I've never seen, that I've
9 never seen a review of, that I have no knowledge of
10 what the implications are.

11 I just think that I had some concern about
12 making sure that the scope and breadth of these
13 particular identified laws are the appropriate ones and
14 that we had some knowledge of what it is that we're
15 passing on here.

16 I didn't know whether or not anyone on the
17 staff has done a review of what these laws are, what
18 they say, what they mean, how they apply to our
19 specific funds or if they apply to our specific funds,
20 what the legislative history was that came to mean that
21 these were the particular laws that were identified as
22 those that pertain to the proper use of LSC funds as

1 federal funds.

2 And so, just as a preliminary matter before we
3 get into discussing what some of the other comments
4 are, I'd like for the staff to address that initial
5 concern because just as all of our board members and
6 recipients and directors will have to become
7 knowledgeable because they will have a two-day notice
8 requirement to the inspector general of all of these
9 things, I think it makes sense for us to get some sense
10 for what all these are all about, or where they came
11 from.

12 MR. SMEGAL: Let me ask a preliminary
13 question. Was this concern raised by anyone? I don't
14 see it in any of the comments.

15 MS. GLASOW: No.

16 MR. SMEGAL: The reason I'm asking the
17 question is why is that not of concern to our
18 recipients, to have to, as LaVeeda has pointed out, be
19 intimately familiar with all of these regulations? Why
20 do not they have that threshold concern?

21 MS. PERLE: I can't answer that. I can say
22 that probably because there were so many rules and

1 everybody was so overwhelmed by sort of having to deal
2 with so many things at one time that people, I guess,
3 made the assumption that the Corporation would present
4 them with copies of these laws and some explanation of
5 what is required under them. And maybe we ought to
6 have an appendix to these.

7 MR. McCALPIN: To what extent are these
8 explained or mentioned at all in the audit guide?

9 MS. GLASOW: I don't believe they are.

10 MR. McCALPIN: They're going to be auditing
11 with respect to these things, aren't they?

12 MR. TULL: No, because these are statutes that
13 set forth criminal --

14 MR. McCALPIN: Handling federal fund.

15 MR. TULL: But they set out crimes for various
16 misuse of federal funds.

17 MR. McCALPIN: Aren't financial audits
18 supposed to turn up evidence of crime and the misuse of
19 federal funds if they exist?

20 MR. TULL: No.

21 MR. McCALPIN: Of course they are. There's a
22 special requirement in the IG act that the IG must

1 immediately report to the attorney general.

2 MR. TULL: Oh, they are supposed to do that
3 but I think the standard language in any audit is, in
4 the boilerplate, to say precisely that it is not
5 designed to uncover evidence of crime because it's on a
6 random basis -- that is, they select files -- and that
7 they don't want to be held to a standard that they are
8 supposed to find crimes. If they do --

9 MR. McCALPIN: They aren't selecting files
10 when they do financial audits, are they?

11 MR. TULL: Sure. Of course. They look in
12 vendor files. They don't look at every transaction.
13 They look at a selection of transactions, including the
14 vendor files -- one vendor file, to see if the invoices
15 are all properly stamped and taken care of.

16 I remember being aware of the boilerplate
17 language the first time I ever did an audit as a
18 project director and being aware of the fact that
19 they're very careful about saying what they don't do,
20 and that that's one of the things that they will say
21 they don't do, because they don't want to be held
22 liable if --

1 MS. BATTLE: Held liable if they don't find
2 it.

3 MR. TULL: Yes.

4 MR. McCALPIN: Laurie, is that your
5 understanding, that they don't look for these things?

6 MS. TARANTOWICZ: I believe that that's true.
7 I must confess I'm not very knowledgeable about this
8 aspect of what our office does. I know that if
9 something is identified when the auditor is on site, if
10 they see something that indicates something, of course
11 it's not going to be hidden, but they're not actively
12 going out to look for a violation of these criminal
13 laws.

14 MS. BATTLE: Well, I guess the concern that I
15 raised, I still would like to see addressed.

16 MS. GLASOW: We see this as a technical
17 assistance problem. And, as we discussed with you this
18 morning, these laws are new to us, too but the federal
19 government agencies are very familiar with these laws
20 because these are laws that apply to the use of federal
21 funds by federal agencies.

22 MR. McCALPIN: Our programs aren't.

1 MS. GLASOW: No, our programs aren't. So what
2 we suggested that we should do is go back and first see
3 what the federal government has available -- the GAO
4 and federal appropriations law I know refers to these
5 statutes. Rather than reinvent the wheel, find out
6 what's out there. There may be some very good federal
7 summaries on these laws. At the least, we should
8 certainly send texts of the laws to the grantees.

9 But we need to go back and do our homework, in
10 essence, to find out what kind of technical assistance
11 we can provide to the field on this.

12 MS. BATTLE: Yes. The reason I raised this
13 question was this. I don't know the genesis of where
14 this list comes from. It's a lengthy list. And what I
15 don't know is, for example, is it that when a state
16 gets funds from the federal government that one, two
17 and three apply to that one and when a county welfare
18 program gets funds, then four, five and six apply to
19 that? And now our Legal Services list is a laundry
20 list of 18 of these statutes. I don't know.

21 MS. GLASOW: I suspect that most of these
22 apply to any person or grantee or anybody that gets the

1 federal funds. They're bound by these laws. I think
2 it's pretty broadly written.

3 MS. WATLINGTON: And I'm concerned because,
4 like you say, I agree with her that I really didn't
5 notice this. Also, your board members have to be with
6 this and how many board members actually know what
7 those laws are? They can be held liable.

8 We've really got to give this a lot more
9 thought.

10 MS. GLASOW: These are the laws that were
11 listed in the legislative history of these provisions.
12 We went back and looked and we're all in agreement that
13 this is what Congress was trying to reach.

14 MR. SMEGAL: Before we complete building this
15 mountain out of this molehill, let me suggest to you
16 that all 13 of these are individual sections of laws
17 and it's conceivable they fit on two pages.

18 MS. BATTLE: It's a crime to murder somebody.
19 It's a crime to --

20 MR. SMEGAL: 286, 287, 1001, 1002, 3730, 3731,
21 3729, all in a row. These things may be two pages
22 long, the total of all 13 of them.

1 So before we get too worried about the
2 attention span of our board chair, let's find out
3 what's there.

4 MS. BATTLE: I can read two pages.

5 MR. SMEGAL: That's why I said that.

6 MR. McCALPIN: Let me, though, raise a
7 question here that's comparable to one that was raised
8 in connection with the alien thing and that is if the
9 law changes or if there is a new federal provision
10 making a crime out of some aspect of federal funds and
11 we've put this in the regulation, are we not better off
12 to put it in an appendix, as they are proposing to do
13 with evidence of citizenship, as I recall?

14 MS. PERLE: I think that those things change
15 much more frequently. They change at the whim of the
16 INS whereas this -- at least Congress has to pass a new
17 statute to change these. I don't see an objection to
18 doing it that way if you wish to.

19 MS. BATTLE: You could just use the words
20 "federal law includes," and then put this list. That
21 way if there's a new law out there --

22 MS. PERLE: I don't think you want to do that

1 because then --

2 MS. GLASOW: A lot of work went into --
3 because the language is so broad in the restriction, we
4 worked to get agreement that this is the law that it
5 covers and an appendix makes it seem more fluid than I
6 think it should be.

7 MS. BATTLE: And we have agreed this is what
8 it is?

9 MS. GLASOW: Yes. And some of these laws have
10 been long-standing. I mean, it's just always been a
11 crime to steal federal funds or to misuse them or to
12 present false claims, so it's not like this is fluid
13 law.

14 MR. ASKEW: Have our grantees always been
15 subject to these laws, or only now?

16 MS. GLASOW: They probably are if they have
17 other federal grants from other federal agencies but
18 our funds weren't considered to be federal funds. So
19 it wasn't through our grants. It was through -- for
20 instance, if they got another federal grant, they might
21 be.

22 MS. PERLE: But there was a general counsel's

1 opinion some years ago when Tim Shay was general
2 counsel that said -- that made the argument and
3 concluded that at least with respect to some of these,
4 that programs, LSC funds were subject to these.

5 MR. ASKEW: In the False Claims Act they --

6 MS. PERLE: Some of these laws are specified
7 in the McCollum Stenholm Act and the False Claims Act
8 was specified in that, in the Kassebaum bill, and this
9 exception was in there.

10 So I don't know whether all of these, but a
11 number of these were specified in some of the
12 reauthorization proposals.

13 MS. BATTLE: We have a law library. We can
14 pull down the code Section 18 --

15 MS. PERLE: It's in a box.

16 MS. BATTLE: Well, to her credit, Suzanne
17 mentioned this morning to me that this list was
18 compiled from a review of our legislative history on
19 the act and on appropriations and on other things. So
20 it was her view that these laws weren't just laws out
21 there that all of a sudden -- "Oh, the words 'fraud,
22 waste and abuse of federal funds' is in there; let's

1 apply it." There is some congressional history around
2 the issues.

3 MS. PERLE: And the IG also.

4 MS. BATTLE: My concern is, and I think maybe
5 Tom has cut this mountain down to a small hill, I just
6 think at this point, before we pass this, we need to
7 look at it and see what those things say and be aware
8 of what it is that we're doing so that we can do it
9 with the full knowledge of what the requirements will
10 soon be on our board members, recipients, directors and
11 employees.

12 MS. PERLE: And I think the Corporation has an
13 obligation to make sure that everybody out there knows
14 where these things are.

15 MR. SMEGAL: For example, Madam Chair, I am
16 familiar with 18 United States Code Section 1001. It's
17 less than 50 words and it has to do with filing a false
18 oath and being subject to imprisonment. It happens to
19 be part of the declaration that an inventor signs when
20 he files a patent application. It's very short. It's
21 50 words, max.

22 So I'm concerned that there's not much here.

1 Any of us could read them in a relatively short period.

2 MS. GLASOW: We'll provide you with a summary
3 of what the law is and the text of the law.

4 MR. TULL: Or just the law, if Tom's correct
5 that it's only one paragraph long.

6 MS. BATTLE: Just give me the law. I think I
7 can read it.

8 MS. PERLE: You might want to put a couple of
9 paragraphs about what it means and how it's been used.

10 MS. BATTLE: There were three basic issue
11 areas, as I recall from our discussion, that were
12 highlighted by management as areas where there were
13 comments on the application of federal law to LSC
14 recipients.

15 The first has to do with this notice
16 requirement wherein a recipient is required to give
17 notice within two days of a violation of any of this
18 list to the inspector general of the Corporation. I
19 think there was some discussion and concern about how
20 that two days play out.

21 I know that there have been some negotiations
22 back and forth about whether it ought to be two or five

1 days and we've come out with the two days. Is that --

2 MR. TULL: The two-day requirement really
3 raises many of the same issues that are involved in the
4 next issue, which is the standard for what then needs
5 to be referred to the inspector general.

6 The inspector general's office probably can
7 speak to this issue better than I. Our conversations
8 with them, we initially suggested five working days and
9 their concern is to get, as quickly as possible,
10 information about any possible violation so that they
11 can -- and this goes also to the question of the
12 standard which invokes the need to do the reporting --
13 that their interest is in making certain that first of
14 all, that they can, as quickly as possible, be in
15 contact with the program and particularly with regard
16 to what the program does when a director or someone in
17 the program has reason to believe that there may be a
18 violation, that these are criminal statutes, that the
19 mere notification of the fact that there's a belief
20 that there may be a possible violation is not a charge
21 by a program as to any employee nor an admission.

22 It is simply notifying the IG so that the IG

1 can then be in communication with the program so that,
2 among other things, the program does not inadvertently
3 undertake some action which might later subvert or
4 undermine a possible prosecution or further
5 investigation.

6 They've had experience in the past apparently
7 where there was embezzlement in a program or there
8 appeared to have been embezzlement and the program got
9 engaged in investigating itself and attempting to sort
10 of identify what the problem was and was so involved in
11 the evidence that later was necessary or would have
12 been necessary to prosecute that that the evidence was
13 tainted and couldn't be used and it subverted what both
14 the program and the inspector general, in carrying out
15 his responsibilities, felt would have been appropriate.

16 So their concern with it being soon and being
17 based on a standard which involves really a mere
18 suspicion is largely to address those two problems. We
19 suggested a different standard and they expressed, in
20 very strong terms, their belief that that was
21 inappropriate, given what I just described, and we
22 agreed therefore to change this back.

1 This is also -- I guess the other thing I
2 would say is that two days and the standard, "any
3 information that indicates that the recipient or any of
4 its employees or board members have taken any actions
5 which may violate," that the two-day notice time and
6 that standard are both currently part of a grant
7 condition with programs as to other kinds of --

8 MS. BATTLE: So we're codifying the grant
9 assurances.

10 MR. TULL: It covers slightly different issues
11 because the grant assurance covers acts of theft and
12 embezzlement against the program. If someone breaks
13 into a program, a burglar off the street, and steals a
14 typewriter, then there's a requirement that there be
15 notification of that. And the inspector general's
16 office has been, I think, very quick and very
17 unintrusive in its investigation of those.

18 It's not created a problem in terms of the
19 fact that they get notice of it and then there's some
20 massive response. It really gives them an opportunity
21 to call up and inquire as to the facts and to interact
22 with the directors as to what's appropriate.

1 MS. BATTLE: I have a couple of questions and
2 maybe I should address them to Laurie because they
3 really have to do with the experience. Certainly these
4 provisions regarding crimes are provisions which
5 inspector generals have some experience with with other
6 federal agencies that dispense federal funds.

7 So my question has to do with what the
8 experience is and how this works in other instances for
9 inspector generals and how they relate to their
10 departments in conducting the work around these issues.

11 MS. TARANTOWICZ: Unfortunately, I can't give
12 you any actual information regarding the experience of
13 the OIG but I should preface any remarks by saying that
14 I think John has adequately described the OIG's
15 position on this reg and in this matter.

16 I should also say that because this is
17 something -- the investigation of potential violations
18 of criminal laws is something that falls squarely
19 within the OIG's operating responsibilities, this is
20 something that the inspector general feels very
21 strongly about.

22 The standard is a broad standard because, as

1 John said, the OIG needs to get involved as soon as
2 possible, especially because if programs are, as you
3 were talking about earlier, not exactly clear what
4 would constitute a violation, the OIG has the expertise
5 in this area and will sometimes say, "This is not a
6 problem, don't worry about it," sometimes ask for
7 further information and direct the program to what
8 information exactly needs to be gained and in what
9 manner. So early involvement is really crucial.

10 MS. BATTLE: I would like to know, before I
11 venture on this particular issue, a little bit more
12 about that experience as to how it's done. I've got
13 some concern about paragraph 2 in the standard of if
14 the recipient has any information that indicates that
15 any of its employees or board members may have taken
16 actions that might violate, because anybody can start a
17 rumor. Anybody can come to the director and say, "Did
18 you know So-and-so cashed that check that belongs to
19 this person?"

20 Now, that's information. Now, the director
21 may have absolutely no belief that this person has done
22 this, and it may take two days for him, before he comes

1 back in off the road, to say, "So-and-so said you
2 cashed this check. Did you?" "Oh, no, I've still got
3 it. It's here. I haven't cashed the check." And it's
4 over.

5 But if information is the standard, as opposed
6 to reason to believe, then you get a lot of mountains
7 out of molehills here. If the standard is that the
8 recipient knows what the law is and has reason to
9 believe it's being violated and needs some help on that
10 investigation, to me, that gets the issue to the
11 inspector general for proper handling.

12 So I'd like to know -- that's why I asked the
13 question about experience and level of involvement of
14 inspector generals in other agencies where they have
15 the same oversight responsibility, and at what point
16 are other agencies required to make that reporting to
17 the inspector general? Is it when they have
18 information or is it when they have reason to believe
19 that there's been a violation?

20 I just raise that because information is such
21 a low standard. I mean, information is somebody just
22 says something.

1 MR. McCALPIN: I agree with you. Is a rumor,
2 an unsubstantiated rumor information?

3 MS. BATTLE: I think it is information.

4 MS. TARANTOWICZ: I'm not necessarily
5 convinced that it is. I think that this is not
6 something that --

7 MS. GLASOW: Any information.

8 MR. TULL: How about credible information?

9 MS. TARANTOWICZ: I'd have to go back. I
10 don't have the authority to agree to the change.

11 MS. BATTLE: I guess what I'm saying is I'd
12 like for the inspector general to come forward with
13 some history. These are not brand new laws. Some
14 history about the experience of how these laws are
15 given oversight by other agencies, as well, so that we
16 know.

17 Before I can agree to this very light
18 standard, I could have a comfort level about how others
19 who receive federal funds out there are required to
20 report when there is potentially some violation of all
21 of this, and that's just to make it consistent. I'm
22 not asking for more or less. I'm just saying I think

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1 it needs to be consistent with reporting requirements
2 for misuse of federal funds, wherever there are federal
3 funds.

4 MR. McCALPIN: Let me say also I'm concerned
5 about the black mark that relaying a suspicion of this
6 kind puts on the character of the person who is the
7 subject of it. You know, you relay a suspicion that
8 somebody has done something wrong. If it turns out
9 that that's not credible, it's a long time before that
10 suspicion goes away from the individual.

11 I think you have to be very careful about
12 putting that black mark on the character of an
13 individual.

14 MS. BATTLE: Yes. The reason to believe
15 standard, to me, at least was a level where this
16 recipient felt substantiated enough. It's almost like
17 a probable cause standard to take some sort of action.

18 MS. TARANTOWICZ: It's just that that's the
19 whole problem here. We don't want recipients
20 investigating to find probable cause. It is the
21 inspector general's function to find out if there are
22 reasonable grounds to believe and to forward that to

1 the appropriate prosecutorial authorities. We do not
2 want the recipients engaging in these investigations
3 without the inspector general's involvement. It
4 defeats the purpose here.

5 And I might add that this is not about making
6 a formal charge of misconduct or illegal conduct. This
7 is about relaying information regarding a suspicion.

8 MR. McCALPIN: The damage is done before the
9 formal charge is made.

10 MS. BATTLE: Even suspicion is greater than
11 just information. This says information. Suspicion,
12 it seems to me, is even greater than just information.

13 MS. TARANTOWICZ: Well, you can have a
14 suspicion based on no information.

15 MS. PERLE: I don't understand why -- you
16 know, when the interim reg was put together, which had
17 the reason to believe standard, the IG was satisfied
18 with that at that time, I thought. And it's only when
19 someone suggested that the two-day notice is too short
20 a time that sort of gave them an opportunity to reopen
21 the whole thing. I think that they're now sort of
22 backing down from where they'd agreed before.

1 MR. TULL: We had actually proposed language
2 which is not reflected here in response to the comment
3 in the letter which said that a recipient has made a
4 determination that, and that is what invoked the
5 concern by the IG, that making a determination implies
6 an investigation and requirement of an investigation.

7 MS. TARANTOWICZ: Well, in addition to that, I
8 can talk to what prompted our concerns. The comments
9 that came in, we read the comments that came in that
10 led us to the conclusion that the standard "reason to
11 believe" that was in the reg was causing confusion
12 because that's not what we intended it to mean. It is
13 a probable cause standard. That's exactly what we
14 wanted to avoid.

15 MS. BATTLE: I guess I need more information.
16 This is a change that I think is substantial. We've
17 got grave consequences. Your funds, if you don't do
18 these things, can be voided. There are grave
19 consequences that flow from this and I think that
20 before we implement a rule, we need to have some real
21 clarity around what the requirements are, real clarity
22 around what the laws are that apply, so that we can, at

1 the appropriate time, inform all of our recipients of
2 their responsibilities and all the board members of
3 their responsibilities around this.

4 Alan?

5 MR. HOUSEMAN: My only point was I think there
6 is also a difference between a federal program, where
7 there's an inspector general and staff who are
8 employees of the federal program, and a grant program,
9 which is what we are running. And I'm not sure that
10 the inspector general in those grant program views it
11 as his or her responsibility to investigate all
12 possible problems of the grantee, as opposed to
13 employees of the agency.

14 I mean, the inspector general has a role to
15 make sure about fraud and all that. That's not what
16 I'm arguing. I'm saying that there's a difference
17 between investigating, in the first instance, within an
18 agency where there's a potential problem of fraud or
19 embezzlement, and a grantee of federal funds, an
20 independent entity out here whose staff and board are
21 independent of the entity that gives them the money.

22 There's clearly a responsibility on the

1 inspector general's part to be involved with problems,
2 but it's not so clear to me that the role is to come in
3 and do the investigation. I think there's an
4 independent responsibility on the part of a recipient
5 to do the investigation, and nothing in this act
6 changes that. I mean, nonprofit corporation laws
7 require them to do certain things in the states.

8 So the statement that it's the inspector
9 general's role to come in from the outset and do all
10 the investigation and the program do nothing is what
11 sort of came out and seems to me to be completely
12 wrong, in terms of looking at the relationship between
13 the grantee, its own board and staff, governing body,
14 state law that governs it and the grantor, the Legal
15 Services Corporation.

16 MR. McCALPIN: I don't think I agree with you,
17 Alan. I think the IG has to follow the federal funds
18 wherever they go.

19 MR. HOUSEMAN: Oh, I agree with that. That's
20 not what I'm saying.

21 MR. McCALPIN: I think he has to investigate
22 any misuse of federal funds, wherever they may --

1 MR. HOUSEMAN: I agree with that completely.
2 That's not what she said. She said the recipient --
3 that they would come in and do the investigation, not
4 the recipient. I think there's a responsibility on the
5 part of the recipient to investigate any information
6 that there's fraud or embezzlement.

7 MR. McCALPIN: I think the OIG has a superior
8 responsibility.

9 MR. TULL: To do the investigation?

10 MR. McCALPIN: Yes.

11 MS. BATTLE: From the onset? Are we talking
12 notice of any information? Are we talking
13 investigation when there's probable cause for an
14 investigation? I mean, there's a whole continuum at
15 which we've got to determine at what point is something
16 at the level that it triggers the kind of activity that
17 this Section 1640 envisions.

18 The concern I have is that we started out with
19 a continuum of reason to believe, which says this is
20 something serious; I need to get the inspector general
21 down here to deal with it, and we've gone to
22 information, which is, to me, a much, much lighter

1 standard.

2 I know that there are federal funds going to a
3 lot of different places and I just think that we need
4 to know what the standards are for other federal
5 grantees about when they have to get their inspector
6 generals involved, and I'd like to know what that is.

7 And I'm sure that there are lots of different
8 standards, but it certainly would help us in fashioning
9 this standard to err on the side of making sure that
10 we've done what we're supposed to do and what's
11 consistent with how these particular laws are
12 implemented in the majority of the places where they
13 fall.

14 MR. McCALPIN: It seems to me one of the
15 problems with this is the program may have to report
16 the information even if the program doesn't believe the
17 information.

18 MS. BATTLE: Yes, that's what I'm saying. If
19 someone comes to me and says that my secretary has
20 absconded with \$100,000 and I know that's not true,
21 this says that's information I've received; I've got to
22 report it.

1 MR. McCALPIN: I'm also worried about the
2 spite accusations.

3 MS. BATTLE: The rumors.

4 MR. McCALPIN: People have a falling out
5 within the program so, in order to get even, somebody
6 makes an accusation. That's information. Do you have
7 to pass it on? Even though you know the background of
8 it and the likely basis of it, you still have to pass
9 it on.

10 MS. BATTLE: Laurie?

11 MS. TARANTOWICZ: Just as a point of
12 information, I'll let you know that this is the
13 standard, as John said, that has been in the grant
14 assurance for two years now and, in our opinion, it's
15 worked very well. I don't have any information --

16 MS. PERLE: But it says information that
17 indicates a recipient has been the victim of theft or
18 something. That's a lot more concrete, isn't it? It's
19 not that they may have taken any action which may
20 violate.

21 MR. SMEGAL: Let me just give you eight words
22 and let you think about it. You don't have to write

1 them down. Change "any" to "sufficient" so it reads --

2 MR. McCALPIN: Where are you?

3 MR. SMEGAL: I'm on 2, page 7. Where it says
4 "any," "it has sufficient information," and then go
5 back to the old language but before getting there put
6 in "to substantiate a reason to believe."

7 So you're got "sufficient" and substantiate."
8 You've got a couple of checks and balances that, it
9 seems to me, gets rid of this rumor that LaVeeda made
10 reference to.

11 MS. PERLE: That may go further than the IG is
12 willing to accept. I think "has sufficient information
13 to indicate that the recipient has taken action." In
14 other words, the information is sufficient to really
15 make some kind of concrete indication that there's a
16 problem.

17 MS. GLASOW: LaVeeda, I have the grant
18 assurance.

19 MS. BATTLE: Let's hear from the grant
20 assurance so we can see where this language has been
21 used.

22 MS. GLASOW: "It," the recipient, "will give

1 telephonic or other actual notice to the LSC Office of
2 Inspector General within two working days of the
3 discovery of any information that indicates the
4 applicant may have been the victim of misappropriation,
5 theft, embezzlement or the like of any funds -- LSC
6 funds, non-LSC funds -- used for the provision of legal
7 assistance and eligible client escrow funds, or theft
8 of any property, regardless of whether the funds or
9 property are recovered. This notice shall be followed
10 by written notice within 10 calendar days."

11 So we've got victim of misappropriation,
12 theft, embezzlement or the like. So they're the
13 victim.

14 MR. McCALPIN: Does it say "have information"?
15 Is that the way it starts?

16 MS. GLASOW: "Discovery of any information."

17 MR. TULL: "That indicates."

18 MS. GLASOW: "May have been the victim."

19 MR. SMEGAL: But that's a victim. This is a
20 different word. There's "violate" here.

21 MS. GLASOW: Here they're the criminals and
22 not the victims.

1 MR. McCALPIN: That's totally different.

2 MR. SMEGAL: That's 180 degrees.

3 MR. TULL: Except for embezzlement.

4 Embezzlement is the one in the grant assurance which is
5 similar to what is in here.

6 MS. BATTLE: I just think this one needs a
7 little bit more work. I think we need to find out the
8 history of how these laws are -- how it's done by
9 inspector generals in other places.

10 We do want to put together a regulation that
11 speaks to this issue directly and clearly, informs
12 recipients and directors as to what their obligation
13 is, but I'd like to see some more work on this.

14 MS. GLASOW: Okay.

15 MS. BATTLE: Are there any other issues?

16 MR. HOUSEMAN: There was one which I don't
17 know if we need to resolve.

18 MS. BATTLE: Is that hearing rights?

19 MR. HOUSEMAN: Yes, which we raised in our
20 comment. Let me just speak briefly to it. Again, this
21 is not some overarching issue of great, huge moment.

22 The question is on a hearing, we all agree

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1 that there's got to be some kind of a hearing before
2 the recipient can be found liable for the actions of
3 its employees if the employee violated one of these
4 provisions, when it's the employee that's been found
5 guilty and not the recipient.

6 Obviously, if the recipient itself is found
7 guilty by a court, it's null and void and it's over
8 with. Nobody disputes that. But in a situation where
9 an employee is found to have violated one of these
10 provisions and then the charge is that the recipient
11 knowingly -- you know, gross negligence -- allowed this
12 to occur, that kind of a question -- we all agree there
13 should be some kind of a hearing.

14 I'm not convinced by reading the statute that
15 the statute, on this question -- first of all, I don't
16 think the statute even addresses this question
17 directly. But I don't think the statute, on its face,
18 overrules the hearing rights that exist in Section 1011
19 of the LSC act.

20 And when they wanted to overrule those hearing
21 rights, they knew how to do it. In the competition
22 section of the appropriation rider, they say that

1 competition shall be held and the rights under Section
2 1011 don't apply. They didn't say anything like that
3 here. They used the words "null and void;" that's
4 true.

5 But the question isn't whether once there's a
6 finding that the recipient acted with gross negligence
7 or with intent, once there's a finding of that, that's
8 true; it's over with. But the question is how do you
9 determine that finding?

10 So I think if you read Section 1011, you read
11 the statute, I don't think that, on its face, the
12 appropriation act trumps Section 1011, so to speak. I
13 think you can read Section 1011 consistent with the
14 statute on this issue. Therefore, I think if we're
15 going to have a hearing, it ought to be a Section 1011
16 hearing.

17 If the Corporation wants to revise 1606, fine.
18 I don't need to reference 1606. But I think the
19 hearing that's held in this narrow circumstance that
20 may never come up ought to be a Section 1011 hearing,
21 however that's interpreted.

22 So that's the point of our comment and that's

1 the point I would make.

2 MR. McCALPIN: Are you referring only to the
3 subparagraph B and not A?

4 MR. HOUSEMAN: Yes, only to subparagraph B.
5 Actually, if a court finds the recipient guilty, that's
6 it. It's done with. They've had their rights.
7 They've been in court, period. They've been before
8 somebody independent and they've lost. I don't have
9 any --

10 MR. TULL: If we can speak to that because we
11 went around this circle ourselves and actually had
12 proposed, at one point, that 1011 rights be -- that
13 there be a specific invocation of 1011 rights. The
14 inspector general's office questioned that and, in
15 discussing the issue with them, we became convinced
16 that, in fact, the 1011 rights probably don't apply and
17 for the reason that what we're talking about is given
18 what's provided now in the regulation, which is there
19 is a right to a hearing, by not invoking 1011 rights,
20 what is left out is the right to a hearing with an
21 independent hearing officer, which is specifically
22 mentioned in 1011.

1 The reason that we felt that 1011 doesn't
2 apply is that this provision is 504(a)(19) and it does
3 not use the words "termination of funds." What it says
4 is that "Unless the person or entity enters into a
5 contractual agreement to be subject to all provisions
6 of federal law relating to the proper use of federal
7 funds, the violation of which shall render any
8 contractual agreement to provide funding null and
9 void."

10 Now, the general counsel's office, in
11 interpreting the language "null and void" discovered
12 what we've reported to you when this was originally
13 discussed, which is that is a legal concept that
14 doesn't make sense in this context. But it appears to
15 me to be a clear indication that what they're saying is
16 we don't want to mess around with hearings in the event
17 of a violation of this; we expect at that point it to
18 be immediate and -- Alex isn't here so I can say self-
19 executing.

20 And I think Alan is correct that as a matter
21 of due process and fairness, that the question of
22 whether or not there has been gross negligence is

1 clearly a finding of fact and one which is very
2 subjective and that there needs to be some opportunity
3 for a program, in the event that that's what is being
4 invoked, to say, "These are the facts; this is what we
5 did," and the Corporation needs to be put to its proof
6 that, in fact, it does rise to that standard.

7 And I think the board properly provided for a
8 hearing for that narrow question, but to require an
9 independent hearing officer, I think, flies straight in
10 the face of what Congress must have meant when it said
11 "null and void."

12 MR. McCALPIN: You read 19 as referring only
13 to the program and a violation by the program. "Enters
14 into a contractual agreement" -- "Unless a person or
15 entity enters into a contractual agreement to be
16 subject to all the provisions of federal law, violation
17 of which represents the agreement to provide funding
18 null and void."

19 You could read that as being limited to a
20 violation by the program. You may not even need
21 (b) (2). If the violation is by an employee of the
22 program, the contract may not be null and void. If the

1 sole violation is by an employee and not by the
2 program, the contract or grant may not be null and
3 void.

4 MS. BATTLE: I have some concern about an
5 employee's conduct being able to nullify the entire
6 recipient's funding. I just think that that --

7 MS. GLASOW: It doesn't. We have to impute
8 that guilt to the recipient after a hearing, saying
9 there's been gross negligence.

10 MS. BATTLE: But the whole imputation process
11 is what -- obviously, because that imputation process
12 could take place at that state court level, as well. I
13 mean, in other words, if the violation of the law by
14 this employee is that grave, then the prosecutor could
15 have gone after the recipient, as well as the employee.

16 And if there's a decision made to go after
17 the employee and not the recipient for it, we come
18 behind that and say, "Aha, but you knew about it and
19 you didn't do anything about it and we're going to take
20 your funds for it." That adds, beyond what I'm hearing
21 Bill said the statute actually provides. It adds
22 another whole circle and it adds a circle where, at

1 least with regard to that employee, there's been a
2 state court hearing; there's due process; there's
3 everything; there are all the constitutional rights.

4 Then you get to the recipient and you're
5 attaching something to that recipient that goes outside
6 of that scope, for now. I've got some concern about
7 what are we doing here and where does our authority to
8 make this leap come from?

9 MS. GLASOW: Without B, if we just follow the
10 statutory language, then we would have to impute guilt
11 automatically to a recipient if there's a violation of
12 this law by an employee or person there. We're
13 basically --

14 MR. McCALPIN: Why would you?

15 MS. GLASOW: Because unless such person or
16 entity enters into a contractual agreement, a violation
17 of which would make the contractual agreement null and
18 void.

19 MR. McCALPIN: If a person or entity has not
20 violated the agreement but only an employee has --

21 MR. TULL: No, the federal law says an
22 employee of a federal agency shall not file a false

1 claim on behalf of that agency in order to gain funds.
2 If that employee is convicted, they have violated the
3 federal law relating to the proper use of federal
4 funds.

5 MR. McCALPIN: Yes, but the employee has, not
6 the agency.

7 MR. TULL: No, to be subject to all provisions
8 of the federal law. And the federal law says that an
9 employee of a federal agency shall not do the following
10 act. It doesn't say the federal agency shall not do
11 the following act. It says an employee shall not do
12 the following act.

13 We're back to our initial conversation, which
14 is we don't know the precise language of all of these
15 statutes, so without that, precisely how they may, in
16 fact, be implemented under (a)(19) or under 1640.4, we
17 don't know. But I would be surprised if we found that
18 all of these statutes only go to an agency as an entity
19 and only provide for convictions of them, and those are
20 the federal laws which relate to the proper use of
21 federal funds.

22 MR. SMEGAL: But 18.1001 is to an affidavit or

1 declaration under penalty of perjury signed by an
2 individual. How can you hold a grantee or a recipient
3 liable for an act of someone who makes a false oath,
4 just because it's in the conduct of his or her
5 employment?

6 MS. GLASOW: Actually, there is some law on
7 this law we're citing that deals with that issue. I'd
8 have to go back and refresh my memory, but we did look
9 at that.

10 MS. BATTLE: This obviously needs some work.
11 There are grave consequences that will flow from the
12 implementation of these two provisions. They're
13 extremely critical, key. The interplay between these
14 provisions and all of those various laws is extremely
15 important and I just think the knowledge level for this
16 committee, before we could make a decision, has got to
17 be greater on all of this.

18 You know, if, as Tom says, some of these laws
19 relate to acts by individuals, then are we tagging the
20 recipient -- you say, "Go do this case." This person
21 does this case in a way in which they sign off on some
22 oath that violates this law. Then are we going to take

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1 the recipient's funding for that?

2 MS. GLASOW: Well, if the recipient knew one
3 of its attorneys was engaging in violation of some of
4 these federal laws and let them do it, I'm not sure
5 that we wouldn't have a great concern about that. They
6 were making false claims to the government for funds
7 that they, in truth, did not earn.

8 MS. BATTLE: When did you find out? Did you
9 find out afterwards? And when you found out
10 afterwards, what did you do about it? Did you know in
11 advance? I mean, those are all of the issues that
12 you'd have to resolve before you determined if it's
13 sufficient for this recipient to lose all of their
14 funding and to have to get out of the business.

15 It seems to me that when the recipient engages
16 in conduct that is a violation, it's a real clear
17 situation. When an employee engages in conduct, the
18 recipient may know about it, may not know about it, may
19 find out about it after the fact, you know, may
20 mishandle it after the fact.

21 How do we make the determination as to when
22 the conduct by the recipient rises to the equal level

1 of a criminal violation? Because really what you're
2 saying is "I'm holding this recipient co-equally liable
3 for violating a criminal statute."

4 MR. TULL: The structure in the regulation is
5 an effort to protect against an abuse of the problem
6 you just described. A recipient has to act through its
7 individuals. A recipient does not sign a document. It
8 is the director. It is the comptroller. It's the
9 chair of the board or someone.

10 So invariably, a violation of these acts is
11 going to involve an individual. And the question will
12 be precisely what you said. Did the person do it with
13 the blessing of the board or of the management or did
14 it do it knowingly or was it ratified by the recipient
15 in some way?

16 What I think we have tried to do,
17 notwithstanding the language which says "null and
18 void," is we have tried to build in a protection
19 against that automatic imputation of that by saying
20 that you do have to look at that and you have to make a
21 judgment as to whether or not, in fact, the person was
22 acting solely on their own, in violation of

1 instructions and rules and procedures and that it was
2 an individual act only by that individual or if the
3 recipient itself is somehow culpable, and the
4 culpability is what is stated in B, which is knowingly
5 and gross negligence, a very high standard.

6 So I think this conversation points out the
7 risks of, by attaching 1011 rights to B and thereby
8 saying that it's really outside of the scope of
9 (a)(19), we may, in fact, lead to a result which is
10 precisely the opposite of what the board tried to do,
11 which is to build in protections against the ax
12 automatically falling in the circumstances which are
13 described in A.

14 MS. PERLE: I followed you up to about the
15 last 30 seconds. It strikes me that --

16 MR. TULL: I got lost about a minute ago.

17 MS. PERLE: Something like 1011 rights, which
18 means that the determination is made by an independent
19 factfinder, provides the additional protection that you
20 need.

21 Maybe 1011 rights is not the right thing
22 because 1011 rights do deal with a termination hearing,

1 but maybe what it needs to be is something that says an
2 opportunity to be heard before an independent hearing
3 officer.

4 I can remember at the Corporation in the days
5 when the Corporation staff asserted that termination
6 hearings did not have to be heard by an independent
7 officer, they could be done by -- I believe it was the
8 general counsel who was going to be the hearing officer
9 and there was a hew and cry and Congress changed it
10 because they felt that that was an action that couldn't
11 be taken within the context of people who were very
12 involved in making the initial decisions about whether
13 they were going to bring a termination proceeding in
14 the first instances.

15 And I think that there's something to be said
16 for that here. You don't want it to be this sort of
17 incestuous process.

18 MR. McCALPIN: Don't I recall that we have
19 generally considered that a procedure under 1011 falls
20 within the Administrative Procedure Act, with all the
21 subsequent possibilities, whereas I would assume that
22 what's written here would not?

1 MS. BATTLE: Yes. So there needs to be
2 some --

3 MR. HOUSEMAN: It doesn't, actually.

4 MS. PERLE: There's a whole series of
5 regulations that talk about the conduct of these
6 hearings. They're not under the Administrative
7 Procedures Act.

8 MR. HOUSEMAN: You have a reg, 1606, that
9 makes some reference on occasion to parts of the
10 Administrative Procedure Act, just as a guide, but it
11 doesn't incorporate the Administrative Procedure Act.

12 MR. McCALPIN: 1011, at the end of a 1011
13 proceeding, an aggrieved party doesn't have the right
14 to petition the court for a review?

15 MS. PERLE: Oh, yes.

16 MS. GLASOW: But that doesn't come out of the
17 APA.

18 MR. HOUSEMAN: They would have that here, too.

19 MR. McCALPIN: They would?

20 MR. HOUSEMAN: Sure. The funds might be cut
21 off, which is true there, too. You don't have a right
22 to keep the funding going. If you lose a 1011 hearing,

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1 the funds get cut off. They can go to court to try to
2 stop it. They could go to court here to try and stop
3 it.

4 MS. BATTLE: There's no mention of hearing
5 right now at all in here.

6 MS. PERLE: Well, it says notice and an
7 opportunity to be heard, but that could be --

8 MS. BATTLE: To be heard means "Tell me, do
9 you think this is true or not?" I mean, that doesn't
10 necessarily say hearing, independent hearing officer or
11 any structure to it, as far as I'm concerned.

12 MR. TULL: If I can revisit the last 15
13 seconds or 30 seconds of what I said before where Linda
14 said she fell off, the reason I think it's important
15 not to say that as a matter of right under 1011, you
16 have a right to an independent hearing officer is that
17 as soon as we say that, then we're saying that as to
18 those issues, they're not issues which arise under
19 504(a)(19) if the "null and void" language means
20 something, which I think it has to mean you're not
21 entitled to the full panoply of rights under 1011.

22 That does not keep the board, when it adopts

1 its procedures under 1640.4(b), from adopting a set of
2 procedures, which has not been done yet, which provide
3 whatever protections you deem are appropriate to make
4 certain that this is not used arbitrarily.

5 MS. PERLE: That was my point.

6 MR. TULL: I think we need to be careful about
7 not saying this is a matter of the application of the
8 statute as a matter of right under 1011 because that
9 has implications as to how we interpret this.

10 MS. PERLE: I agree with that. I think Alan
11 agrees with that, as well.

12 MR. HOUSEMAN: Right.

13 MS. PERLE: The notion, though, is that it has
14 to be some degree of protection where there's some
15 independent fact-finder who's making this determination
16 and it's not just the Corporation staff or somebody in
17 the IG's office.

18 MS. BATTLE: Can we take this one back and
19 revisit these issues?

20 MR. HOUSEMAN: I agree. I think we're moving
21 closer to a resolution.

22 MS. BATTLE: Let's try to do that.

1 MR. McCALPIN: Could I ask another one of
2 those apparently self-answering questions? If funds
3 are embezzled from a program by an employee of the
4 program and the employee is convicted of that
5 embezzlement, is that a violation which would render
6 the program's grant null and void?

7 MS. PERLE: Only if the recipient knowingly or
8 through gross negligence --

9 MR. McCALPIN: I'm sorry?

10 MS. PERLE: Only if the recipient knowingly or
11 through gross negligence allowed it to happen.

12 MR. TULL: And they were convicted under one
13 of these statutes. State statute --

14 MR. McCALPIN: I may have used embezzlement
15 wrong but made away with federal funds, one way or
16 another, okay.

17 MS. BATTLE: The example that I suggested
18 didn't get on the record. I think we were both
19 speaking at the same time. I said is it a recipient if
20 the executive director embezzles but the board knew
21 nothing about it?

22 MS. GLASOW: No.

1 MS. BATTLE: When is it the recipient? When
2 the board of director knew?

3 MR. TULL: I think it's what it says here.
4 It's when it's knowingly or through gross negligence.
5 They have reason to believe that the director has, in
6 fact, been -- not reason to believe -- they know that
7 the director has been embezzling funds or they have had
8 significant indication of that and have grossly
9 neglected any appropriate response to investigate that
10 and take steps to address it. Then the second section
11 would be invoked.

12 MR. McCALPIN: But suppose that both the
13 program and the president are charged with the misuse
14 of program funds and both are convicted.

15 MS. PERLE: Then the recipient has violated --

16 MS. GLASOW: Then that falls under A.

17 MR. HOUSEMAN: Then that's clear, it seems to
18 me. It's over with.

19 MS. GLASOW: The contract's over.

20 MR. McCALPIN: But if only the president is
21 prosecuted, then you have to go through the further
22 proceeding.

1 MS. GLASOW: Right.

2 MS. BATTLE: It's further proceedings for
3 everybody unless it comes under Bill's suggestion about
4 both the board and the directors.

5 MS. PERLE: So unless a court finds that it is
6 the recipient that has violated.

7 MS. GLASOW: And we've had administrative
8 hearings in our past, an instance where funds were
9 misused or stolen or embezzled, and we looked into it
10 and even had an administrative hearing and decided that
11 the recipient was not held responsible. It was an
12 individual action and we could not impute that to the
13 recipient because when they found out, they did
14 everything they were supposed to do to take care of the
15 issue.

16 MR. TULL: For the record, I'm not sure that
17 the answer to the question you just asked, if both the
18 president of the board and the director are convicted,
19 would --

20 MS. PERLE: I said the president of the board
21 and the recipient itself.

22 MR. HOUSEMAN: He said the recipient itself.

1 MR. McCALPIN: I said the recipient and the
2 president.

3 MR. TULL: Oh, I'm sorry.

4 MR. McCALPIN: Are charged.

5 MS. PERLE: If the president of the board and
6 the director are in cahoots --

7 MS. BATTLE: We don't even know if these
8 statutes will allow you to charge entities, as opposed
9 to individuals.

10 MS. PERLE: Right.

11 MS. BATTLE: So I don't even know if that can
12 be envisioned from these statutes, so we need to look.
13 I mean --

14 MR. HOUSEMAN: Some of them do, I think, but
15 we need to look.

16 MS. BATTLE: We need to look and see.

17 MR. HOUSEMAN: And the False Claims Act is
18 another -- it's complicated. It's a civil violation
19 and turning it into a criminal violation.

20 CONSIDER AND ACT ON A DRAFT INTERIM REGULATION

21 (TO BE CODIFIED AS 45 C.F.R. PART 1639)

22 PROSCRIBING GRANTEE'S INVOLVEMENT IN CHALLENGES

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1 TO WELFARE REFORM

2 MS. BATTLE: All right, I'm ready to move on
3 to 1639, which is the last one we'll do today.

4 Welfare reform. There are essentially no
5 changes proposed to the welfare reform statute by our
6 staff. There is a proposal by CLASP that we amend one
7 particular section to further clarify what is existing
8 law. When I tried to make this argument, it becomes
9 very circuitous for me, so I'm going to allow Suzanne
10 and Alan --

11 MR. HOUSEMAN: We have been talking about
12 this. We haven't reached an agreement because we
13 really haven't had time but let me throw this out. My
14 problem would be solved, without fooling around with
15 what we've proposed or existing law, by changing the
16 title of 1639.4 to be something like -- it's now
17 "permissible representation of eligible clients." If
18 you changed it to say "permissible representation of
19 eligible clients in welfare reform cases," that solves
20 all of my problems.

21 MS. BATTLE: That's pretty easy.

22 MR. McCALPIN: You can't say that because you

1 can't participate in a welfare reform case.

2 MR. HOUSEMAN: Except under this provision.

3 MR. McCALPIN: Well, but you put that in black
4 letter and you've got the Congress all over you saying,
5 "You're doing exactly what we told you not to do. You
6 are representing eligible clients in welfare reform
7 cases."

8 MS. BATTLE: What about welfare cases?

9 MS. PERLE: That doesn't help.

10 MR. HOUSEMAN: Let me go back. This, as I
11 read this statute, it has a prohibition and an
12 exception to the prohibition. The prohibition is you
13 can't do something in a welfare reform case. We agree
14 on that.

15 Then it says except that you can represent an
16 individual client who is seeking specific relief from a
17 welfare agency if such relief does not involve an
18 effort, and the legislative history clearly said that
19 that's what you could do in a welfare reform case.

20 MS. BATTLE: But isn't the second part of that
21 actually the reform piece? If the relief doesn't
22 involve reform, so you're really talking about

1 representation of individual clients in welfare cases
2 under new welfare law.

3 MR. HOUSEMAN: That's right. I don't have any
4 problem with that.

5 MS. BATTLE: And I understand Bill's point.
6 When you use welfare reform, you're saying --

7 MR. HOUSEMAN: That's not going to solve the
8 confusion problem that exists here, so I'm not sure.

9 MR. McCALPIN: Politically, you can't say
10 that.

11 MS. BATTLE: An individual --

12 MR. ASKEW: "Of eligible clients in welfare
13 cases under new welfare laws."

14 MS. BATTLE: Yes.

15 MR. HOUSEMAN: Oh, that's fine.

16 MR. ASKEW: "Under new welfare laws."

17 MR. HOUSEMAN: That's fine. That's my only
18 point.

19 MS. BATTLE: It's "permissible representation
20 of eligible clients in welfare cases under new welfare
21 laws."

22 MR. ASKEW: "Pursuant to new welfare laws."

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1 MS. BATTLE: "Pursuant to."

2 MR. HOUSEMAN: Then we can leave the statutory
3 language alone. We don't have to worry about this.

4 MS. BATTLE: All right, I think that works.

5 MR. McCALPIN: Say this again.

6 MS. BATTLE: It's "permissible representation
7 of eligible clients in welfare cases pursuant to new
8 welfare law."

9 MR. McCALPIN: Do you have to put all that in
10 the title?

11 MS. BATTLE: Yes.

12 MS. GLASOW: I'm sorry; what are we doing?

13 MR. HOUSEMAN: It's just the title.

14 MS. BATTLE: The title change is all.

15 MS. GLASOW: "Permissible representation of
16 eligible clients" what?

17 MS. BATTLE: "In welfare cases pursuant to new
18 welfare laws."

19 Are there any other concerns in welfare
20 reform? We had four comments, four timely comments.

21 MR. McCALPIN: Wait just a minute. You talk
22 about new welfare laws in your caption and you talk

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1 about existing law in the body of the regulation. Is
2 that consistent?

3 MS. BATTLE: Yes. As I understand it, the
4 existing law, if you're trying to change existing law,
5 then you're participating in reform.

6 MR. McCALPIN: Well, are new laws and existing
7 laws the same thing?

8 MS. BATTLE: New laws is what comes after your
9 reform.

10 MR. McCALPIN: I don't think so.

11 MS. PERLE: I think that the suggested
12 language does what it should do but people are not
13 willing to do that. In other words, the language that
14 says, after "existing law," "enacted as part of a
15 reform of federal or state welfare systems," I think
16 that should be added there.

17 Is there objection to doing it the way it was
18 recommended, other than by the staff?

19 MR. McCALPIN: I can't hear you, Linda.

20 MS. PERLE: Is there an objection to
21 incorporating what's on the first page of the comment,
22 on the bottom, is there an objection to that?

1 MR. McCALPIN: I haven't had a chance to read
2 this document. I got up this morning and we've been
3 here all day.

4 MS. PERLE: Our recommendation was in that
5 section on existing law, on 1639.4, after the second
6 line which says "otherwise challenge existing law," put
7 a comma and then say "enacted as part of a reform of
8 the state welfare system that is in effect on the date
9 of the initiation of the representation." It's simply
10 to make it clear that the exception is only an
11 exception to the restriction. Otherwise, there's
12 confusion in the community about what that means.

13 MR. McCALPIN: Well, what does the last
14 clause, "that is in effect" add to the word "existing,"
15 which is just before --

16 MS. PERLE: It doesn't add anything but it's
17 in the statute.

18 MR. HOUSEMAN: Yes, it's in the statute.
19 We're tracking the statutory language here.

20 MS. PERLE: And what this does is just makes
21 clear what we think the statutory language was intended
22 to mean.

1 MR. McCALPIN: "May represent an individual
2 eligible client who is seeking specific relief from a
3 welfare agency if the representation does not seek to
4 amend or otherwise challenge existing law enacted as
5 part of a reform of a federal or state welfare system."

6 MS. BATTLE: That does not bother me. I mean,
7 this language --

8 MS. GLASOW: We're not opposing it. We're
9 just not taking a stand. We're making no
10 recommendation.

11 MR. TULL: There may be a staff member here
12 who, having had a conversation recently with a member
13 of Congress or their staff, feels differently about
14 that.

15 MR. McCALPIN: You're mumbling.

16 MS. PERLE: He's doing that on purpose.

17 MR. TULL: I'm mumbling back to Martha.

18 MS. BERGMARK: Would you just read the phrase
19 again, Linda?

20 MS. PERLE: It's on the front page.

21 MS. BATTLE: I'll read it out loud.

22 "Recipients may represent an individual eligible client

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1 who is seeking specific relief from a welfare agency if
2 the representation does not seek to amend or otherwise
3 challenge existing law enacted as part of a reform of a
4 federal or state welfare system that is in effect on
5 the date of the initiation of the representation."

6 MR. McCALPIN: What's wrong with that?

7 MR. SMEGAL: What was wrong with it the way it
8 was?

9 MS. BERGMARK: That it's permissible to
10 challenge a law that is part of welfare reform?

11 MS. BATTLE: No. This says "does not seek to
12 amend or otherwise challenge."

13 MS. BERGMARK: Okay.

14 MR. TULL: So it limits it to those. In other
15 words, the question is whether or not -- the
16 prohibition is against welfare reform and the
17 exception, saying you can represent individual persons
18 except for challenging existing law where the existing
19 law, because it is a prohibition and an exception to
20 that, necessarily is defined as what is said here,
21 which is "enacted as a part of reform of a welfare
22 system."

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1 The board had this conversation last time we
2 talked about it and felt uncomfortable with that. I
3 think we do have -- we didn't frame it precisely this
4 way and we do have one set of facts which is different
5 now, which is we have welfare reform. Congress has
6 acted. There's an act which is referred to as the
7 Welfare Reform Act. It does draw boundaries now that
8 we didn't know of before.

9 We were writing -- the board was writing a
10 regulation in the context of future action by the
11 Congress and lots of action by states under waivers and
12 various other procedures and trying to fit frankly very
13 poorly drafted legislation into that matrix of
14 uncertainty.

15 I think the degree to which we now know what
16 welfare reform is, at least at the federal level and we
17 have some notion of what that may mean at the state
18 level, it may be that the change in the language
19 should -- addressing this issue and treating it as I
20 think it properly -- I think it is correct that it
21 would be a better statutory construction to say that if
22 you state a prohibition, that an exception that is

1 listed there has got to be an exception to the
2 prohibition, not an exception which swallows the
3 prohibition, is broader than it, just as a matter of
4 logic within statutes.

5 There was a concern before that doing that,
6 when it wasn't clear what welfare reform meant,
7 somehow --

8 MS. PERLE: I don't think it swallowed the
9 prohibition. I think it broadened the prohibition.

10 MR. TULL: Correct. I'm sorry, that it
11 broadened the prohibition.

12 MS. PERLE: That suggested things were
13 prohibited beyond what was -- that individual
14 representation challenging a law that was not part of
15 welfare reform.

16 MR. TULL: And we have had some indication
17 apparently in conversations with folks on the Hill who
18 have looked at this who feel that it would be
19 appropriate to reference the federal legislation, that
20 given the fact that that is their concern, that that
21 should be referenced. That's not something that's done
22 here now.

1 MS. BATTLE: So that's what's done here, isn't
2 it, in this proposal?

3 MR. TULL: That is not done. No, I mean to
4 specifically reference it.

5 MR. SMEGAL: By number?

6 MS. BERGMARK: Including but not limited to.
7 When we were considering this back last summer, there
8 was not yet an enacted federal statute on this but
9 there now is.

10 So the suggestion is yes, you can talk all
11 around this if you want but certainly we mean that. I
12 have explained that there was no intention not to
13 include that; it just wasn't the law at the time we
14 adopted the interim reg.

15 So the suggestion is to incorporate a
16 reference to the federal statute somewhere.

17 MR. McCALPIN: If we were to adopt what's at
18 the bottom of the first page, I don't think we need the
19 added language to the caption of 1639.4.

20 MS. BATTLE: It's one or the other.

21 MR. HOUSEMAN: No, no. I was trying to figure
22 out a way -- this is better.

1 MS. BATTLE: Would the reference to the law
2 come in the purpose? I mean, would we cite out
3 front --

4 MS. PERLE: In the commentary.

5 MR. McCALPIN: They're suggesting that this
6 becomes --

7 MS. BATTLE: It was in the commentary before.

8 MR. McCALPIN: This would be 1639.4.

9 MR. HOUSEMAN: No, you're talking about this
10 other point that Martha made.

11 MS. BATTLE: Yes.

12 MS. PERLE: Well, we could actually put it in
13 the definitions in 1639.2(a)(1).

14 MS. GLASOW: Martha would like to reference it
15 in the text of the rule.

16 MS. PERLE: We could put it in 1632.2(a)(1).
17 It now talks about federal and state AFDC programs and
18 they've been repealed.

19 MR. TULL: There's a definition of "reform" in
20 B.

21 MR. SMEGAL: What do we need to put in the
22 definitions if it's already there?

1 MR. HOUSEMAN: New programs enacted --

2 MR. SMEGAL: Oh, that part. You're not
3 talking about substituting this for 4.

4 MS. BATTLE: Why don't I do this? For at
5 least the board members, are we comfortable with the
6 proposed language that we have on the bottom of the
7 management proposal?

8 MR. McCALPIN: Yes.

9 MS. BATTLE: Then we have resolved the issue
10 regarding .4.

11 MR. SMEGAL: But you appreciate there are
12 changes from the existing 4 to the one on the front, in
13 addition to the bold-faced words.

14 MS. BATTLE: Yes.

15 MR. McCALPIN: Are there?

16 MR. SMEGAL: Yes.

17 MS. GLASOW: You could put it in the
18 definition of existing law.

19 MR. HOUSEMAN: That's fine. To solve Martha's
20 problem we could define "existing law means Title I of
21 the Personal Responsibility Act or other federal or
22 state statutory --

1 MS. BATTLE: Title what now?

2 MR. HOUSEMAN: Title I of the Personal
3 Responsibility Act. What I suggest is why don't we
4 think about where we put this because actually I'm not
5 sure -- I don't have a problem there but I'm not sure
6 it does what she wants it to do.

7 MS. GLASOW: Maybe we can have an agreement
8 that we will reference it here somewhere and come back
9 to you.

10 MR. TULL: It seems like this obviously,
11 because of the complexity of this statute and the
12 regulations, which we discovered last time and we're
13 now rediscovering, perhaps what we ought to do is see,
14 and by "see" I mean have some staff work on thinking
15 through to report back to you what the impact would be
16 of putting the specific reference to federal welfare
17 reform, which is whatever you just said, Personal
18 Responsibility --

19 MR. HOUSEMAN: Title I of the Personal
20 Responsibility Act.

21 MR. TULL: -- as a part of existing law, so
22 that existing law, as used in this part, means --

1 MS. BATTLE: That plus whatever --

2 MR. TULL: That, plus, and then we have to
3 have some plus that encompasses state, unless it -- I
4 think we have to think that through --

5 MS. BATTLE: Other law, because they may amend
6 that next year.

7 MR. HOUSEMAN: Yes, they may amend it,
8 although probably not Title I. Oh, they actually are
9 going to amend Title I.

10 MS. PERLE: Also it means state laws that are
11 passed pursuant to that.

12 MR. HOUSEMAN: I'm not sure it goes in
13 existing --

14 MS. BERGMARK: You could put it under reform.
15 The specific request was to make sure -- that an
16 example of reform is the now-enacted welfare law and
17 you can say something like, in B, reform of blah, blah,
18 blah, blah, including laws and regulations that
19 implement the changes in Title I blah, blah, blah or
20 including but not limited to Title I.

21 MR. HOUSEMAN: Right, that's fine.

22 MS. BATTLE: Where did you say, Martha?

1 MS. BERGMARK: Put it in B under reform, but I
2 would concur with John's suggestion that staff take a
3 look at that.

4 MS. BATTLE: Can you do that and bring this
5 particular one back? I think that this is one, if we
6 got it back tomorrow, we could pass this one. We've
7 got some that are going to have to be revisited. I
8 think, if we don't have any other issues in welfare
9 reform, that we can put this in the package.

10 MR. HOUSEMAN: This is just a matter of
11 figuring it out.

12 MS. BATTLE: The meeting tomorrow morning will
13 not be until 10:00. You will have some time, first
14 thing in the morning, to look at something like that.

15 MS. PERLE: 10:00 here?

16 MS. BATTLE: Here.

17 MR. HOUSEMAN: I was trying not to come back.

18 MS. BATTLE: No, we're not going to let you
19 get away. We've got three more regs that we've got to
20 do tomorrow, the easiest ones in the bunch, as Bucky
21 has said. 1609 on fee-generating cases, 1626 dealing
22 with aliens, and 1642 addressing attorneys' fees are

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1 the three that we have left.

2 I'm hoping we can close down by about 3:30 or
3 4:00 for flight purposes. I don't know what everybody
4 else's flight schedules are like but we should be able,
5 it seems to me, to get through those three tomorrow.

6 MS. GLASOW: We are going to give you a copy
7 of 1626 to take with you but we're still polishing a
8 couple of items that we're negotiating with, but it'll
9 give you a general idea of where we're going.

10 MS. BATTLE: Good. We'd like to take that
11 with us tonight as bedtime reading.

12 We are now in recess until 10:00 tomorrow
13 morning. I'd like to thank the staff and our friends
14 for the diligent help and for our friends coming up to
15 be with us to help us with leadership issues and the
16 inspector general's office for all of the hard work of
17 getting us to where we are today. I appreciate it.

18 (Whereupon, at 4:45 p.m., the meeting
19 recessed, to reconvene at 10:00 a.m. the next day.)

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