

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS
OPERATIONS AND REGULATIONS COMMITTEE
OPEN SESSION

Saturday, December 4, 1996
10:15 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. Watlinton

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 Tarentowicz, Office of Inspector General

OTHER PARTICIPANTS:

Linda Perle, Center for Law and Social Policy
Alan W. Houseman, Center for Law and Social Policy
Michael Millemann, on behalf of SCLAID and the ABA
Roger McCollister, Kansas Legal Services
Marilyn Harp, Kansas Legal Services
Frank Akerman, Client of Kansas Legal Services
Michael Ferry, Legal Services of Eastern Missouri
Ellen Taylor, DNA People's Legal Services

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P R O C E E D I N G S

(10:15 a.m.)

CHAIRPERSON BATTLE: Good morning, everyone. We are here for a continuation of the meeting of the Operations and Regulations Committee that begun in earnest on yesterday. We have several matters before us today, not quite as much as we had before us on yesterday, but, nevertheless, several very important regulations that we must review and take public comment on, and particularly review the public comment.

AGENDA ITEM NO. 1

CHAIRPERSON BATTLE: What I would like to do today is to first review one of the regulations that we considered yesterday and requested that the staff revisit for some amendments, so that we can dispose of it with a recommendation from this committee on today.

That regulation is Part 1639, welfare reform. I understand that the staff and the community have had an opportunity to get together and to review the concerns that we raised yesterday about the language in this regulation, and you have a proposal for us to consider today; is that right?

1 MS. GLASOW: Yes.

2 CHAIRPERSON BATTLE: Okay. We're ready to
3 hear that proposal.

4 MS. GLASOW: First, I want to hand you
5 yesterday's version, because you're going to need to
6 look at this provision on the bottom, in conjunction
7 with the proposal on the new two-page version.

8 Yesterday, the committee decided to add that
9 provision recommended by CLASP at the bottom of that
10 cover page.

11 We were attempting to define and clarify what
12 existing law is. And, in conjunction with that, for
13 the very same purpose, in the three-page handout we
14 gave you this morning, on Page 3 -- the handout we gave
15 you starts with Page 2 -- in Paragraph C in the middle
16 of the page, the bolded language is the new language
17 that we've added.

18 So it reads: "'Existing law,' as used in this
19 part, means Title 1 of the Personal Responsibility Work
20 Opportunity Reconciliation Act of 1996" -- I still need
21 to get the cite -- "any federal, state, or local
22 statutory laws or ordinances implementing such act."

1 CHAIRPERSON BATTLE: Go ahead, Tom.

2 MR. SMEGAL: So the way 4 now reads, or the
3 way it would be construed, is that the only thing a
4 recipient may do with respect to representing eligible
5 clients, the only permissible representation is with
6 respect to specific relief from a welfare agency, with
7 respect to existing law as defined in 1(C)?

8 In other words, if you represented -- if the
9 recipient wanted to represent an eligible, individual
10 eligible client with respect to some other welfare
11 agency activity, they couldn't do it?

12 MR. HOUSEMAN: No, they couldn't.

13 MR. SMEGAL: This says you can't.

14 MR. HOUSEMAN: No. This is part -- you have
15 to look at the whole thing. What is guiding this
16 regulation is a prohibition on certain activities.

17 MR. SMEGAL: Right.

18 MR. HOUSEMAN: This is an exception to the
19 prohibition.

20 MR. SMEGAL: Right. And it's the only
21 exception.

22 MR. HOUSEMAN: But the prohibition doesn't

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1 cover all of it. It only covers -- it only covers
2 welfare reform. In other words, the prohibition is on
3 welfare reform activity.

4 MR. SMEGAL: Well, reform of a federal or
5 state welfare system.

6 MR. HOUSEMAN: Right.

7 MR. SMEGAL: That's the prohibition.

8 MR. HOUSEMAN: Right.

9 MR. SMEGAL: And the only exception to that
10 prohibition is with respect to a subpart of the
11 prohibition.

12 MR. HOUSEMAN: Right, besides the --

13 MR. SMEGAL: The existing law.

14 MR. HOUSEMAN: Right. That is, so if you're
15 representing an individual client who is adversely
16 affected by action taken by a welfare agency, based on
17 a welfare reform law, the only thing you can do is seek
18 specific relief for that client through the
19 administrative processes, or beyond, if necessary, from
20 the welfare agency; and that's what the statute says.

21 CHAIRPERSON BATTLE: Do you understand the
22 point that I think Tom is raising? What he is saying

1 is, if you look at the purpose as it is now set out, it
2 basically reads, "The purpose is to ensure that
3 recipient do not participate in reform of a federal or
4 state welfare system, which is a broad definition, that
5 you do not participate in that.

6 Then it gives an exception, with language in
7 the exception about existing law, which pertains only
8 to one particular law, which one could term welfare
9 reform.

10 So his concern is that the overarching
11 statement in the purpose covers a broader scope than
12 does the exception; is that right?

13 MR. SMEGAL: Right.

14 CHAIRPERSON BATTLE: That is what I understand
15 his concern to be. And it may be that just some -- we
16 need to tinker a little bit with this purpose.

17 MR. HOUSEMAN: But "federal state welfare
18 system" is defined in the definitions.

19 MR. SMEGAL: Right.

20 MR. HOUSEMAN: And it says "Title 4(A) of the
21 Social Security Act" --

22 MR. SMEGAL: Right.

1 MR. HOUSEMAN: -- which has now been replaced
2 -- well, it's not been replaced, but it's -- the
3 Personal Responsibility Act, Title 1 of the Personal
4 Responsibility Act is now being incorporated into Title
5 4(A) of the Social Security Act.

6 MR. SMEGAL: Okay.

7 MR. HOUSEMAN: Which is all that we're
8 referencing.

9 MR. SMEGAL: So you're saying there are no
10 state welfare systems that are not encompassed by the
11 definition --

12 MR. HOUSEMAN: Right, that's correct.

13 MR. SMEGAL: -- that I find at 2(A)(1)?

14 MR. HOUSEMAN: That's correct.

15 MR. SMEGAL: Okay.

16 CHAIRPERSON BATTLE: Does that give you
17 assurance that the language, then, is consistent with
18 what we're intending to do?

19 MR. SMEGAL: Well, it gives me assurance that
20 Alan is certain that it does. That's good enough for
21 me.

22 (Laughter.)

1 CHAIRPERSON BATTLE: Okay. Are there any
2 other questions about this proposed change to the
3 regulation?

4 MR. McCALPIN: I'm not concentrating very
5 well, but on Page 3, under sub (2) -- you just asked
6 about 2(A)(1), Tom -- there's a sentence that's sort of
7 stuck in, that doesn't follow on the paragraph. It
8 doesn't have a separate heading.

9 But it says: "'Federal or state welfare
10 system' does not include other public benefits
11 programs, unless changes to such programs are part of
12 the reform of the AFD or general assistance program."

13 Now, would that reform be included within
14 Title 1 of the Work Responsibility Act?

15 MR. HOUSEMAN: It would be part of state
16 implementation of Title 1 of the Personal
17 Responsibility Act.

18 MR. SMEGAL: A recipient could initiate
19 litigation, challenge, or participate in efforts to
20 reform other public benefit programs. So the position
21 we're taking here is that Congress did not prohibit our
22 recipients from --

1 MR. HOUSEMAN: Right.

2 MR. SMEGAL: -- doing those things with
3 respect to other than federal or state welfare systems,
4 as defined.

5 MR. HOUSEMAN: Right.

6 MR. SMEGAL: Okay.

7 CHAIRPERSON BATTLE: Give me an example of
8 that, so I understand the distinction of what your view
9 is now, what's really permissible under this framework.

10 MR. HOUSEMAN: Okay. Child support is a
11 separate title of this, and it's a separate title of
12 the Social Security Act. You could still represent
13 people under child support or challenge state child
14 support systems. That's an example of it. That's one
15 example.

16 SSI, the Personal Responsibility Act makes
17 changes in the SSI disability program.

18 CHAIRPERSON BATTLE: Okay. Go back to 504
19 language. I see your point now. Now, I'd like to know
20 exactly what we had in 504 that we're attempting to
21 interpret now. Suzanne?

22 MS. GLASOW: We wanted Alan to have a chance

1 to explain this to the committee, but management would
2 like some time today to confer on this provision before
3 the committee --

4 CHAIRPERSON BATTLE: During the lunch break,
5 you got time.

6 MR. TULL: Would that be possible?

7 CHAIRPERSON BATTLE: Yes.

8 MR. TULL: We didn't get a chance to share
9 this with senior management, and to have them have a
10 chance to look at it, so that their thoughts can be
11 fully part of this conversation, I think would be
12 helpful.

13 CHAIRPERSON BATTLE: Sure. Now, let me tell
14 you what my concern at this point is, so that you can
15 take this into your deliberations, and I think it
16 really stems from Tom's first question. By identifying
17 existing law in specific terms to relate to the Title 1
18 of the Personal Responsibilities Work Opportunity
19 Reconciliation Act of 1996, we are specifying, in our
20 definition, what welfare reform is.

21 What I want to understand is, if you go back
22 to 504, pull out that section, how Congress termed what

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1 it is that is now restricted, to make sure that how we
2 define welfare reform is consistent with the intent of
3 what Congress set out on what welfare reform ought to
4 be, and I want to make sure that what we put in place
5 covers the entire spectrum of what Congress requested
6 us to do. Okay?

7 Does that get at the underlying thesis of your
8 concern?

9 MR. SMEGAL: Yes.

10 CHAIRPERSON BATTLE: Okay.

11 MR. McCALPIN: Except 504(A)(16) says,
12 "involving an effort to reform a federal or state
13 welfare system," and that's as much definition as it
14 gives.

15 CHAIRPERSON BATTLE: And my concern is, I
16 think that's broader, potentially, than what we have
17 here, and so that's why I want you to go back and look
18 at it and make sure that the way we set this out
19 covers, if it's (A), instead of specifying (A), or if
20 we don't have a legislative history, that the intent
21 had to do with that particular -- at the time, you've
22 all been welfare reform --

1 MR. HOUSEMAN: This latest permutation came up
2 because of a suggestion that we specifically reference
3 the Personal Responsibility Act.

4 CHAIRPERSON BATTLE: Well, yes.

5 MR. HOUSEMAN: So I don't have any problem not
6 referencing the Personal -- we were trying to respond
7 to, I think, what Martha said yesterday, that those
8 people would be pleased. Maybe we need to reference it
9 somewhere else.

10 CHAIRPERSON BATTLE: "Such as" -- maybe we can
11 say "such as this" --

12 MR. HOUSEMAN: Yes.

13 CHAIRPERSON BATTLE: -- but not make it
14 exclusive, so that others are not covered.

15 But I want the staff to take a look at this
16 issue, I think, particularly with what Bill has pointed
17 out as to what 504 actually says, so that we can make
18 sure that we're consistent with the full interpretation
19 we need to give to that section of our appropriations
20 act. Okay. Got it? After lunch.

21 MR. McCALPIN: Let me just ask, as a matter of
22 structure, do you intend the fifth and sixth lines on

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1 Page 3 to be a part of (A) (2) or separate from?

2 MR. SMEGAL: The sentence should be over as
3 part of that paragraph, Bill.

4 MR. McCALPIN: Well, except that what they're
5 saying is it means (1) and (2), and then they're saying
6 it doesn't mean.

7 MR. HOUSEMAN: I think this version doesn't --

8 MS. GLASOW: I think we left it hanging. I'm
9 sorry. I apologize.

10 MR. HOUSEMAN: I think, you know, when it went
11 to the Federal Register -- you know what happened?
12 When you went to the Federal Register, they changed
13 this and cleaned it up, I think. So we need to learn
14 how they did it in the Federal Register.

15 MS. GLASOW: I'll check that out, Bill.

16 CHAIRPERSON BATTLE: Okay. Any other concerns
17 about 1639, from any of our Board members?

18 (No response.)

19 CHAIRPERSON BATTLE: Okay. We'll look to hear
20 back, then, after --

21 MR. HOUSEMAN: Do you have any idea when
22 you're meeting for lunch? Because I'm totally screwed

1 up, my day, now. I got to take my daughter to a piano
2 recital early this afternoon.

3 CHAIRPERSON BATTLE: Okay. Well --

4 MS. GLASOW: We could bring it back in
5 January.

6 CHAIRPERSON BATTLE: This is the one specific
7 issue that should not take more than five minutes. We
8 can do that.

9 MS. GLASOW: Why don't we do that, bring it
10 back in January?

11 MR. TULL: Then we can all go to your
12 daughter's piano recital.

13 CHAIRPERSON BATTLE: I don't have a problem
14 with that.

15 MS. GLASOW: Okay.

16 CHAIRPERSON BATTLE: Because of the fact that
17 this seems to have raised some other issues, and I
18 really do want to make sure that we get this
19 specifically clear -- so, we'll do that.

20 MR. HOUSEMAN: Thank you.

21 CHAIRPERSON BATTLE: Okay. So we have, then,
22 no motion with regards to this one. We will defer

1 this, as we have others, until our meeting in January.
2 So 1639 is deferred for continued deliberations of the
3 committee.

4 What I would like, with regard to this one,
5 though -- well, no, I won't say that. I was going to
6 say, let's get started on the commentary on this one,
7 but I don't know that we'll have time. I really would
8 like to make sure we have full explanations in our
9 commentary, but we may not have time for the committee
10 to start on that one. So all right.

11 AGENDA ITEM NO. 2

12 We also have before us the regulation which
13 pertains to restrictions on legal assistance to aliens
14 in 1626, as the next regulations we will now take up.

15 We are losing one of our distinguished
16 members. He must get back to California. Thank you so
17 much for joining us for this meeting, and we lost this
18 morning another distinguished Board member. Maria, I
19 think, is chairing a session with another board. She
20 called to let me know this morning that she would not
21 be able to join us.

22 We have at least three or four major -- well,

1 I say three or four. There are at least six issue
2 areas raised in the comments that we received on
3 restrictions on legal assistance to aliens.

4 And, in part, as I understand it, the
5 presentation we will have today will have to do with
6 the staff's recommending to the Board that it, because
7 of the Kennedy amendment, put out a portion of this for
8 comment, because the Kennedy amendment passed after we
9 issued this first regulation, and it has an impact
10 specifically in this regulation.

11 So this is one that, even after we get through
12 this process, there will be further comment on, as I
13 understand it.

14 So why don't we do this? We'll take up those
15 issues relating to the Kennedy amendment and, as well,
16 the other issues raised by commenters on the other
17 provisions in 1626, and attempt now to get through all
18 of them, with the recognition that we'll have a
19 different kind of recommendation coming from this
20 committee than finality on this one.

21 MS. GLASOW: Although we are only recommending
22 that those provisions in 1626 that deal with the

1 Kennedy amendment be published as interim/provisions
2 within a final rule. In other words, we're
3 recommending that the rest of the rule go forward as
4 final.

5 CHAIRPERSON BATTLE: Oh, okay. You can do
6 that?

7 MS. GLASOW: Yes.

8 CHAIRPERSON BATTLE: That's appropriate under
9 the Federal Register?

10 MS. GLASOW: Yes. They may make us do it as
11 two separate documents but, however the Federal
12 Register requires it. But because the Kennedy
13 amendment is effective and is law, and because of the
14 way it is phrased, basically saying that we are now to
15 interpret a provision in alien restriction to mean that
16 we can't provide assistance in certain areas, we feel
17 that it's already effective and we feel it needs
18 guidance on this issue. But we also need to put it out
19 for comment.

20 CHAIRPERSON BATTLE: All right. We will now
21 hear from our panel.

22 MS. GLASOW: The first issue is the Kennedy

1 amendment, and this amendment permits LSC recipients to
2 use non-LSC funds to provide legal assistance to
3 ineligible aliens who are victims of domestic abuse
4 when the legal assistance is directly related to the
5 prevention of or obtaining relief from the abuse.

6 And I provided each of the committee members a
7 copy of this year's appropriations provisions that do
8 include the Kennedy amendment, in case you need to look
9 at that.

10 CHAIRPERSON BATTLE: Thank you. What page in
11 this document is that on? Is that the last page?

12 MS. GLASOW: On Page 9. I'm sorry. It is --

13 MR. TULL: It's most of it.

14 MS. GLASOW: It's most of it. It's Section
15 501 -- no, excuse me -- 502, C, Capital C, do you see
16 that, where it says Subsection A-11 of Section 504?
17 There's a Capital C that starts the paragraph.

18 MR. McCALPIN: It's right at the top of Page
19 2.

20 CHAIRPERSON BATTLE: It's the bottom.

21 MS. GLASOW: There's two different versions
22 floating around, right. Okay.

1 Basically, we suggest three provisions. It
2 would include two definitions and the Kennedy
3 amendment's language itself.

4 The first definition is of the phrase
5 "battered or subjected to extreme cruelty." And the
6 Kennedy amendment basically directs us to use the
7 definition that is used that one would find in 8 CFR
8 Part 204, Section 204(2)(C)(vi).

9 These regulations have been promulgated by the
10 INS, but they are not finalized, and so we suggest just
11 referring to that definition, rather than putting in
12 their proposed definition at this point, because it may
13 become obsolete. Whatever they do end up with as final
14 will be the definition that we will need.

15 If they do finalize it before we finalize our
16 provisions on this, we may decide to do otherwise, but
17 at this point we just suggest referring to the site.

18 MS. PERLE: Just to make it clear, those are
19 interim regs.

20 CHAIRPERSON BATTLE: Let me suggest something,
21 and you can tell me whether this is Federal Register
22 appropriate.

1 Sometimes, when we end up revising our regs,
2 we take out sections, and so these numbers could vary.
3 I guess, is this sufficient to identify what it is we
4 intend, in case, since they're doing interim regs, if
5 they revise them and change the numbering, it's clear
6 that this is what we're referencing?

7 We're talking about the definition, that is,
8 of this, which is contained here, so that if this
9 particular cite changes, people will know to look for
10 that particular one, however they have phrased it, as
11 the caption for that section. That might be helpful.

12 MS. PERLE: What we could do -- I don't think
13 the part number would change, so what we could do is
14 just take out the reference to the specific section
15 number in the definition, but just say, as the meaning
16 given that phrase under 8 CFR Part 204, the regulations
17 issue, pursuant to --

18 CHAIRPERSON BATTLE: Yes. People can find
19 that, and then read and find out wherever in 204 that
20 ends up falling.

21 MS. PERLE: Okay.

22 CHAIRPERSON BATTLE: It's just because of the

1 experience that we have with interim regs, that
2 sometimes these things change.

3 MS. PERLE: Okay.

4 MS. GLASOW: Okay. And we've also cited the
5 act from which those regs come, so that would be
6 helpful, too.

7 MR. McCALPIN: Why do you cite the reg instead
8 of the Act?

9 MS. PERLE: Because our Act says you're
10 supposed to use the definition in the regs that are
11 issued pursuant to the Act, in the appropriations bill.

12 MS. GLASOW: And the Kennedy amendment says,
13 "The term 'battered or subjected to extreme cruelty'
14 has the meaning given such terms under regulations
15 issued pursuant to the Act."

16 MS. PERLE: So that term is not defined, I
17 don't think you know, in the Violence Against Women
18 Act.

19 MS. GLASOW: The second definition is of the
20 phrase "Legal assistance directly related to the
21 prevention of or obtaining relief from battery or
22 cruelty."

1 Comments on this definition urged us to
2 include all legal assistance that would be necessary to
3 ensure that victims of the abuse would be able to
4 escape abuse, ameliorate the current effects of the
5 abuse, and be able to prevent any future abuse,
6 realizing that persons in these situations are very
7 vulnerable and helpless, and they need assistance in
8 getting out of that situation.

9 There is an Act, Violence Against Women Act,
10 that I read an article on, that says the purpose of
11 this act was to weaken the control of abusing parties
12 and to create a mechanism for abused spouses or
13 children to free themselves from such relationships
14 without losing their ability to immigrate, and this Act
15 basically allows these victims of abuse to self-
16 petition for immigration status because, before, they
17 were totally dependent on either the parent or the
18 abusing spouse, and also to petition to stop a
19 deportation order.

20 So we recommend that this definition include
21 representation in those situations at this point, and
22 then put it out for comment.

1 So, in our definition, our standard is
2 basically, on Page 9, Paragraph F, "'Legal assistance
3 directly related to the prevention of or obtaining
4 relief from the battery or cruelty' means legal
5 assistance that will assist the victim of abuse to
6 escape from the abusive situation, ameliorate the
7 current effects of the abuse, or protect against future
8 abuse."

9 MR. McCALPIN: Where in the regulation do you
10 use the term which is defined in (F)?

11 MS. PERLE: In the applicability section,
12 1626.4. This is (C), but it should be (B).

13 MR. McCALPIN: Which?

14 MS. PERLE: On Page 9, at the bottom, and the
15 top of Page 10.

16 MS. GLASOW: Section 4(B), that is (C).

17 MR. McCALPIN: B?

18 MS. GLASOW: Yes. You're going to find a lot
19 of technical problems in this. It's a (C), but it
20 should be (B).

21 MR. McCALPIN: Okay.

22 MS. GLASOW: This was our last rule, and we

1 changed a lot of things at the last minute.

2 "This part does not apply to the use of non-
3 LSC funds by a recipient to provide legal assistance to
4 an alien who has been battered or subjected to extreme
5 cruelty in the United States, by a spouse or a parent,
6 or by a member of the spouse's or parent's family,
7 residing in the same household as the alien and the
8 spouse or parent, who consented or acquiesced to such
9 battery or cruelty, or whose child has been battered or
10 subjected to extreme cruelty in the United States by a
11 spouse or parent of the alien that" -- and it goes on.

12 MR. McCALPIN: That doesn't contain the phrase
13 which is defined in (F).

14 MS. GLASOW: Go further. It says, "Provided
15 that the legal assistance is directly related to the
16 prevention or obtaining relief from the battery or
17 cruelty," and that's the phrase that we want to --

18 MR. McCALPIN: Why don't you simply the phrase
19 "related legal assistance" like the statute does?

20 MS. GLASOW: Because comments said they needed
21 guidance on what that means, and related legal
22 assistance --

1 MR. McCALPIN: Well, the statute says what it
2 means.

3 MS. GLASOW: Well, it says, "directly
4 related." So the comment said, "What do you mean by
5 'directly related?'"

6 MS. PERLE: If you read the comments, in terms
7 of what people thought should be included in there,
8 there's a very wide range of activity that people
9 thought should be included in there. I mean, some
10 people said basically any legal assistance should be
11 viewed as directly related, and others were -- you
12 know, there were suggestions that it should be related
13 only to getting civil protection orders.

14 And so what we really wanted to do was give
15 them some guidance as to what it is. Now, I would
16 recommend that the commentary give some examples of
17 some of the comments. We had suggested a variety of
18 examples.

19 For example, we said that, in the domestic
20 relations area, we thought that "directly related"
21 should obviously include civil protection order, but
22 also should include divorce, so that you can end this

1 abusive relationship, and it should include
2 representation of the mother to terminate the parental
3 rights of the father, assuming that the father is the
4 abuser.

5 It should not include, if the mother
6 remarries, someone who is also an ineligible alien, and
7 that person wishes to adopt the children, I don't think
8 that that should be included. I think that's not
9 directly related.

10 So, in other words, there are certain things
11 that clearly are related to ending or preventing the
12 abuse, and other things that are not.

13 Similarly, if they're living in the same
14 household, the abused spouse needs another place to
15 live, needs some legal assistance to get alternative
16 shelter, I think that that should be included in
17 directly related. But if she's been living there for a
18 while, she stops paying rent, and she's evicted for
19 nonpayment of rent, I don't think that should be
20 included.

21 Similarly, you know, the abuser has all the
22 income in the family, if she doesn't work. Will she be

1 able to get legal assistance to get some -- to get
2 public benefits, if they're available in a program, or
3 some alternative means or supporting her and her
4 children? But, if she's later kicked off the program
5 for failure to meet requirements, then I don't know
6 that that should be included.

7 So I think we need to put some examples, to
8 show the range of activity.

9 CHAIRPERSON BATTLE: I think the concern here
10 is that, though Congress set out this term, "directly
11 related to," that people could breathe a lot of room
12 into what that actually means, and I think what we're
13 attempting to do here is to set some parameters to give
14 guidance to programs as to the range of issues that
15 might be included and possibly the range of issues that
16 may not be included, by setting a standard that they
17 can use to evaluate a case, to determine whether it's
18 permissible under this section or not.

19 And I think that's good to do, given the fact
20 that one could argue that virtually any legal
21 assistance to a woman who is undergoing a situation
22 where there is spousal abuse is related, because it

1 empowers her to move on and, even if she's not good at
2 moving on, and she loses her benefits because she
3 doesn't do anything, well, that's because of the abuse.

4 I mean, people could come up with ways to get
5 to far-reaching issues that could cause us problems.
6 So I think it does make sense here to provide
7 parameters and a definition that give guidance and, as
8 well, to illuminate in the comments some specific
9 examples of what's in and what's out, not as a
10 complete, exhaustive list, but as an example list that
11 gives guidance to what people can consider.

12 MS. PERLE: I think it's particularly
13 important, though, that we put in the self-petitioning
14 and the suspension of deportation.

15 MR. McCALPIN: The what?

16 MS. PERLE: The Violence Against Women Act
17 created new procedures for women who are aliens, who
18 are victims of domestic abuse, which was the self-
19 petitioning process, so it allowed her to petition on
20 her own behalf, whereas before, the husband or wife,
21 whoever is the abusing spouse, who was the citizen or
22 permanent resident alien, had to file the petition, in

1 order to allow them to become immigrants.

2 MR. McCALPIN: Private right of action.

3 MS. PERLE: Pardon me?

4 MR. McCALPIN: A private right of action.

5 MS. PERLE: Well, I guess you could call it
6 that. And also that there's a new suspension of
7 deportation process, which comes into play much earlier
8 than under the regular rules.

9 Because what often happened would be that the
10 abusing spouse would say, "If you leave me, I'm going
11 to call INS and have you deported," and so that was the
12 situation. So the Violence Against Women Act
13 specifically devised these two new processes to assist
14 these people, and I think that since this is referenced
15 in our Act, that it's important to --

16 CHAIRPERSON BATTLE: To make it permissible.

17 MS. PERLE: -- to make it clear that those
18 two, that legal assistance on those two things is
19 permissible.

20 CHAIRPERSON BATTLE: Okay. All right.

21 MS. GLASOW: For example, when we put
22 "'Directly related' would include actions to ameliorate

1 the current effects," we put the word "current" in
2 there on purpose, because some effects of abuse could
3 last forever and a day, and a lifetime, so we didn't
4 want, ten years down the road, for someone to say, "I'm
5 having emotional problems from the abuse, I need legal
6 assistance to, you know, get benefits." So we're
7 talking about the current effects.

8 And so those are the type of guidelines we're
9 trying to give in this rule.

10 CHAIRPERSON BATTLE: Okay. I think that makes
11 good sense. Are there any other questions about this?

12 (No response.)

13 CHAIRPERSON BATTLE: Okay. What are the other
14 aspects that we need to consider?

15 MS. GLASOW: Okay. I guess that's it for the
16 Kennedy amendment.

17 Documentation of alien status. Our rule
18 currently lists the documents that are outdated and
19 several comments suggested, and we agree that, because
20 these documents change over time, that we would
21 recommend including an appendix to this rule, instead
22 of listing them in the rule itself, that could be

1 revised annually by staff, because it's really just a /
2 technicality -- it's like our appendix to the
3 eligibility rule, where the numbers change every year
4 -- and, just within the rule, basically state -- where
5 is that; Page 12:

6 "An alien seeking representation shall submit
7 appropriate documents to verify eligibility. A
8 recipient may accept originals, certified copies, or
9 photocopies that appear to be complete, correct, and
10 authentic documents, found in Appendix A, as proof of
11 eligibility."

12 MR. McCALPIN: I would suggest you move the
13 last phrase up into the first line to follow the word
14 "accept."

15 MS. GLASOW: "As proof of eligibility" after
16 "accept"?

17 MR. McCALPIN: Yes.

18 MS. GLASOW: Okay.

19 CHAIRPERSON BATTLE: Now, I've got a question
20 about Appendix A. Do we have any other appendices to
21 our rules, and does it turn out to be Appendix A that
22 we can use for this?

1 MS. PERLE: We have Appendix A to Part 1611,
2 and it's, as Suzanne just mentioned, it includes our
3 financial eligibility guidelines, which are revised
4 this year, based on the HHS guidelines.

5 CHAIRPERSON BATTLE: So that isn't a separate
6 appendix, we're going to include this in the A Appendix
7 that we already have?

8 MS. PERLE: No, no. This is Appendix A to
9 this rule.

10 MS. GLASOW: I think it would be helpful to
11 publish it with this rule because this is where a
12 grantee looking for this issue would need to find it,
13 rather than have to go back and find another --

14 CHAIRPERSON BATTLE: So just, as a practical
15 matter, when we publish our rules, as we do ultimately,
16 are we going to have two Appendix As, one to Part 1611
17 and then one to this one, 1626?

18 MS. PERLE: Right. But they're published with
19 the rule, and then what happens is, each year, when
20 they're revised, the staff just issues, in the Federal
21 Register, a new Appendix A, which is substituted, and I
22 think you probably mail them out to the programs, don't

1 you?

2 MS. GLASOW: Yes. We don't really need to
3 call it Appendix A. There's only going to be one
4 appendix. We'll just call it the appendix.

5 MR. McCALPIN: Do we publish annually a
6 revised appendix to 1611?

7 MS. GLASOW: Yes, we do.

8 CHAIRPERSON BATTLE: Okay. I think that makes
9 good sense, because that gives you the fluidity of
10 being able to publish it without going back through
11 this process again, when there are changes. That makes
12 good sense.

13 Is there anything else?

14 MS. GLASOW: We clarified the types of
15 documents that would be other authoritative documents
16 issued by the INS, and comments informed us that there
17 are other documents, such as where a court or other
18 governmental agency may issue an authoritative order or
19 ruled that would establish eligibility of a particular
20 person.

21 And, on Page 11, in Section 1626.5(A), we have
22 language recommended. Excuse me. 12.

1 CHAIRPERSON BATTLE: On Page 11 and 12?

2 MS. PERLE: It's 11 and 12. And it's in (A)
3 and it's in (1).

4 MS. GLASOW: It's in Section 5(A)(2) on Page
5 12.

6 MS. PERLE: Well, it's also in (1), because it
7 talks about the copies.

8 MS. GLASOW: That's another issue.

9 MS. PERLE: Oh, okay.

10 CHAIRPERSON BATTLE: Are we going to talk
11 about the language in (A)? That's a different issue
12 though, right? So, we're really looking at 5(A)(2) on
13 Page 12.

14 MS. GLASOW: Right.

15 CHAIRPERSON BATTLE: Okay. Any questions
16 about that?

17 (No response.)

18 CHAIRPERSON BATTLE: Hearing none, we can go
19 on.

20 MS. GLASOW: And comments also expressed a
21 concern about what happens when a person loses their
22 document, or it's stolen, and we added language that

1 would allow recipients to accept certified copies of
2 documents or photocopies that are complete, correct,
3 and authentic. And that's on Page 12.

4 MS. PERLE: Two places, Suzanne. It's in both
5 the citizenship and in the alien provisions. So it's
6 also -- both of those provisions are also mentioned,
7 one on Page 14, and on 12(B)(1). 12(A)(1) and (A)(2)
8 and 12(B)(1) and (C).

9 MR. McCALPIN: What pages are you on?

10 MS. PERLE: I'm sorry. On Page 12 and Page
11 14.

12 MS. GLASOW: We did this basically for
13 citizenship status and alien status. Same thing.

14 CHAIRPERSON BATTLE: There is a lot of
15 language stricken in this.

16 MS. PERLE: That's the stuff that will be in
17 the appendix.

18 CHAIRPERSON BATTLE: Oh, okay. Okay.

19 MR. McCALPIN: Stuff that what?

20 CHAIRPERSON BATTLE: Will be in the appendix.
21 All of this information was the attempt by the staff to
22 actually set out what those documents should be, and

1 now we're going to put that in the appendix, so all of
2 this stricken language will come out in favor of the
3 appendix.

4 MS. PERLE: The material that's stricken was
5 written in 1989, and many of those documents are no
6 longer current, or they're called different things, or,
7 you know, they're obsolete documents, and there's a
8 number of new documents that are now issued by INS, and
9 some issued by courts, some issued by State Department,
10 others.

11 CHAIRPERSON BATTLE: Since we're going to be
12 using just the appendix, I guess in (C) on Page 14, we
13 need to strike the (A) --

14 MS. PERLE: Yes.

15 CHAIRPERSON BATTLE: -- and put it in the
16 appendix. Just an editing suggestion. Okay. Is there
17 anything else on this particular issue?

18 MR. McCALPIN: Yes.

19 CHAIRPERSON BATTLE: Okay. Bill.

20 MR. McCALPIN: It looks to me like you have
21 inverted the natural sequence of things in the first
22 two sentences in 1626.5(A).

1 | You say, "Verification of citizens shall not
2 be required unless you have reason to doubt." Then you
3 say, in effect, "If there is a doubt, a citizen seeking
4 representation shall attest in writing."

5 Apparently you shouldn't have to verify,
6 unless there is a doubt.

7 MS. PERLE: That's what we're trying to say.

8 MR. McCALPIN: Well, but you start out by
9 saying they shall attest in writing in a form approved
10 by the Corporation.

11 MS. PERLE: Attestation is different than
12 verification.

13 MR. McCALPIN: Well, I understand that.
14 That's right. But is the attestation required unless
15 there is a doubt?

16 MS. PERLE: Yes, attestation is required.

17 MR. McCALPIN: In every event?

18 MS. GLASOW: Every case, yes. And most of our
19 recipients have them on the retainer agreement form.
20 It's just, you know, they attest to their citizenship.

21 MS. PERLE: Or at the bottom of their
22 financial --

1 MR. McCALPIN: So then, what you're saying in
2 the second sentence, if you don't believe the
3 affidavit, then --

4 CHAIRPERSON BATTLE: You request verification.

5 MR. McCALPIN: You request verification.

6 MS. PERLE: And this is language that's been
7 in the rule since 1983.

8 MR. McCALPIN: Yes, but I don't regard that as
9 a very strong reason --

10 MS. PERLE: They're all things that programs
11 understand what it means.

12 CHAIRPERSON BATTLE: Let me see if I can walk
13 through this so that we're clear as to how this works,
14 because I think this gets to an issue that the
15 inspector general may have raised.

16 Right now, in place with all of our
17 recipients, is a procedure for attestation of
18 citizenship. So, as people request services, they must
19 attest to their citizenship, regardless of where you
20 are in the United States or any other territory in
21 which we provide funds for services.

22 If there is a reason to doubt that

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1 attestation, then the program may require verification
2 of citizenship. If there is verification required,
3 then we have all of these things that come out of what
4 has been generally termed to be the kinds of documents
5 that you could use to determine whether or not you can
6 verify, independent of the attestation, the issue of
7 citizenship.

8 MS. TARENTOWICZ: Right.

9 CHAIRPERSON BATTLE: Okay. Now, I understand
10 the issue that has been raised by the inspector general
11 -- and, Laurie, you help me with this -- to be, "We
12 think you ought to have verification in every
13 instance." Okay. That seems to jump over this issue
14 of attestation.

15 I was not clear, until Bill raised this issue,
16 that we already had a procedure in place for
17 attestation, so the only reason you would verify is if,
18 for some reason, you doubted the attestation that you
19 received.

20 And the other piece is, we've got a provision
21 in here that says we cannot base our doubt on
22 discriminatory reasons. We can base our doubt on a

1 lack of credibility of the person or some other
2 legitimate reasons, but not illegal reasons.

3 So it gives part of the definition to how you
4 go about determining whether there is sufficient reason
5 to doubt the attestation that you have received.

6 MS. GLASOW: That's correct.

7 CHAIRPERSON BATTLE: Now, help me to
8 understand, from the inspector general's point of view,
9 why this is not a sufficient procedure.

10 MS. TARENTOWICZ: Well, the OIG is concerned
11 with assessing compliance with the requirement, which
12 begins with the law and is in the reg, that only U.S.
13 citizens and certain documented aliens receive legal
14 assistance, and so, in order to verify that, you
15 require documentation from those aliens that fall
16 within the categories that are allowed to receive legal
17 assistance.

18 And we feel that, in order to make sure that
19 only citizens and those certain aliens receive legal
20 assistance, we need to have some documentation to
21 verify that somebody is either a citizen or an alien
22 falling within one of the categories.

1 CHAIRPERSON BATTLE: Well, now is the
2 attestation sufficient for meeting that standard? And
3 you tell me why it is not. If you've got a reason for
4 saying that the attestation itself is not sufficient,
5 I'd like to understand why.

6 MS. TARENTOWICZ: I think it just stems from
7 the attestation is just somebody saying that's so.

8 MR. McCALPIN: Is it under oath? It's not?

9 MS. TARENTOWICZ: I don't think so.

10 MR. TULL: They're not typically notarized.

11 CHAIRPERSON BATTLE: What does attestation
12 mean?

13 MS. TARENTOWICZ: My understanding is it's
14 just a statement that "I am a citizen."

15 CHAIRPERSON BATTLE: Okay.

16 MR. TULL: Signed by the person.

17 CHAIRPERSON BATTLE: Signed by the person.

18 MR. TULL: Verifying the person --

19 MR. McCALPIN: So it's not under oath, they
20 are not making a false statement under oath?

21 MS. GLASOW: I don't believe so. It doesn't
22 say anything about perjury or anything.

1 MR. McCOLLISTER: We just use a client
2 agreement form that basically states the citizenship
3 issue, and then assign them a file. It's not attested
4 or notarized.

5 CHAIRPERSON BATTLE: Could you state your name
6 for the record?

7 MR. McCOLLISTER: I'm sorry. Roger
8 McCollister, Kansas Legal Services.

9 CHAIRPERSON BATTLE: Okay. All right. And I
10 think that your hand was up.

11 MR. MILLEMANN: Michael Millemann. I'm from
12 SCLAID, but I also teach at the University of Maryland
13 Law School.

14 Just on the attestation, a statement that's
15 not under oath that generates services, an allegation
16 that's not true, that generates services, will be
17 subject to penalties under criminal law, under state
18 common law and state statutory schemes. That's, you
19 know, a variant of fraud, criminal fraud, or a variant
20 of misrepresentation.

21 MR. TULL: We had a long conversation with the
22 inspector general's office on this issue, and they

1 urged us very strongly to agree with them, and we
2 rejected, as strongly, on evaluation of the
3 recommendation.

4 And we do have another -- our procedure for
5 determining eligibility under 1611 is a very similar
6 procedure, where a person states what their income is.
7 If there is reason to doubt the validity of what
8 they're stating, then it can be certified.

9 And, in neither of those cases, has there been
10 a problem in the past with assessing compliance,
11 whether their program is in compliance with the
12 regulations.

13 And the cost to a program -- not to a program,
14 to its clients in requiring a person who is in a time
15 crisis in their life, to go find documentation of their
16 citizenship if they may be worried about being evicted
17 the next day, they may be trying to get protection from
18 their husband for some -- because they're being abused
19 in that circumstance, to add an impediment of going and
20 getting a document to prove their citizenship, in our
21 view, would be a very unnecessary and additional
22 impediment to what the program -- to what clients

1 already face in coming to programs.

2 CHAIRPERSON BATTLE: Okay.

3 MS. TARENTOWICZ: As to John's latter concern,
4 we have procedures, I think, in the reg, to deal with
5 emergency situations, and I believe that they state
6 even for those who fall within the categories of aliens
7 who may be provided services, that documentation is not
8 required, if there's an emergency, it's not required
9 right away.

10 There are procedures governing what you can do
11 in an emergency that could similarly govern
12 verification of citizenship.

13 CHAIRPERSON BATTLE: Well, I guess the concern
14 becomes this. The principal, threshold concern is
15 whether the attestation, as it is presently
16 constructed, is sufficient, a preliminary measure for
17 determining citizenship, which will meet compliance
18 requirements down the road. And I see we've got to
19 balance some competing interests here.

20 On one hand, I do think we are going to have
21 to have sufficient measures in place, if there is a
22 question about citizenship, to show, before we take a

1 case, that we can document that this person qualifies
2 under these new restrictions that we have from Congress
3 for services, and I have no doubt in my mind that that
4 is part of what we must do.

5 At the same time, when you have a person who
6 requests services, this is not just a unique issue. I
7 think it flows through not only to legal services
8 programs. There are measures in the Welfare Reform Act
9 and in other places about this issue.

10 And I have to ask myself the question, because
11 Congress is not only requiring us to do this, but also
12 welfare departments, until we have welfare departments
13 across the nation now requiring each person who steps
14 up to request services, that they bring proof of
15 citizenship.

16 And, if there is a lower standard out there
17 that has become acceptable on this citizenship issue,
18 and other instances where there is the same
19 requirement, then I think that we can have some
20 comfort, if Congress has accepted it in other
21 instances, that it will accept a measure that we put in
22 place that is similar there, too.

1 So I really would like for us to look at this
2 issue, given that it not only applies to us, but it
3 also applies in other places, for how we are to assure
4 that we have complied with this new restriction with
5 regard to who is eligible for services, and see if that
6 initial measure of attestation meets the criteria that
7 other departments must now meet, as well.

8 And, if we find that it does, then I've got a
9 comfort level. If we find that it is too low, then we
10 have some adjustments to make. And that's pretty much
11 where I come out, because I think that, if you can
12 apply now for food stamps in a state, and there is some
13 language in there about the whole issue of citizenship,
14 which meets Congress's muster, and this is what they've
15 got, then I think we're fine.

16 If our standard is too low, then we need to
17 raise it. If it's just fine, we need to leave it where
18 it is. And I'd like for us to at least visit that
19 issue.

20 MS. GLASOW: Just a couple of points I'd like
21 to make. Really, the only new restriction, the main
22 new restriction on the salient regulation is the fact

1 that it now applies to all funds, rather than just to
2 LSC funds. So a lot of this has been in place for
3 years, so we're not responding to new congressional
4 law, in that sense.

5 The reason, underlying reason for both taking
6 the applicants word or attestation, both in the
7 eligibility and the citizenship issue, is we're trying
8 to protect the attorney-client relationship. You need
9 to develop a trust relationship.

10 And so that's why, in both of these roles,
11 we're saying only when you have reason to doubt. And
12 the legal aid attorneys have a pretty good feel when
13 they've been doing this work for a while, when
14 someone's not being honest with them. There's ways of
15 telling that.

16 So that's part of the intent behind this, too.
17 We do have this unique relationship that needs to be
18 built on a certain level of trust.

19 MS. PERLE: I think it's also true, following
20 up on what Suzanne just said, that, you know, we've
21 been living under this for, you know, 13 years. There
22 have never been allegations that programs are serving -

1 -
2 CHAIRPERSON BATTLE: Populations we shouldn't
3 be serving?

4 MS. GLASOW: That they're serving people on
5 the basis of, you know, someone who's lying about their
6 citizenship. There's just not an issue. And one of
7 the main reasons the OIG is interested in this issue is
8 to prevent discrimination, and we see that as overkill.

9 The majority of our clients are U.S. citizens,
10 and in order to protect discrimination against a few,
11 it's like you're requiring every applicant that walks
12 in the door to have documents in hand.

13 MR. ASKEW: Well, I think they answered it.
14 This has been in place since '83, right, the way this
15 is done now, and there haven't been allegations of
16 abuse or problems with this, in monitoring or in the
17 compliance phase; is that right? And nothing in the
18 new appropriations, right, changed the issue of
19 documentation.

20 CHAIRPERSON BATTLE: Now, hearing that, if I
21 understand what you're saying, the only change is the
22 extension of this to private funds?

1 MS. GLASOW: That and the Kennedy amendment
2 are the new issues.

3 CHAIRPERSON BATTLE: So that means that we've
4 had in place a system that has worked since 1983
5 -- this is 1996 -- with regard to all the other
6 underlying issues.

7 MS. PERLE: And if you think about it, there
8 are probably many areas of the country. I talked to
9 someone the other day who -- we talked about, you know,
10 how they were complying with this.

11 And he said, you know, honestly, there is not
12 a person who has come into my office in the last ten
13 years who is not a U.S. citizen, because there are
14 just certain areas of the country where, you know,
15 where there's not an immigrant population.

16 And, for those programs, where maybe 99
17 percent of the people that come to them are, in fact,
18 citizens, for them to have to go through this process
19 and request documentation from everybody who walks in
20 the door, you know, I think that does --

21 CHAIRPERSON BATTLE: It has a chilling effect
22 on the services, actually.

1 You have to step back from this and see
2 whether what we put in place ultimately has -- if I had
3 to prove citizenship, I mean, and if you would take my
4 driver's license and I had to go hunt down my birth
5 certificate, that may take a significant amount of
6 time, given I'm not close to the place I was born and
7 I'd have to send off for it, and nobody answers the
8 phone when I call up there for it, because I've been
9 through that once before, in trying to get a passport
10 -- that could have a significant chilling effect on my
11 ability to get delivery of services, particularly when
12 there is no issue of credibility on the issue of
13 citizenship.

14 MS. GLASOW: And in terms of assessing
15 compliance, if the Corporation says it's sufficient to
16 have this attestation in those cases, and that's what
17 the recipient has, they're in compliance with our
18 regulation.

19 CHAIRPERSON BATTLE: Okay. Laurie.

20 MS. TARENTOWICZ: Well, that's true, but
21 that's sort of -- I don't think that answers the
22 question, if you're trying to devise a regulation that

1 ensures compliance with the law.

2 In any case, we just don't understand how
3 -- I'm not all that convinced by the long-term argument
4 that it's been place for this long, therefore, it's
5 okay. It just -- there's obviously been some newly
6 focused concern with this, to extend it to non-LSC
7 funds.

8 We don't understand how to assess compliance,
9 if you don't have documentation, just as we require --
10 when a monitor goes in to assess compliance with
11 regulatory requirements, they look for documentation.
12 You need to have documentation.

13 And I would suggest that, at the very least,
14 we take a look at other benefits programs, to see what
15 they do. We didn't have time to do an exhaustive look.
16 We know that you need these documents to get a job.
17 Everybody that has a job has applied for documentation.

18 CHAIRPERSON BATTLE: A job is different.

19 MS. TARENTOWICZ: Everybody that applies for
20 SSI benefits, we understand, has to provide this
21 documentation. We haven't had the time to do an
22 exhaustive search of benefits programs. We would be

1 happy to do so, and I would urge that, at the very
2 least, you await that, to make a determination.

3 CHAIRPERSON BATTLE: Well, I have this
4 question to ask. What would the IG do, had Congress
5 not said, "Now, what you've been doing in the past, you
6 have to do it with private funds, too"? How would you
7 have handled compliance if we had not had to revisit
8 this issue at all?

9 And that's the only issue. If I'm
10 understanding what Congress -- what came out of this
11 Appropriations Act was only the issue of whether to
12 apply this already existing restriction to private
13 funds.

14 MS. TARENTOWICZ: Which is why we didn't
15 address this concern in the initial round, because our
16 understanding was the interim regs were just in place
17 to implement the restrictions in the Appropriations
18 Act, and then we would take a look at -- we could take
19 a look at the regs as a whole, when they were going
20 from interim to final, and that's when this issue
21 arose. This was the first time we really took a look at
22 it.

1 The IG's office hasn't been involved, up until
2 now, until -- as involved with this as in compliance,
3 and it's now been transferred.

4 CHAIRPERSON BATTLE: I get back to the
5 question of why is the attestation not sufficient to
6 determine compliance with this reg?

7 MS. TARENTOWICZ: Because -- I think it's just
8 like anything else. "Because I said so" is really not
9 adequate.

10 CHAIRPERSON BATTLE: "Because I said so" is
11 almost what you get into virtually on every piece of
12 paper you pick up when you do an audit. It is only
13 when there is a credibility gap that the "because I
14 said so" becomes insufficient.

15 I mean, in other words, when you have budget,
16 when you get somebody's documentation on their numbers,
17 "because I said so" is the underlying issue on
18 virtually everything you pick up in an audit, until you
19 look at this number and it doesn't comport with
20 something else, so there's a credibility issue, and
21 then you say, "Because I said so" is not going to be
22 enough. I need some documentation on this."

1 Roger?

2 MR. McCOLLISTER: Let me tell you from
3 experience why this has passed monitoring and auditing
4 in the past. We probably screened 50,000 people a
5 year, to represent 27 to 30 thousand people.

6 If we had to get a birth certificate on
7 everybody, if we had to get their work history to
8 determine eligibility, look at their bank records to
9 prove that they didn't have any money in the bank, the
10 whole thing would come to a halt.

11 So what you do in the interviewing process,
12 what legal services programs have done for years, is
13 develop sophistication in interviewing. You ask
14 certain questions and, if you don't get the right
15 answers, then you ask for more information. Then you
16 ask for documentation.

17 And that's proven to be 99.9 percent accurate.
18 By asking the right questions, if you don't get the
19 right answers, then you demand the documentation in
20 those few cases where you get the wrong answers. And
21 any auditor would say that if you're that accurate, why
22 collect documents on everybody?

1 And that's the reason we passed audits for
2 years, on this issue, without having documentation on
3 everybody, is because the system is designed to catch
4 99.9 percent of situations, the way it is, and it does.
5 I can tell you from experience that it does.

6 And we do ask for documentation on some
7 people, but not everybody, because that would be silly
8 and it would mean we would only represent 8,000 people
9 a year instead of 30,000 people, because we would spend
10 all the rest of the time getting documents.

11 CHAIRPERSON BATTLE: There is a significant
12 resource issue tied to this. I would, if we were at a
13 point where there was some requirement that I could
14 glean from this Appropriations Act which required us to
15 do it, then I would take a serious look right now at
16 our doing it.

17 As I understand the issue before us, it has
18 arisen at the second look taken by the inspector
19 general at this issue, in reviewing the reg, and not as
20 a result of what was contained in the appropriations
21 rider, I mean, the Appropriations Act.

22 So it's a broader compliance based issue but,

1 even in that forum, I really would need a little bit
2 more to take that into account, to place the kind of
3 resource burden that it would ultimately result in on
4 programs to find out, particularly when there's no
5 credibility issue, additional documentation.

6 Now, if there is a way to instruct programs on
7 what kinds of questions to ask to test that
8 credibility, and not just accept that attestation, then
9 I think that that makes good sense, because that gives
10 programs the ability to ferret out those instances in
11 which they're going to need additional documentation.

12 But, on this particular issue, I don't -- I
13 mean, and I'll hear from the other Board members, their
14 thoughts about this, but I'm not sure that we have
15 sufficient grounds here to make a change in a policy
16 that's been in place, with a law that's been in place,
17 simply because it now applies to private funds of this
18 magnitude.

19 MR. ASKEW: What the IG is doing is balancing
20 waste, fraud, and abuse -- because what you're talking
21 about is fraud, I guess, by a client -- with economies
22 and efficiencies and, in this case, there's no evidence

1 that there's been fraud over the history of this.

2 Secondly, there tends to be an assumption
3 somewhere by people that programs are interested in
4 serving financially ineligible clients or clients who
5 are ineligible for another reason, and that's just
6 simply not true, I don't think. I don't believe you
7 can document that programs have any interest in serving
8 ineligible clients.

9 So, if you have to strike a balance between
10 waste, fraud, and abuse where there's no evidence of
11 fraud, against economy and efficiency, where there's
12 going to be great evidence that this is going to be
13 very inefficient, and end up reducing level of services
14 to other eligible clients, then it seems to me we're
15 safe to go with the economy and efficiency here,
16 because there's simply been no evidence that there's
17 any abuse here.

18 CHAIRPERSON BATTLE: Laurie?

19 MS. TARENTOWICZ: I don't think our concern
20 stems from our suspicion that there's abuse out there
21 and we're just not catching it. We just don't know.
22 And our concern is more than waste, fraud, and abuse.

1 Now, compliance, the responsibility for
2 overseeing compliance monitoring has been transferred
3 to the OIG. It's much more than looking at, you know,
4 waste, fraud, and abuse, the traditional OIG concerns.

5 CHAIRPERSON BATTLE: But what else is there?
6 I'm trying to understand, what is it that you're
7 looking at and trying to get at with this proposal?

8 MS. TARENTOWICZ: Compliance with the
9 requirements of the law.

10 MR. ASKEW: Well, there will be compliance if
11 they have a client retainer form or a financial
12 eligibility sheet with attestation on it, and that's
13 all the local CPA would have to do is say, "Yes,
14 there's compliance," if that's what the regulation
15 says.

16 MR. TULL: It's only a compliance issue if you
17 assume that people are lying on those attestation forms
18 in massive amounts, and you need further documentation,
19 because there is clearly a document you can look at.
20 It's very easy to verify. It's probably one of the
21 easiest regulation requirements to verify that we have.

22 MR. ASKEW: So, if there's no attestation,

1 then they're out of compliance, and they have to get
2 attestations on those intake sheets.

3 CHAIRPERSON BATTLE: I think I've heard at
4 least sufficiently, and I hope all the other Board
5 members have, on this issue. Are there any questions
6 about it?

7 (No response.)

8 CHAIRPERSON BATTLE: Okay. Let's move on to
9 the next issue. Thank you for your input.

10 MS. GLASOW: The next issue is an issue of
11 confidentiality of applicants for service and, in two
12 areas, comments raise concern.

13 One is for applicants for services who are
14 rejected or referred to another legal services
15 provider, because they do not fall within one of the
16 permitted categories of aliens who may be served, or
17 clients who are represented using non-LSC funds under
18 the Kennedy amendment.

19 The concern was that if certain documents were
20 required of these clients and applicants, that they
21 would be put in a situation that these documents could
22 be turned over to other authorities if they were kept

1 by the legal services programs.

2 We suggest adding a new section on
3 applicability, on Page 9. Basically, what we're saying
4 is this rule, this part does not apply to normal intake
5 and referral of an ineligible alien, and it doesn't
6 apply to the Kennedy amendment clients and, because it
7 doesn't apply to them, they're not subject to the
8 requirements of this part.

9 And we do have agreement with the OIG on this
10 issue. There is no LSC regulatory requirement that
11 would require recipients to maintain documents or
12 records that would include confidential information
13 about a person's immigration status and, because those
14 documents won't be required to be kept by recipients,
15 we don't feel it causes a problem.

16 CHAIRPERSON BATTLE: Linda.

17 MS. PERLE: I agree with what you're trying to
18 do. I don't agree that this does it.

19 First of all, when you have the 1626.4(B) that
20 says this part does not apply to the use of non-LSC
21 funds by recipient to provide legal assistance to the
22 Kennedy amendment part, that's a little contradiction

1 in terms because, then, the Kennedy amendment
2 provisions are in this part. So that's confusing.

3 And, second of all, there's nothing in here
4 that says you don't have to keep documentation about
5 people you either serve under the Kennedy amendment or
6 that you don't serve and, in fact, in the old
7 regulation, the prior version of 1626, it said
8 specifically that you did have to keep documentation
9 with respect to people who sought assistance but were
10 denied assistance.

11 And this is silent on it. It doesn't say
12 specifically you don't have to keep it.

13 I think that a better approach would be to say
14 that, first of all, at 1626.4 applicability, you could
15 say that the requirements of this part regarding
16 verification or whatever do not apply, then you ought
17 to say specifically that if a person is served under
18 the Kennedy amendment or that the person is not served,
19 because they're found to be ineligible, that the
20 program should not -- not only that they're not
21 required, but they should not be eligibility records
22 with respect to alien status.

1 I also have some question, and I think we can
2 certainly receive some assurance from the IG that this
3 is true, that the Kennedy amendment clients, you may
4 have to keep in their record some information about
5 their alien status, particularly if the service you're
6 providing to them is self-petitioning or suspension of
7 deportation, because you're going to have to have that
8 information.

9 And we need some assurance that the IG is not
10 going to ask to look at that information that's in the
11 client file.

12 MR. TULL: Can I speak to that? Because this
13 is a very difficult problem which is created by 509(I),
14 which does specifically say that records which are
15 available under 509(H) of the Appropriations Act are
16 available to law enforcement agencies, and there is a
17 question of the OIG's responsibilities when they have
18 information of a crime.

19 I'm not speaking for them now, but I
20 understand from conversation with them that their view
21 is not that they automatically, any time they have
22 information about existence of a crime, have an

1 affirmative duty to report any such information, but
2 there are inspector generals who have a different view
3 of that.

4 So the question is what documents become
5 available under 509(h) to the inspector general or an
6 auditor from the Corporation or from another agency.

7 The fact that there's information in a file
8 about the alien status of the client is only a problem
9 if it's identified as a record which is available under
10 509(H), and the compromise here, which the OIG has
11 agreed to, because in conversations with them they
12 understand the problem, they understand that if we get
13 into a situation where we ask for records about illegal
14 alien status in the context of records which are
15 available under 509(H), that it creates a reporting
16 requirement, the potentiality of a reporting
17 requirement, which would destroy the confidentiality of
18 the attorney-client relationship.

19 You can't have a situation where a client
20 going to a legal services program, the fact that
21 they're going may subject that person to prosecution,
22 and that the source of the information for that

1 happening would be the very lawyer that the person went
2 to.

3 That obviously goes to the very core of the
4 way our legal system works, and the IG understands that
5 and is seeking a way to cooperate with us, consistent
6 with their responsibilities under the IG Act, and our
7 responsibilities under the scheme that we need to
8 function under.

9 So that the intent here is specifically to say
10 that the records which will be required to be kept,
11 which would be subject to 509(H), do not include, for
12 Kennedy amendment clients, information about their
13 alien status.

14 It doesn't mean the program takes every piece
15 of information about that person's status and throws it
16 away, because they may need that for purposes of
17 representation, but that is a part of the body of
18 confidential information that they have that pertains
19 to the representation and does not pertain to the
20 eligibility.

21 And we recognize there's a certain illogic in
22 that, but it's an illogic which is required by the

1 problem we're trying to solve, and I fear that, if we
2 fix the logic, we won't be able to solve the problem.

3 CHAIRPERSON BATTLE: And I wonder how we can
4 say that in 1626.4? Because what I'm hearing Linda say
5 is, okay, the problem that I'm hearing, that there is
6 agreement between the Office of Inspector General and
7 the staff that this needs to be fixed in a certain way,
8 but that if someone were to pick up what we've written
9 on this, they aren't going to get what we intend.

10 MS. PERLE: That's what you're hearing from
11 me.

12 CHAIRPERSON BATTLE: So is there a way that we
13 can reconstruct this applicability section so that it
14 articulates, in the best way possible, what it is we're
15 seeking to do in protecting confidentiality and, at the
16 same time, ensuring that we have adequate measures for
17 compliance?

18 MR. TULL: I wonder if we could add to 6(B),
19 add -- in saying "does not apply," specifically says,
20 "and does not require records related to the
21 applicant's alien status as a part of their," what,
22 "intake" -- "as a part of their qualification for

1 eligibility"?

2 MS. TARENTOWICZ: Just "does not require
3 documentation on a person's immigration status.

4 MR. TULL: Because the language we need to
5 have is something which invokes 509(H), which is the
6 section which says what information is available to
7 auditors, and it includes financial information and
8 eligibility information.

9 MS. PERLE: But not just on B. I believe that
10 also includes A and B.

11 MR. TULL: Correct. Yes. Okay.

12 CHAIRPERSON BATTLE: We could have a Paragraph
13 1 and then make Subparagraph (A) and (B), so that this
14 language would be applicable to both (A) and (B).

15 MR. TULL: This could be the missing (B), and
16 we'll just make it (C).

17 CHAIRPERSON BATTLE: Since we're talking about
18 eligibility in both instances, let's set it out at the
19 top. And it also seems to me, by setting it out at the
20 top, makes clear the point that we're making about this
21 documentation and its use.

22 MR. ASKEW: Can you have a 1 when there's no

1 2?

2 MS. PERLE: I think we're in agreement on what
3 we want to do, but I think we'll have to work it. I
4 still don't know that it works, you know, stating it as
5 the applicability. I'm just not sure that really works
6 right. But I think we do understand what your
7 suggesting, and I think it's consistent with certainly
8 what I was suggesting and, if the IG is comfortable
9 with that, we could work out language that we can get
10 back to you.

11 MS. GLASOW: So that both of these situations
12 are covered by this.

13 CHAIRPERSON BATTLE: Can we do that, and take
14 the time to just go back and look at that, and this is
15 on our plate for our January meeting.

16 MS. GLASOW: Okay.

17 CHAIRPERSON BATTLE: Okay. Now, any other
18 issues on aliens?

19 MR. McCOLLISTER: LaVeeda, on Page 11, what is
20 listed as 1626.5 is really .6.

21 MS. GLASOW: There's a lot of technical
22 mistakes in this, because we were changing things at

1 the last minute, and we will carefully go through it
2 and make sure all the numbers and everything are
3 correct.

4 CHAIRPERSON BATTLE: After confidentiality,
5 what is our next issue?

6 MS. GLASOW: There's just a few small issues.
7 For instance, we deleted the provision on replenishment
8 agricultural workers, RAWs, because they no longer
9 exist.

10 CHAIRPERSON BATTLE: Replenishment, what?

11 MS. GLASOW: Agricultural workers. There's a
12 category called SAWs, and RAWs were supposed to replace
13 them but, apparently, the law has been changed.

14 MS. PERLE: That provision was never
15 implemented, and then it was repealed.

16 MR. McCALPIN: What's the change? The
17 elimination at the top of 17?

18 CHAIRPERSON BATTLE: It's actually the bottom
19 of 17. Replenishment agricultural workers is on Page
20 17 as 626.9.

21 MR. McCALPIN: I've got that on Page 16. This
22 is dated December 13th.

1 MR. TULL: The next page is the replenishment
2 agricultural workers.

3 MS. GLASOW: You're looking at SAWS, probably.

4 CHAIRPERSON BATTLE: That's not it. Go to the
5 next one. There. What's a RAW and a SAW?

6 MS. GLASOW: These are agricultural workers
7 that come over into the United States, special
8 categories under the INA that do agricultural work, and
9 then I think they go back home, or whatever. But they
10 don't exist.

11 CHAIRPERSON BATTLE: Okay. Anything else?

12 MS. GLASOW: Yes.

13 CHAIRPERSON BATTLE: Okay.

14 MS. GLASOW: Technical changes again. The
15 SCLAID pointed out that we should clarify that persons
16 born in Puerto Rico and the U.S. Virgin Islands are
17 U.S. citizens, and we did that, somewhere.

18 CHAIRPERSON BATTLE: Where is that?

19 MS. GLASOW: Maybe we did it in definitions.

20 MS. TARENTOWICZ: I think you were going to do
21 it in the commentary, but referring to the INA in the
22 definitions section, we'll do that.

1 MR. TULL: It's in 1626.2(A), on Page 8. I'm
2 sorry, no, it's not, because that's ineligible alien.

3 MS. GLASOW: It's somewhere. I'll find it.

4 MR. TULL: Refer to the definition of citizen
5 in that, in that definition, we actually don't define
6 citizen.

7 MS. PERLE: Citizen or national of the United
8 States -- I thought that was what we did to address
9 that issue, that if the person was a U.S. national.
10 That's a different issue.

11 MS. TARENTOWICZ: Citizen or national of the
12 United States are the terms used by the INA, and
13 national is defined in the INA, United States is
14 defined in the INA. Citizen is not defined in the INA,
15 particularly, but I think the U.S. Constitution does
16 that.

17 MS. GLASOW: I have the definitions. National
18 and U.S. citizen are pretty much the same thing.

19 MS. PERLE: They're not an alien, anyway. I
20 may need to add something.

21 CHAIRPERSON BATTLE: I think since this whole
22 issue is determining whether a person is a citizen or

1 not, let's start with some major premises here -- what
2 it is, what it is not. For someone coming out, I want
3 to tell you, because I don't work in this area all the
4 time, this thing reads like Greek to me.

5 MS. GLASOW: It's a very technical rule. It
6 takes a lot of expertise.

7 CHAIRPERSON BATTLE: And I guess what I'm
8 saying is, I think we need to step back from this
9 particular rule and construct it in a way that someone
10 who is not familiar with this can sit down, read it
11 from beginning to end, and know what their
12 responsibilities are.

13 MS. PERLE: If you read the old 1626, you
14 think this is Greek, that's Swahili.

15 MR. McCALPIN: How about Sanskrit?

16 MS. PERLE: Sanskrit. Right. Sorry. Swahili
17 was bad. Sanskrit.

18 (Laughter.)

19 MS. PERLE: I mean, this is modern Greek and
20 that's ancient Greek. It was so impossible to
21 understand, and it was written sort of layer upon layer
22 upon layer, to say the same thing four or five times in

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1 different ways.

2 And we originally -- we didn't make a major
3 effort to sort of go through the rest of the rule to
4 kind of clarify it. When we went through the second
5 version to do the finalized rule, we did make some
6 effort to kind of cut through some of those layers to
7 get to the core of what the rule meant and to simplify
8 it.

9 We may need to do some additional work on
10 that, and I certainly have no objection to that.

11 CHAIRPERSON BATTLE: Something simple, like
12 "Legal services are available to U.S. citizens and so-
13 and-so. This part prohibits recipients from providing
14 legal services for those who are ineligible aliens"
15 -- a major premise that says, "These are the folks we
16 serve, these are the folks we don't."

17 I think that that's helpful, because it just
18 kind of sets the overarching parameters, so you know,
19 you kind of launch right into, "This is what we don't
20 do," without ever stating what it is we do, and who it
21 is we serve.

22 MS. PERLE: So you want to define "citizen"?

1 CHAIRPERSON BATTLE: Yes.

2 MR. TULL: Do I also understand you to suggest
3 an additional sentence in the purpose, stating it
4 affirmatively, rather than negatively?

5 CHAIRPERSON BATTLE: Right.

6 MR. TULL: To assure that legal services are
7 provided to U.S. citizens or citizens of the United
8 States and aliens who are eligible for such services?

9 CHAIRPERSON BATTLE: Yes. I think that just
10 puts a better tenor on this. Do we need a break?
11 Let's finish aliens.

12 MS. PERLE: We have a number of issues still
13 on aliens, I think.

14 MS. GLASOW: I don't believe the INA has a
15 definition for citizen.

16 MS. TARENTOWICZ: It doesn't, but the
17 Constitution does.

18 MS. PERLE: We can also say that we include
19 -- make it clear that people who are, you know, from
20 Puerto Rico or the Virgin Islands or the --

21 MS. TARENTOWICZ: That's in the definition of
22 the United States in the INA.

1 MS. GLASOW: We'll fix it.

2 CHAIRPERSON BATTLE: I think everybody needs a
3 break. Resume in five minutes.

4 (A brief recess was taken.)

5 CHAIRPERSON BATTLE: Why don't we gather back
6 around? Why don't we do this? We're going to finish
7 this morning aliens, and then we'll take a lunch break
8 and begin the final two regs that we have on our agenda
9 this afternoon.

10 As I understand it, we still have some other
11 issues that we need to discuss regarding 1626.

12 MS. GLASOW: We just have two more brief
13 issues. On Page 15, the third criterion for what you
14 do in emergency situations regarding alien eligibility
15 and --

16 MR. McCALPIN: That really starts on 14?

17 MS. GLASOW: Starts on 14, yes.

18 MR. McCALPIN: And this should be (D)?

19 MS. PERLE: Yes, (D), but below, where it says
20 1626 (A) through (D), and that should be through (C).

21 MS. GLASOW: Like I said, we need to fix all
22 these. We'll fix it.

1 MS. PERLE: References need to be fixed.

2 MS. GLASOW: But if you go to Page 15, number
3 3 at the top is one of the criteria that is no longer
4 consistent with our priorities rule, and we would
5 suggest deleting that.

6 MR. McCALPIN: Do we need to take that whole
7 paragraph out?

8 MS. GLASOW: Yes.

9 CHAIRPERSON BATTLE: And tell me why that's
10 inconsistent with our priorities.

11 MS. GLASOW: Because we clarified in our
12 priorities rule that emergencies -- because our
13 priorities rule now requires that emergency cases for
14 the purposes of that rule only deal with emergencies
15 outside of priorities, and not within priorities. Does
16 that make sense?

17 MR. McCALPIN: Yes. We did that yesterday.

18 MS. PERLE: So this says you have to use the
19 same criteria for emergency assistance used in their
20 general determination of priorities, and uses the
21 procedures in 1626.5(B), only in the cases -- it
22 doesn't really have anything to do with it anymore.

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1 MS. GLASOW: If an alien representation is
2 within their priorities, then --

3 MS. PERLE: Regardless of whether it's an
4 emergency or not.

5 MS. GLASOW: -- it doesn't -- then 1620 no
6 longer deals with emergencies within priorities, it
7 only deals with emergencies outside. If they're doing
8 alien representation, it's within their priorities and,
9 therefore, the 1620 emergency provisions don't relate
10 to this.

11 MR. TULL: I think the problem here is that
12 this provision was probably surplusage in the first
13 place. Under the old priorities regulation, there was
14 no requirement of any criteria for emergency
15 assistance. So this assumed that programs, as a part
16 of their priority setting, would have such criteria, a
17 fact which probably was not true in 80 percent of the
18 cases.

19 So its old use was just, it was like an
20 appendix -- a human appendix -- had no function. We
21 now have defined emergency assistance or emergencies,
22 in the context of priorities, for a very special

1 purpose, which is statutory, and which relates to
2 reporting to us, and relates to a set of procedures
3 that need to follow afterwards in terms of the Board,
4 or changing priorities in response to those emergencies
5 which were outside of priorities.

6 And this really relates to -- the notion of
7 being able to represent a person without verification
8 in an emergency has to do with the immediacy of having
9 to represent that individual, because they'll lose some
10 benefit or right.

11 Emergency in the priorities reg is defined
12 much more broadly than that, and it involves issues
13 which would not have come to the attention of the Board
14 in setting the priorities, and they haven't had time to
15 change them yet and, therefore, if other criteria are
16 met, the program can meet it.

17 So it's a much broader definition than I'm
18 sure was contemplated when this was adopted, even
19 though it had no real bite to it, in reality.

20 CHAIRPERSON BATTLE: Laurie?

21 MS. TARENTOWICZ: I certainly agree on
22 deleting the reference to 1620, but I would suggest

1 some guidance with regard to what an emergency is.

2 CHAIRPERSON BATTLE: Can you say "See our new
3 procedures with regard to this in the priorities"?

4 MS. PERLE: No, no. That doesn't make any
5 sense. That's the problem.

6 MR. TULL: Because the definition of emergency
7 in the priorities reg is much broader than is really
8 appropriate here.

9 MS. GLASOW: The priorities reg basically says
10 you can take an emergency case. It is not one of the
11 priority areas you adopted, only under certain
12 circumstances.

13 CHAIRPERSON BATTLE: Why do we need to speak
14 to emergency situations in this instance here?

15 MR. TULL: Because it has to do with providing
16 an opportunity to go ahead with services in the event
17 that a person doesn't have the documents but, if you
18 wait 'til they get them, they're going to already be
19 out of the house or whatever.

20 But it's not a waiver of documentation. It's
21 simply saying --

22 CHAIRPERSON BATTLE: It just says, "Get the

1 documentation to me, but get started on the case."

2 Okay.

3 MR. TULL: Which is why the definition of
4 emergency needs to be a temporal one that has to do
5 with a need to act quickly.

6 CHAIRPERSON BATTLE: When you delete 3, is
7 there sufficient information in 2 through the 4 that
8 was left, to inform people as to how to handle the
9 emergency situation if you don't immediately have
10 documentation?

11 MR. McCALPIN: Except for the failure to
12 define emergency.

13 MR. TULL: What if we were to add, in the
14 beginning of (D), "In an emergency" -- this is on Page
15 14 -- if we were to say, "In an emergency" -- and then
16 add language -- "where if action is not taken
17 immediately the client will be unduly harmed" -- or
18 will be --

19 MS. PERLE: You could put something like that.
20 In 1611(A), on the retainer agreement requirement,
21 there is a parenthetical that says, "The retainer
22 agreement shall be executed whenever presentation

1 commences," and then it says, "or, if not possible,
2 owing to an emergency situation, as soon thereafter as
3 is practical." And then it goes on to talk about
4 what's in the retainer agreement.

5 I think that there is probably a general
6 understanding among recipients as to what constitutes
7 an emergency.

8 MR. TULL: Although we have defined emergency,
9 elsewhere in the regulation, which not be appropriate
10 here, so we may need to. Someone could say, "What is
11 an emergency? Well, is there something in 1620. Let's
12 use that definition."

13 MS. PERLE: I have no objection to doing
14 something simple like that.

15 CHAIRPERSON BATTLE: The simplest way is to
16 give, right after the use of the term, some qualifying
17 language that defines it right here, and then disposes
18 of it.

19 MS. PERLE: That's fine.

20 CHAIRPERSON BATTLE: And it's really a time
21 issue. It's a time and irreparable harm issue. You
22 don't have time to get all this documentation and, if

1 you waited on it, irreparable harm would be done.

2 MR. TULL: What if we say that, "In an
3 emergency where immediate action is necessary to avoid
4 irreparable harm" -- maybe that's too high a standard.

5 MS. PERLE: That's too high a standard.

6 MR. TULL: Significant harm.

7 MS. PERLE: Significant harm, and then legal
8 interests or property.

9 MR. McCALPIN: Life, liberty, or property?

10 MR. TULL: Or pursuit of happiness? Why does
11 that come to mind?

12 (Laughter.)

13 MR. McCALPIN: You've heard that phrase
14 somewhere.

15 MR. TULL: Somewhere. I think it's a rock 'n
16 roll song.

17 CHAIRPERSON BATTLE: Okay. We know how to fix
18 this one? Okay. What's the next issue?

19 MS. GLASOW: The last issue, Page 15, and goes
20 over to 16, the special eligibility questions. We
21 thought with were just making a technical change to
22 this section and, in essence, we were not consistent

1 with the applicable law on this.

2 The original restriction applied to the
3 recipients. We applied it only to the citizens.

4 MS. PERLE: That's not exactly it. Go on.

5 MR. McCALPIN: That's not right, in Paragraph
6 (A).

7 MS. GLASOW: It also had a reference to the
8 citizens. It said, "The citizens of these entities are
9 eligible for legal assistance, provided that they are
10 otherwise eligible."

11 In other words, the legal assistance on the
12 basis of their status of being persons who lived on
13 these entities did not prevent them from receiving
14 legal assistance, as long as they were financially
15 eligible or otherwise eligible.

16 So the old provisions had a reference both to
17 -- it says the restriction is not applicable to the
18 recipients of this part, but it followed up with a
19 provision talking about the citizens of those entities
20 being eligible for legal assistance.

21 The OIG pointed out to us in their comment,
22 which you received, that changing it to just a

1 reference to the citizen was incorrect, because there
2 is a covenant and a compact with the United States that
3 deals with these entities and the services applying to
4 those covenants and compacts deal with the recipients
5 and not the citizens.

6 And the wording of that in the compact with
7 Federated States of Micronesia and the Marshal Islands
8 says that, "In addition to the programs and services
9 set forth in Section 221 of the compact and pursuant to
10 Section 224 of the compact, programs and services of
11 the following agencies shall be made available to the
12 Federated States of Micronesia and to the Marshal
13 Islands," and (A) is the Legal Services Corporation.

14 So it's made applicable to the entities.

15 MR. McCALPIN: What you're saying is that a
16 program in Micronesia doesn't have to pay any attention
17 to the alien regulation.

18 MS. GLASOW: That is correct, pursuant to this
19 compact. This is a compact.

20 MS. TARENTOWICZ: The INA, I don't believe the
21 INA applies in those entities. While I think citizens
22 of Commonwealth of the Northern Mariana Islands are

1 U.S. citizens, I don't think the INA applies to them,
2 and these other entities are not part of the United
3 States, so the Immigration Act doesn't apply. So
4 making 1626 applicable doesn't make any sense.

5 CHAIRPERSON BATTLE: I guess the question I
6 have, if someone from the Republic of the Marshal
7 Islands was to come to the United States, would the INA
8 not have any application to them and, therefore, this
9 reg. not have any application to them, if they apply
10 for services here?

11 MR. TULL: It would apply to them. The change
12 is to say that that person, when they are in the
13 islands, that then they may go to the legal services
14 program on that island and, without regard to this
15 requirement, get services, because they can't ever
16 satisfy this requirement.

17 CHAIRPERSON BATTLE: We could have a mass
18 migration. Everybody in the United States that can't
19 qualify here could just go down to the islands.

20 MR. TULL: Right. There's one slight
21 impediment that, which is about 4,000 miles of ocean.

22 But it does mean that, if a person from Palau,

1 for instance, comes to the United States, and then goes
2 to the Neighborhood Legal Assistance Foundation of San
3 Francisco, they're not -- they would have to qualify as
4 either a citizen of the United States or as one of the
5 qualified aliens in order to get service.

6 CHAIRPERSON BATTLE: Just help me. Would they
7 be a qualified alien if they came from the Republic of
8 the Marshall Islands?

9 MR. TULL: No. They get no special alien
10 status by being a member. This is a treaty with
11 another sovereign so that, as members of that
12 sovereign, to which we have agreed, by treaty or by
13 compact, to provide certain services to, because of our
14 protectorate responsibilities after the war.

15 We agreed to provide legal services, and to
16 apply 1626 would -- it isn't that it's -- it would
17 mean, if we applied it, that they would not be able to
18 get services, because they're not any of the required
19 persons. They're not citizens of the United States,
20 except for there's a change in that, because the
21 Northern Mariana Islands are now a territory.

22 MR. McCALPIN: So if a Maori from New Zealand

1 winds up in Palau, the legal services program must
2 provide service, irrespective of the nationality,
3 citizenship, or origin of that applicant?

4 MR. TULL: Well, it's not must. It is they
5 would not be prohibited from.

6 MS. PERLE: They're eligible. I just want to
7 make clear, though, under the old rules, which were in
8 existence from '83, that it says all citizens of these
9 entities are eligible to receive legal assistance,
10 provided they are otherwise eligible under the Act.

11 And that, I think, was read to say that, if
12 they did come to the United States, that they would be
13 eligible for services.

14 CHAIRPERSON BATTLE: That will have some
15 impact.

16 MS. PERLE: I'm sure it won't have a
17 tremendous impact, because I don't think there are that
18 many people that actually would be eligible who would
19 come, but it will have an impact on certain people.

20 MS. GLASOW: I don't know that we interpret it
21 that way, because that provision didn't say they were
22 eligible for legal assistance anywhere. So basically,

1 my point is, I don't know that it's been a problem.

2 CHAIRPERSON BATTLE: What was that cite in
3 1626?

4 MS. PERLE: On the old reg?

5 CHAIRPERSON BATTLE: Yes.

6 MS. PERLE: 1626.10(A).

7 MS. GLASOW: On Page 55 of the book of regs.

8 MS. PERLE: Except this is on Page 56. It
9 says, "All citizens of these entities are eligible to
10 receive legal assistance, provided they are otherwise
11 eligible under the Act."

12 CHAIRPERSON BATTLE: Okay. I see.

13 MR. TULL: So that could have been read a
14 variety of ways. And I think what this change does is
15 just makes it clear that, where -- our read of this is
16 that we do have an obligation under the treaties, and
17 this satisfies that, but it does not provide special
18 treatment for persons here.

19 MS. PERLE: I would like to make a suggestion
20 that I think is consistent with your intent here, but I
21 don't think the language that you have here is -- I
22 think it's a problem.

1 Because what it says on Page 16, Section (A)
2 now, it says, "This part is not applicable to
3 recipients of The Commonwealth of Northern Mariana,"
4 which suggests that they're receiving something from
5 the commonwealth.

6 I think it's really recipients providing
7 services to citizens of The Commonwealth of the
8 Northern Marianas.

9 CHAIRPERSON BATTLE: And it's not just
10 citizens, it's people.

11 MS. TARENTOWICZ: I think it's "were not
12 recipients in" instead of "of."

13 CHAIRPERSON BATTLE: Okay. "In" is the
14 easiest way to do it.

15 MS. PERLE: "Providing services in The
16 Commonwealth."

17 CHAIRPERSON BATTLE: That's a good suggestion.

18 MS. PERLE: Just to make clear what it means.
19 I mean, you know, I think that there are people in the
20 community who would have difficulty with this change,
21 but I don't think it's a change that will affect a
22 significant number of people.

1 MR. McCALPIN: I think you could take the
2 "the" out, and make it "to recipients providing
3 services."

4 CHAIRPERSON BATTLE: You've got "the" in front
5 of every last one of those other things, unless you're
6 going to take all those "these" out. You've got "The
7 Commonwealth," "the Republic," "the Federation" --

8 MR. TULL: But you need it there, because it
9 is --

10 MS. PERLE: "The Commonwealth," is part of the
11 title.

12 CHAIRPERSON BATTLE: Okay. So we do this
13 editorial stuff. We thrive on changing these "these"
14 and "ands" and "ofs."

15 MR. McCALPIN: My mind gravitates towards
16 minutiae.

17 CHAIRPERSON BATTLE: We do real well at that.

18 MS. GLASOW: This is a good rule for that.

19 CHAIRPERSON BATTLE: Okay. Are there other
20 issues?

21 MS. GLASOW: Two brief ones. In Paragraphs
22 (B) and (C), we returned language that we took out that

1 said, at the end of each of those provisions, "provided
2 they are otherwise eligible under the Act." That was
3 in the old rule. We took it out for the interim rule.

4 And comments made us realize that this could
5 be misinterpreted as suggesting that, just because they
6 are American Indian, that they don't have to comply
7 with the financial eligibility issues.

8 MR. ASKEW: Actually, that's Puerto Rico and
9 the Virgin Islands under this section.

10 MS. PERLE: Because those people are U.S.
11 citizens.

12 MR. ASKEW: If there's confusion whether they
13 are citizens or not, this might be a place to put it,
14 if they are eligible, if they are otherwise eligible.

15 MS. GLASOW: Yes. I think that's a good idea.

16 MS. PERLE: Are there other places besides
17 Puerto Rico and the Virgin Islands? Are there other
18 territories?

19 MR. ASKEW: Alabama.

20 (Laughter.)

21 CHAIRPERSON BATTLE: Georgia.

22 MS. TARENTOWICZ: Puerto Rico, the Virgin

1 Islands, and other territories? If we have a
2 definition of the United States in there, I don't see
3 it as a problem.

4 MR. McCALPIN: The District of Columbia is a
5 territory. What's Guam?

6 MR. ASKEW: It's a territory. The Act has a
7 list, doesn't it?

8 MS. PERLE: Yeah, but I think it's somewhat
9 outdated.

10 CHAIRPERSON BATTLE: Is it the United States
11 and its territories, or the United States --

12 MR. TULL: This specifically says, "United
13 States as defined in," in the Immigration and
14 Naturalization Act.

15 CHAIRPERSON BATTLE: For our people that have
16 to read this, let's define what "United States" means.

17 I mean, we're not going to list every state,
18 but just if there are citizens -- citizens, so that
19 people looking at this, trying to determine whether
20 somebody who has now checked off a box saying that "I'm
21 Canadian born and such-and-such," that they can come to
22 this rule and the commentary and figure out, "Well,

1 that makes you a citizen," or "It doesn't."

2 I mean, you can't cover everything, but it
3 sure would be helpful to someone who gets one of these
4 boxes checked off in some group that's not the normal
5 group, to be able to determine whether they've got more
6 work to do.

7 Laurie.

8 MS. TARENTOWICZ: I just have a definition of
9 the United States from INA.

10 CHAIRPERSON BATTLE: Tell us what page you're
11 reading from. Tell me what page in the book you're
12 reading from.

13 MS. TARENTOWICZ: It's on Page 91, on that
14 page, and it's at 8 USC 1101.

15 "United States is defined as the continental
16 United States, Alaska, Hawaii, Puerto Rico, Guam, and
17 the Virgin Islands of the United States."

18 CHAIRPERSON BATTLE: Okay. List them. That's
19 real simple. We're going to list them so that people
20 know who are citizens of the United States, what that
21 means when you say "citizens of the United States."

22 MR. TULL: And that would be listed in --

1 MR. McCALPIN: Well, maybe at a minimum you
2 ought to put the citation of the Act, the 8 USC 1101.

3 CHAIRPERSON BATTLE: United States is defined
4 as this, because I still think if somebody from Guam
5 comes in someone's office, they're not going to know,
6 and I think it's helpful to have that listing.

7 MS. PERLE: We talked about defining
8 "citizen," and we could say -- we can work on it.

9 CHAIRPERSON BATTLE: Yes, work on it. Make
10 this something that, when you read it, it's clear, it's
11 usable, it's user friendly.

12 MR. TULL: You may have set an impossible
13 standard.

14 CHAIRPERSON BATTLE: Okay. Are there other
15 issues?

16 MR. ASKEW: American Samoa.

17 MS. PERLE: I think American Samoa is part of
18 The Commonwealth of the Northern Marianas. We'll check
19 it.

20 CHAIRPERSON BATTLE: All right. Anything
21 else?

22 MS. PERLE: Do you want to raise this issue

1 just to mention this Hague Treaty thing?

2 MS. GLASOW: Oh, yes.

3 CHAIRPERSON BATTLE: And also, if there are
4 any comments from the public on this reg, we do them
5 kind of at the same time, so just let me know.

6 MS. GLASOW: Okay. The Office of General
7 Counsel --

8 MR. McCALPIN: Page what?

9 MS. GLASOW: Page 6, where I have a discussion
10 of it. It's raised by the ABA.

11 And there is a -- the Hague convention on the
12 civil aspects of the International Child Abduction
13 Treaty and an implementing statute read together with
14 our alien restrictions has been interpreted by the
15 Office of General Counsel, and it was done in 1974, as
16 allowing -- 1994 -- as allowing representation of
17 people who come under that act.

18 The suggestion was that we make that clear in
19 the rule. I say here in my comments to you that we
20 would take care of it in the commentary but, subsequent
21 to that, we decided it would be a good idea to list
22 that in the rule.

1 MR. McCALPIN: You decided what?

2 MS. GLASOW: To list it in the rule.

3 MR. McCALPIN: Where are you going to put it?

4 MR. TULL: In the special eligibility.

5 MS. GLASOW: Probably in the special
6 eligibility.

7 CHAIRPERSON BATTLE: The treaty section?

8 MS. GLASOW: It depends. I need to go back
9 and loop at that opinion, but the opinion may conclude
10 that they come under one of the eligible aliens we can
11 represent, rather than not. I don't know. I have to
12 check it out.

13 MS. PERLE: I don't think so. I mean, these
14 are people, just to make it clear, these are people,
15 indigent people, living outside of the United States,
16 citizens or nationals of some other country -- Asia,
17 Latin America, whatever -- whose children are abducted
18 and taken to the United States for adoption.

19 And this treaty says -- my understanding of
20 this treaty is that it says that these people shall be
21 entitled to legal representation to get back their
22 children.

1 MR. TULL: Entitled or eligible?

2 CHAIRPERSON BATTLE: Eligible.

3 MS. PERLE: For legal representation, as if
4 they were U.S. citizens. There was apparently some
5 discussion about whether that would mean the United
6 States would pay for private legal representation, and
7 the conclusion was, no, that the United States wouldn't
8 have that obligation but, if they were eligible for
9 legal aid, they could get it.

10 CHAIRPERSON BATTLE: Eligible and within the
11 priorities of the program that they approached.

12 MS. PERLE: How are they going to find a
13 program? I don't know the answer to that. But the
14 issue was raised.

15 CHAIRPERSON BATTLE: And the program has to
16 have priorities.

17 MR. TULL: And program where, if they're out
18 of the country?

19 MS. PERLE: Probably where the child is.

20 MR. TULL: I mean, as a practical issue.

21 CHAIRPERSON BATTLE: Where the child is, the
22 jurisdiction or the state where the child is.

1 MS. PERLE: It could be that their relatives
2 who are in the United States, of the parent. But we
3 know that, in fact, that does happen, that children are
4 abducted and then brought to the U.S. to be adopted.

5 CHAIRPERSON BATTLE: All right.

6 MR. McCALPIN: I don't think we're ready for a
7 recommendation.

8 CHAIRPERSON BATTLE: No, we're not. We are
9 not ready for a recommendation on this reg. What I
10 would suggest is that the staff and our stakeholders
11 take this back, look at it in light of the discussion
12 today. You'll have a transcript of this.

13 MS. PERLE: And I think your suggestion also
14 was that, wherever possible, we should simplify the
15 language?

16 CHAIRPERSON BATTLE: Yes.

17 MS. PERLE: Suzanne's only concern about that
18 is that we don't want to simplify it to the point where
19 it suggests that there are major substantive changes
20 that --

21 CHAIRPERSON BATTLE: I understand. My
22 suggestion -- I think I kind of gave a short outline

1 -- let's place the major premise in there.

2 Let's talk about who citizens are. Let's put
3 a list in here so people know, if someone comes in who
4 has a unique origin, that they could pull this rule out
5 and the commentary and figure, "Oh, well, you qualify
6 because you're a U.S. citizen or you're a whatever."

7 You know, let's have something that gives
8 people a way to use this. And I'm not saying to change
9 the language to the point that it doesn't meet what
10 we've got to do, but just make it real user-friendly.

11 Because it's real complex right now, and
12 starting out with that major premise and who U.S.
13 citizens are and that's who we're supposed to serve,
14 rather than ineligible aliens are prohibited from
15 service from legal services as your major premise, I
16 think just helps kind of set the stage for how you
17 handle the rest of it.

18 And, if you think of it in those terms, as you
19 write through it, it might help to make it more
20 sensible.

21 MS. PERLE: Okay.

22 CHAIRPERSON BATTLE: And have it back to me by

1 January 5th.

2 MS. PERLE: Okay.

3 CHAIRPERSON BATTLE: Do your best on this
4 particular one, and we've got an interim rule out
5 there. I really would like to get all of these done,
6 if we can, by the 5th but, if not --

7 MR. TULL: Well, this we do because the
8 Kennedy amendment provisions are new.

9 CHAIRPERSON BATTLE: The interim piece has to
10 go.

11 MR. TULL: I think we do need to act on this
12 quickly, because we're now only under the statute.
13 There's no guidance for a program.

14 CHAIRPERSON BATTLE: That's right. Well, then
15 have it to me by the 5th.

16 Any other questions on the alien reg?

17 (No response.)

18 CHAIRPERSON BATTLE: Hearing none, then we
19 will revisit this at our very next meeting. Why don't
20 we take a lunch break, 45 minutes, and get back?

21 (Whereupon, at 12:14 p.m., a luncheon recess
22 was taken.)

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1 A F T E R N O O N S E S S I O N

2 (1:15 p.m.)

3 CHAIRPERSON BATTLE: We are ready to go on the
4 record. Since I see so many smiling faces, why don't
5 we go home right now, while everyone is still smiling?

6 (Laughter.)

7 AGENDA ITEM NO. 3

8 CHAIRPERSON BATTLE: We have before us this
9 afternoon the final two regulations in our series of 10
10 that we have considered over the last two days.

11 The first is Part 1609, which pertains to fee-
12 generating cases, and the other is Part 1642, which
13 addresses attorneys' fees.

14 In our packet, we received both of these two
15 regulations discussed jointly, in a management review,
16 with a summary of comments and recommendations. So I
17 would like to start our discussion by asking the staff
18 to give us your initial review of what the commentary
19 has been with regard to these issues.

20 Let me also say this, since we have some
21 members of the public here who have not participated
22 before. We tend to take public commentary in tandem

1 with our discussions. So if you have questions that
2 you would like to raise or statements that you would
3 like to make, you may make those statements.

4 First, introduce yourself, so that the court
5 reporter can take your name, and then make those
6 statements, once you're recognized, in tandem with our
7 discussions, rather than waiting for a specific time
8 frame for public comment. Okay? And we do it, as you
9 can see, very informally. Okay.

10 MS. GLASOW: Most of the comments we received
11 on all of the 11 rules that we've been considering in
12 the last two days were focused on these two rules. The
13 main issue is how to deal with Social Security cases.

14 The comments were mixed, even among types of
15 commenters. I don't know that you can draw any
16 specific conclusions from any particular category of
17 commenter, because, for instance, only a few bar
18 associations commented, and we know we have many across
19 the country.

20 However, the comments were very, very helpful
21 and raised a lot of important issues.

22 The first issue that we need to deal with,

1 which would be an issue in 1609 on fee-generating
2 cases, is whether or not recipients need to either
3 attempt referral of Social Security cases or determine
4 whether private representation is otherwise available
5 in their particular service area before they can take
6 these cases.

7 CHAIRPERSON BATTLE: Let me say this, before
8 we get too far. Now, the genesis of this discussion
9 regarding Social Security stemmed from information in
10 the commentary, is that right, because the actual
11 proposed interim rule, or the interim rule, really
12 didn't address this issue directly; is that right?

13 MS. GLASOW: The interim rule would have
14 allowed -- matter of fact, the interim rule continued
15 the --

16 MR. McCALPIN: We don't have an interim rule
17 on 1609.

18 MS. GLASOW: You're correct. It's a proposed
19 rule. the proposed rule would have continued the
20 Corporation's longstanding interpretation of
21 congressional law since 1977 that our recipients do not
22 need to attempt referral on Social Security cases due

1 to an amendment that Congress put into the LSC Act in
2 1977.

3 We are recommending continuing that ,
4 interpretation of that law. We believe that, looking
5 at the legislative and regulatory history of that 1977
6 amendment, that Congress intended to require the
7 Corporation to preclude, so that our guidelines would
8 not preclude recipients from taking these cases without
9 meeting to attempt referral, and I provided you with
10 all the regulatory and legislative history in this
11 memo.

12 We believe we would need legislative direction
13 to change that policy, that Congress intended us to
14 allow recipients to take these cases without first
15 attempting referral, that they specifically provide for
16 that.

17 The language in the LSC Act is somewhat vague.
18 We believe the legislative history is very clear. And
19 then, when you look at the regulatory history, where
20 the Corporation interpreted it concurrently, in
21 essence, contemporaneously with passage of that
22 legislation, it was our understanding at that time and

1 continues to be that recipients do not need to attempt
2 referral.

3 Congress understood this type of case to be
4 one where there was not a strong private bar to
5 represent these cases, that the private bar didn't
6 particularly have the expertise to handle these cases.

7 Some of the comments indicate that that
8 situation is changing out in the country. Other
9 comments say the private bar still has no interest in
10 areas.

11 But we believe, because of the congressional
12 intent behind that 1977 amendment, that we would need
13 -- that it's not necessarily just a policy decision,
14 that we would need some kind of legislative to change
15 that in the rule.

16 MR. TULL: Could I add a staff comment on
17 this? As with all the regulations, we met with the
18 Inspector General's Office and, on this particular
19 issue, they didn't agree with the analysis and did
20 state in the course of our discussions about it, that
21 they thought that a different and better reading of the
22 Act is that the standard which would require referral

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1 was a standard, and not a legislative finding that
2 other assistance is not available -- that private
3 counsel is not otherwise available.

4 They did not feel -- and I'm speaking for them
5 now, and Laurie can correct me if I'm wrong. My
6 understanding of the conversation was they were not
7 deeply invested in that, understand that this is a
8 matter of interpretation and that it is language which
9 was not clear but did state a different view and, just
10 for the record, I'd like to --

11 MS. GLASOW: My understanding is that, as long
12 as we have a reasonable interpretation, they're willing
13 to go along with that, even though they might have come
14 out differently on their own.

15 CHAIRPERSON BATTLE: Laurie, is that accurate?

16 MS. TARENTOWICZ: That's correct. We would
17 have a different legal interpretation of that. But
18 it's a policy decision.

19 CHAIRPERSON BATTLE: Well, it's a reasonable
20 interpretation of what the statute and the legislative
21 history there behind that statute would --

22 MS. GLASOW: And we feel that's the better

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1 interpretation.

2 CHAIRPERSON BATTLE: Okay. And also, with
3 regard to that, there are no recommendations then, as
4 it regards that issue, to change what you have in 1609;
5 is that correct?

6 MS. GLASOW: That is correct.

7 CHAIRPERSON BATTLE: So the proposal before us
8 with 1609 is status quo, as it relates to this issue on
9 referral?

10 MS. GLASOW: Right. Now, the draft we gave
11 you will need to have language deleted.

12 CHAIRPERSON BATTLE: Where?

13 MS. GLASOW: Page 13. I'm sorry. Wrong rule.
14 I'm sorry.

15 MS. PERLE: Let me just say that the only
16 recent legislative guidance we have is in the Kassebaum
17 bill, which the Senate never took up, but it did pass
18 out of the Senate Labor and Human Resources Committee,
19 which said specifically that Section 1007(B) of the LSC
20 Act would be amended to read, "to provide legal
21 assistance with respect to any fee-generating case,
22 except that this paragraph does not preclude

1 representation of otherwise eligible clients in cases
2 in which the client seeks benefits under Titles 2 or 16
3 of the Social Security Act."

4 So the recent congressional statements would
5 support this position.

6 CHAIRPERSON BATTLE: Okay. That's helpful.
7 Are there any other questions about this specific
8 referral issue that we've gotten some input from the IG
9 on, we've gotten a statement about the last at least
10 congressional movement on this issue, and we've gotten
11 what the history has been and what the staff
12 recommendation was? Bill.

13 MR. McCALPIN: There is a tendency, I think,
14 to view this rule entirely in the context of Social
15 Security cases, because those have been the most
16 numerous, those are the issues that have been raised.

17 I think it's fairly clear that the rule in
18 fact goes beyond Social Security cases, which may be
19 fee-generating. And, in that context, I've been
20 looking at 1609.3(B)(2) on Page 12 of the latest
21 version. And we talk about, is one that private
22 attorneys in the area served by the recipient

1 ordinarily do not accept or do not accept without the
2 prepayment of a fee.

3 I think the landscape is changing. We have
4 done some pushing to merge fees, to expand service
5 areas. We certainly have always had some statewide
6 service areas. And I think we know now that situations
7 are different in different parts of a service area,
8 particularly if it's as big as a statewide area.

9 So when we talk about one that private
10 attorneys in the area served by the recipient, we're
11 talking about a whole state, in the case of a statewide
12 program, whereas it may be different in urban areas and
13 rural areas or small community areas of the state.

14 I don't know how we accommodate that. Do we
15 have different outcomes for different sections of
16 state, so that in one point of a state a program may be
17 permitted to represent a client in a fee-generating
18 case whereas, in another part of the same state, it may
19 not?

20 MS. PERLE: I think that would not be an
21 unreasonable outcome. I mean, our priority statement I
22 believe says that you can have different priorities for

1 different parts of the service area. You can have
2 different priorities for different parts of the service
3 area.

4 CHAIRPERSON BATTLE: I took Bill's question to
5 mean, in part, that can you justify taking a case
6 because you sent a letter to someone in Mobile and they
7 don't take it down there, but your area is the entire
8 state, and the case originates in Birmingham.

9 MR. McCALPIN: Yes.

10 CHAIRPERSON BATTLE: And I think that one way
11 to address that is with a further description of what
12 "area" means, and "area" means the area generally
13 established where attorneys would seek to take cases.

14 Because I have a firm, for example, in
15 Birmingham -- I'm using Alabama as an example because
16 I'm familiar with it -- and we take clients -- I've had
17 clients in Huntsville, I've had clients in Delta
18 before.

19 So we have taken cases all over the state, but
20 not every lawyer does. And not every area of the state
21 ultimately ends up being serviced by a firm in one
22 particular area.

1 But I do think we might want to illumine, in
2 the commentary that, because of the changes that have
3 happened with our programs, some further definition of
4 what "area" is, so that it is interpreted in a
5 reasonable way when making a determination as to
6 whether there are attorneys in a particular area that
7 would take the case.

8 MS. PERLE: You might facilitate that by
9 adding an "s" to "area." Say, "in the areas served."
10 And that makes it clear that there may be more than one
11 area.

12 CHAIRPERSON BATTLE: Well, I see it the other
13 way. I see us as attempting to be reasonable about
14 where you do your search for availability --

15 MS. PERLE: I agree.

16 CHAIRPERSON BATTLE: -- as it relates to the
17 client.

18 MS. GLASOW: That could be confusing, because
19 a recipient may have one or two service areas versus
20 one big area, where we're trying to ask him to kind of
21 consider areas within the area.

22 CHAIRPERSON BATTLE: That's a commentary

1 issue, it seems to me.

2 I think that addressing the fact that now
3 there's a different landscape, our programs have, in
4 some instances merged, we need to be sensitive to how
5 you interpret "area," so that it is reasonable in the
6 context of who is available to serve that client.

7 The other concerns about the specific issue or
8 referral in 1609. The issue was raised and has
9 continued for some time on whether recipients can take
10 fees from clients in the social security cases. We
11 looked at the restriction on attorneys fees in Part
12 1642, and our definition of attorneys fees, an award
13 which we recommend continuing with, does not include
14 social security fees, so we do not believe that
15 legislatively Section 504(a)(13) of the Corporations
16 Appropriations Act applies to social security fees.
17 And so we would not change that. We don't feel that
18 that provision prevents recipients from taking fees in
19 social security cases.

20 However, we are concerned about the LSC Act.
21 In a situation where it only authorizes LSC-funded
22 legal assistance to be provided free of charge, and

1 I've provided you with the legislative history in the
2 LSC Act because the LSC Act uses the terms "unable to
3 afford," and it has been a longstanding interpretation
4 by the Corporation that the LSC Act language, based on
5 its legislative history, in our view, implies very
6 strongly that LSC-funded legal assistance is supposed
7 to be provided free of charge, and that has come out in
8 a variety of ways historically in the Corporation.

9 Although we've never done a regulation on it,
10 it's been mentioned in three of our annual reports and
11 the LSC opinions that have been provided to particular
12 grantees when they have asked the question, and I know
13 that this board has been grappling with it for several
14 board meetings on regs that we had to take over
15 sometimes because the law --

16 MS. BATTLE: Let me unravel what you just
17 said. The first piece has to do with 1609.3, the
18 general requirement contained in (b)(1), which gives an
19 exception to the fee-generated-case referral issue, and
20 what you're saying is that (b)(1) is still vital after
21 your review of 504.

22 MS. GLASOW: Yes. It doesn't affect this rule

1 at all as to whether we can take fees.

2 MS. BATTLE: Okay, okay.

3 MR. McCALPIN: (B)(1) doesn't have anything to
4 do with fees.

5 MS. GLASOW: That's right. We moved the whole
6 fee issue over to 1642.

7 MR. McCALPIN: To 1642. Right.

8 MS. GLASOW: So we should now be looking at
9 1642. And 1642 only deals with attorneys fees, and our
10 reading of the attorney fee restriction is that it does
11 not include taking fees from social security cases
12 because "attorneys fees" is not defined as including
13 fees from the social security cases because it's
14 basically client money and it's not an attorney fee as
15 we defined it here.

16 MS. BATTLE: Okay. Now, with that, are there
17 any changes to -- you've got language in 1609.3(c), --

18 MS. GLASOW: Yes.

19 MS. BATTLE: -- and that is based on a change
20 we made to 1642, and unless you adopt the change in
21 1642, we're going to need to delete this from 1609.

22 MR. McCALPIN: I would strongly urge you to

1 delete it.

2 MS. BATTLE: Okay. Let me hear from the other
3 board leaders. This, this --

4 MS. GLASOW: It's simply a reference to 1642.

5 MS. BATTLE: It's a reference to 1642, and
6 until we get to 1642 really we've got to make a
7 decision about what we're going to do, and we've got
8 one board member who says -- advises us to delete it.

9 MS. GLASOW: Right.

10 MS. BATTLE: Do we have any other reactions
11 from any of the other board members?

12 MS. WATLINGTON: Is this saying that no fees
13 should come from the client?

14 MS. BATTLE: Yes. Well, it's saying that this
15 issue will be resolved in 1642, and part of the dilemma
16 is that 1642 deals with attorneys fees which don't come
17 from a client. Attorneys fees are awarded by a court,
18 and they come from the other side. So there is a
19 question as to whether this is an appropriate reference
20 in any assistance because we really don't deal with the
21 issue of fees coming from clients in 1642.

22 MS. MERCADO: What we really need to do in

1 order to not get that confusion is to just delete that
2 part that says the charge is --

3 MR. McCALPIN: If we don't deal with it in
4 1642, then there is no point to refer to it.

5 MS. GLASOW: That's correct.

6 MS. BATTLE: So it needs to come out.

7 MR. TULL: Well, the proposed 1642 does deal
8 with it, and we haven't yet talked about 1642, so I
9 understand from those comments that you assume we might
10 be changing 1642. But 1642 as proposed in the draft
11 you have in front of you does relate both now to
12 retaining -- to attorneys fees and to fees charged to
13 the client.

14 MS. GLASOW: In 1642, we were trying to deal
15 with the issue that the attorneys fees section doesn't
16 deal with taking fees from clients, the Fee Generating
17 Rule doesn't deal with taking fees from clients
18 anymore, so where do we put the issue of whether or not
19 we can take fees from clients? And we decided if we
20 put it anywhere, it's in 1642, and so we did provide
21 provisions in case you wanted to do that in 1642, but
22 it is a separate issue. And to do that, we would have

1 to change the scope of 1642 and add a title, indicating
2 something other than the attorneys fees, and we would
3 have to add extra provisions. We've done that, but
4 whether that's the way you want to go is at issue.

5 MS. MERCADO: Or you have it under attorneys
6 fees and fees from the client as being entitled with
7 1642, the addition to that, --

8 MS. GLASOW: That's right.

9 MS. MERCADO: -- and then you added the
10 applicability --

11 MS. GLASOW: Added a sentence in the Purpose
12 section and then at the bottom of page 16 we added a
13 new section.

14 MR. McCALPIN: Are we dealing with 1642 now?

15 MS. BATTLE: Yeah. Well, I tell you what, we
16 can, it seems to me, table this issue because it will
17 either stay in or go out, depending on how we resolve
18 the issue in 1642. So let's do this. With the
19 exception of this one issue, are there any other
20 questions about 1609? Let's just skip that one not
21 completed.

22 MR. McCALPIN: I have some suggested editorial

1 changes, which I'll pass on to you.

2 MS. BATTLE: Okay.

3 MR. McCALPIN: There's no point in taking
4 everybody's time up with it. There will still be some
5 slight modification of words and description --

6 MS. BATTLE: Well, we enjoy hearing -- that's
7 fine, Bill. That's right. And Bill will get with you
8 on the editorial changes. Anything else? I want to
9 take the substantive issues relating to 1609. Are
10 there any questions about it? Anyone from the public?
11 Okay. Are we through with 1609? We can make a
12 decision, I think -- we'll see if we can on both of
13 these at the same time rather than taking them one at a
14 time.

15 AGENDA ITEM 4 (1642)

16 MS. BATTLE: Let's move on, then, to 1642,
17 Attorneys Fees, and we have a proposal from management
18 that we add "and fees from clients." We have a
19 proposal from management that we add to the title "and
20 fees from clients," and we need to hear from the staff
21 on that.

22 MS. GLASOW: Again, we believe the LSC Act

1 very strongly indicates as interpreted in flight of its
2 legislative history and longstanding Corporation
3 interpretation of that Act, that Congress intended LSC-
4 funded legal assistance be provided free of charge.
5 And whether this rule is the appropriate place to do
6 that or not to get that interpretation across, I'm not
7 sure we feel that strongly on that issue, but if you do
8 want to put it in this rule, we've provided provisions
9 for that.

10 It's a very strongly felt issue. The comments
11 were very well written, I think, in the sense that they
12 really outline all of the policy and legal issues that
13 needed consideration. We fully considered all of the
14 comments on it, and we just bring it to the board for
15 your decision on this issue.

16 MS. BATTLE: I'm going to reverse our
17 discussion for just a minute. I'd like for us to
18 handle all of the issues that pertain to attorneys
19 fees, not fees from clients, first, --

20 MS. GLASOW: Okay.

21 MS. BATTLE: -- just the provisions of
22 attorneys fees so that we can go through the reg and

1 clear up any concerns that there are about what was in
2 place before this new proposal by management.

3 MS. GLASOW: Actually, very few changes on
4 those provisions dealing with attorneys fees. We
5 generally recommend adoption of what was in there. We
6 restructured a few areas. We added paragraph (c) to
7 the definitions -- (c) to the definitions, which really
8 just moved some provisions over from another section in
9 the Interim Rule. What we tried to do was define what
10 an attorney fee is not in paragraph (c) of Section 2.
11 (C)(1) was just moved from another section in the
12 Interim Rule.

13 MS. BATTLE: Is it word-for-word essentially
14 what was in the other section?

15 MS. GLASOW: I think so. It's just a
16 stylistic change just to make things parallel.
17 Basically, this is payments made to recipient employee
18 for a case in which -- it's a court appointment.

19 MS. MERCADO: But I was trying to figure out
20 what other provision that was in before?

21 MS. GLASOW: It's (c)(1) on page 15.

22 MS. MERCADO: Okay.

1 MS. GLASOW: (C)(2) is new.

2 MS. MERCADO: It was in the previous --

3 MS. PERLE: It was, I think, in the
4 Prohibitions section of the old --

5 MS. GLASOW: Page 16. Do you see where it's
6 crossed out?

7 MS. BATTLE: Page 16. It would be (c)(2). So
8 we did reword it just a little bit to make the language
9 parallel.

10 MS. PERLE: The purpose of doing it this way
11 was we had mixed together in the Interim Rule those
12 things which really were not attorneys fees with those
13 situations where the attorneys fees restriction was
14 simply not applicable, even though it was an attorneys
15 fee. So we felt that they need to be separated so that
16 it would be clear that these are things that under any
17 circumstances you just don't consider them attorneys
18 fees as opposed to the few other situations.

19 MS. MERCADO: I think that makes it clearer.

20 MS. GLASOW: I'm now back on page 15.

21 MR. McCALPIN: Oh, okay. You're still on (c)?

22 MS. GLASOW: Yes. Paragraph (c)(2) is a new

1 paragraph that we are recommending adding to the rule.
2 We want to clarify the payments made by a governmental
3 agency or other third party through a recipient or an
4 employee recipient for representation of clients is not
5 an attorney fee. So if you're doing another government
6 grant or contract for a program or project, that's not
7 an attorney fee.

8 MR. TULL: And under some arrangements that
9 programs have, the payment from the state agency is
10 based on representation of a client in a particular
11 matter prevailing in that, so it has more of a look or
12 feel when you first look at it as something that might
13 be like a fee paid to the client, but it's clearly not.
14 It's something else, and we felt it was important to
15 verify that.

16 MS. BATTLE: Okay. Three comes from (3) under
17 (c) (3).

18 MS. GLASOW: Yes, and (c) (3) was moved from
19 the old (c) (3), and we've added something.

20 MS. PERLE: Well, I would like to suggest that
21 we add something. We did add something. We added that
22 statute. Under the previous (c) (3), is a section

1 opposed by the court for violations of the court rules,
2 including Rule 11 of the discovery rules or similar
3 state court rules, and was brought to our attention to
4 comments that in some places those are violations and
5 not statement through court rules but through statutes.

6
7 And then since the comments were received,
8 some people have brought to my attention that there are
9 situations where the court will impose a sanction on
10 the opposing party, which is really based on common-law
11 principles that are not stated in court rules or
12 specific statutes and that we should, in my view, we
13 should state those kinds of sanctions or things that
14 are in the nature of a sanction which are imposed as a
15 result of common-law principles should also be
16 excluded. So I had made that suggestion, and I'm not
17 sure how the staff feels about it.

18 MR. TULL: We didn't have an objection to it
19 other than an uncertainty that there was such a thing
20 as a common-law sanction, since a sanction is in the
21 form of a punishment and whether you can have such a
22 thing in common law -- it really was a matter of not

1 wanting to put something into the rule we weren't sure
2 existed and --

3 MS. BATTLE: What about court rules, practice,
4 or statutes?

5 MS. MERCADO: Because in the practice we'll go
6 into the common-law practice and common-law --

7 MR. MCCALPIN: It says "court practice."

8 MS. PERLE: Relating to the court practice.

9 MS. MERCADO: No, no. It's relating to court
10 practice. In other words, if the court says that in
11 the practice the defendant has done something for which
12 they should be sanctioned. That's what that's intended
13 to do. I think if you say --

14 MS. BATTLE: -- "court rules, practice, or
15 statutes," you can take out "related to" --

16 MS. PERLE: Well, I think it's "court rules or
17 practices or statutes," because they are not court
18 statutes.

19 MS. BATTLE: Okay. "Court rules or practices,
20 or statutes."

21 MS. PERLE: "Violations of statute, court
22 rules, or practice." Why don't you say "statutes,

1 court rules, or practices"?

2 MS. BATTLE: Okay.

3 MR. McCALPIN: Why don't you just put the
4 court rules or practices or statutes, just put -- if
5 you're going to do two things related to modified by
6 court, put them together.

7 MS. BATTLE: "Court rules or practices, or
8 statutes relating to" whatever.

9 MS. PERLE: I think that that gives enough
10 discretion in terms of how to interpret that.

11 MS. BATTLE: Rule 11 raises an issue for me
12 that we may need to discuss a little bit, and I know
13 that this was in our earlier draft. I have had judges
14 to sanction the other side when I've had to fly out of
15 town to do a deposition and they are supposed to have
16 documents, and I get there and they have no documents
17 and I have to fly back home to file something where the
18 court said, you pay her flight back up there to go get
19 that. And I've also had judges who say not pay her
20 expenses, but you pay her for her time to fool with
21 this.

22 Now, that is a sanction, but it also dovetails

1 back into an award once I turn in my statement of what
2 my time has been on that. And have we cut this in a
3 way that what we're saying that the court orders to do
4 somebody to do something as punishment, that's
5 different from saying that you have succeeded in your
6 case. Is that the thought that was done on this?

7 MR. TULL: Yes.

8 MS. PERLE: I mean, I think that that
9 situation is not dependent on whether you win or lose
10 ultimately in the case.

11 MS. MERCADO: That's right.

12 MS. PERLE: And I don't know when it's
13 actually paid. It may not be paid until the end of the
14 case. I don't know. It's paid right away, isn't it?
15 And I think the purpose of putting this in was --

16 MR. McCALPIN: Unless there is an appeal.

17 MS. PERLE: I mean, if the purpose of putting
18 this in and making it explicit was to make it clear
19 that even if the court says, we want you to pay your
20 attorneys fees for this thing, it's still a sanction,
21 and it's not the attorneys fees that were intended to
22 be covered by the restrictions.

1 MS. BATTLE: Okay. Anything else on these
2 changes? Okay.

3 MR. McCALPIN: I have a question and a
4 suggestion. In paragraph two, "payments made by a
5 governmental agency or other third party," this is not
6 parallel to the provision in 1609.2, and I wonder if
7 that is deliberate because 1609.2, at the top of page
8 12, it talks about under a contract with a government
9 agency or other entity, and there is no reference to
10 contract in here. And I just wondered if that
11 difference was intentional or if there is a meaning to
12 the difference.

13 MS. MERCADO: It says "representation of
14 clients," which one assumes that you have a contract.

15 MR. TULL: Oh, yeah. It was not intentional.
16 It was not intentional. There was no intended
17 difference in meaning. It could certainly mean --

18 MS. PERLE: Well, I think that there are
19 situations where you may not have a specific contract.
20 There may just be a program where if you did it, you
21 get paid.

22 MR. TULL: Do you mean anybody who does?

1 MS. PERLE: Anybody who does it, and I think -
2 - in the fee-generating case provision, I think that
3 there was some sense that maybe in that situation that
4 is considered to be a fee-generated case, whereas --

5 MR. McCALPIN: It does not include.

6 MS. PERLE: So it isn't included in there.

7 The contract reference is in 1609, --

8 MR. McCALPIN: Yeah.

9 MS. PERLE: -- not in here, and it's not in
10 here because if you do it, you should be able to get
11 paid on the same basis as anybody else. It's not an
12 attorneys fee under our definition.

13 MS. BATTLE: Give me an example of that so I
14 can see the distinction.

15 MS. PERLE: I'm trying to recall. There are
16 certain situations -- in a social security case -- we
17 have some situations where programs have a contract
18 with the state to do these cases, but there are other
19 states where there is no specific contract with the
20 attorney that's doing it; there is a program where the
21 state says, if you take these cases, anybody -- you,
22 private attorney; you, legal services program, whatever

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1 -- and you take the case, we'll pay you.

2 MR. McCALPIN: Well, then, should you leave
3 "contract" in 1609?

4 MS. PERLE: Well, the question is -- I
5 wouldn't have any terrible objection to taking it out -
6 - the question is whether that is -- then is that a
7 fee-generated case?

8 MS. BATTLE: You're saying -- the question is,
9 is it a fee-generating case, or is it an attorneys fee?
10 And we're saying clearly there are a lot of things that
11 if you don't get paid by the side that's losing a case,
12 it's not an attorneys fee, so you've got a different
13 sphere that you're looking at under the attorneys fee
14 provision.

15 "Fee generating" means I get paid for this.
16 It doesn't specify who is paying me, but I'm getting
17 paid for this. And so it seems to me that you're
18 looking at a different issue when you say, I'm getting
19 paid for this, as opposed to whether or not it's an
20 attorneys fee.

21 MS. PERLE: That's right. And that's why
22 there is a difference, but you can make them the same.

1 Just don't put in "contract" in the --

2 MS. BATTLE: Well, it's not an attorneys fee.
3 An attorneys fee is getting paid by anybody other than
4 the guys on your side --

5 MR. McCALPIN: An attorneys fee is getting
6 paid by the people on the --

7 MS. BATTLE: Well, I'm saying the exclusion
8 here is a larger sphere because as long as it's not
9 coming from --

10 MS. PERLE: And that's why there is a
11 difference, but it may be a difference without any
12 significance.

13 MR. McCALPIN: Okay. Then my suggestion --
14 and this goes -- will be what you raised a while ago.
15 It says attorneys fees do not include sanctions. There
16 is no way that an attorney can include a sanction; it's
17 a payment received as a result of sanctions imposed.

18 MS. MERCADO: What line are you on?

19 MR. McCALPIN: Three.

20 MS. MERCADO: Okay. So how would it read,
21 though?

22 MR. McCALPIN: "Payments received as a result

1 of" --

2 MS. MERCADO: -- "sanctions imposed by."

3 MR. McCALPIN: -- "sanctions imposed by."

4 MS. BATTLE: So it should be payments,
5 payments, payments, reimbursements.

6 MS. MERCADO: Right.

7 MS. BATTLE: Okay. Good.

8 MS. PERLE: But do you have a concern about
9 Number 2? Is there any change you want to make either
10 in Number 2 of 1642 or the comparable one in 1609?

11 MR. McCALPIN: I don't know. Maybe you had
12 pointed out that there is a difference in the two
13 situations which warrant a difference in the language.
14 It wasn't immediately apparent to me when I read it,
15 and I wondered why there was the difference in
16 treatment between two relatively comparable provisions.

17 MS. MERCADO: Maybe if you have something in
18 the comment that would distinguish that somehow as to
19 why one has one and the other one doesn't. I mean, if
20 you think that's even necessary.

21 MS. PERLE: Maybe programs sponsored by a
22 governmental agency.

1 MS. GLASOW: We're concerned with Number 2
2 under (c)(2).

3 MR. TULL: Back to page 15, (c)(2). The issue
4 you raised a minute ago.

5 MS. GLASOW: What we're trying to cover with
6 (c)(2) is the situations where you're under contract or
7 grant of a governmental agency, and through that grant
8 or contract agreement you take particular cases or
9 types of cases, and the government pays you.
10 Therefore, you're not taking these clients in essence,
11 and its another grant program. This doesn't
12 necessarily say that.

13 MR. TULL: Well, I think the problem with the
14 language is it's not intended, but if you read it
15 literally and take out the third-party language, it is
16 payments made by a governmental agency to a recipient
17 or employee for representation of a client.

18 MS. PERLE: If the government is a defendant.

19 MR. TULL: So, yes, it could be read to
20 encompass the very thing that this regulation --

21 MS. BATTLE: Under a grant or contract.

22 MS. PERLE: But it could be a program other

1 than a specific grant or contract, so why don't we say
2 something like made by a government agency or under a
3 grant, contract, or other program for --

4 MS. GLASOW: Pursuant to a government --

5 MS. PERLE: -- grant, contract or program --
6 something like that.

7 MS. MERCADO: But I don't think that you can
8 make it solely be a governmental agency because there's
9 other --

10 MS. PERLE: Well, there's other third party.

11 MS. MERCADO: John was taking it out, though.

12 MR. TULL: No, no. I was just saying if you
13 read it without that language, then it would actually
14 encompass what the rule covers.

15 MS. BATTLE: Why not grant, contract, or
16 program by a governmental or other third party? In
17 other words, you need that qualifying language to apply
18 to a third party as well as to a governmental entity.
19 So you need to structure it that way. You don't want
20 to have it all qualify the governmental agency and
21 leave the third party out there.

22 MS. GLASOW: Grant, contract, or other program

1 --

2 MS. BATTLE: Make it apply to both.

3 MS. MERCADO: If you have the language of
4 grant, contract, or whatever.

5 MS. PERLE: Or other arrangement.

6 MS. MERCADO: Or other arrangements, yeah,
7 whatever the term.

8 MS. BATTLE: I like arrangement.

9 MS. PERLE: That may include settlement.
10 Well, we'll figure it out.

11 MS. BATTLE: Work on it. You understand the
12 intent.

13 MS. PERLE: Yes, yes, we do.

14 MS. BATTLE: Work on that. Anything else?
15 Anything else? Does that cover everything we've done
16 to 1642 on the attorneys fees?

17 And what about the language that's stricken?
18 We had gotten an explanation as to why --

19 MS. GLASOW: Most of that was transferred.

20 MS. BATTLE: I don't see the word "PAI,"
21 except as permitted by paragraph (c).

22 MS. GLASOW: That's on page 17 now. This was

1 the Applicability section.

2 MS. BATTLE: Okay.

3 MS. GLASOW: We put some of that in
4 Applicability and some in --

5 MS. BATTLE: I got you. Okay.

6 MS. GLASOW: Attorneys fees is not.

7 MS. BATTLE: Okay. All right.

8 MS. PERLE: And the only other thing that we
9 were talking before that we might want to put in the
10 comments some discussion of what reimbursement covers,
11 reimbursement for the costs and pocket expenses, just
12 to make it clear that that doesn't cover attorneys,
13 fees for attorneys' time.

14 MS. BATTLE: Yeah. That's right. Okay.
15 Anything else? Any other questions about -- Mike?

16 MR. MILLEMANN: Just a clarification. Leaving
17 aside the second language which we're about ready to
18 come to, the second set of language, --

19 MS. MERCADO: What page are you on?

20 MR. MILLEMANN: Well, I'm talking generally
21 now about beginning on page 14. My question is this:
22 As I understand this regulation, prior to the addition

1 of the additional restriction, it would allow a legal
2 services program to keep -- call it what you will -- a
3 payment or a fee from a percentage of a lump sum social
4 security order. Right or wrong?

5 MR. McCALPIN: Correct, (c)(1) 1609.5.

6 MR. MILLEMANN: (C)(1)? Say that again?

7 MS. PERLE: 1609.5 is what -- suggested.

8 MR. McCALPIN: 1609.5 is the regulation.

9 MR. MILLEMANN: What I'm looking for is in the
10 language that you have, (c)(1) on page 15, would that
11 language include the section on property?

12 MS. PERLE: No. There is nothing in the rule
13 that affirmatively states that fees are in social
14 security cases. The reason it permits it is because
15 they are not included in the definition.

16 MR. MILLEMANN: Of what?

17 MS. PERLE: Of attorneys fees.

18 MR. TULL: The 1642.2(a) which defines
19 attorneys fees made pursuant to common law or federal
20 or state law does say fee shifting.

21 MR. MILLEMANN: Thank you. I've got it.

22 MS. GLASOW: Basically, without additional

1 language, this rule does not reach the issue of taking
2 fees from clients in social security cases.

3 MS. PERLE: You know, if there was a decision
4 affirmatively, you know, if we wanted to make an
5 affirmative statement on policy, it would be
6 appropriate to put it on page 15 under (c) as Number 5
7 or whatever, if you wanted to make that kind of
8 affirmative statement.

9 MR. McCOLLISTER: Question. Roger
10 McCollister.

11 MS. PERLE: Roger?

12 MR. McCOLLISTER: I'm lost because it's the
13 first time I've seen this. What is the impact of this
14 on social security fees or fees of any other character?
15 Is this for people they are talking about regarding
16 permitting taking those with non-LSC funds? I'm at a
17 loss. What is the impact on taking Title II social
18 security fees of your proposal, the staff's proposal?

19 MS. GLASOW: If we continue this rule the way
20 it was published, the Interim Rule with the few changes
21 we just now discussed, this rule does not deal with
22 that issue other than it's clear that social security

1 fees are not included within the definition of
2 attorneys fees for the purposes of this rule. So this
3 rule does not include if adopted without additional
4 language, taking social security fees because it's not
5 included within the definition of attorneys fees. I
6 said if we don't add the additional language.

7 MS. MERCADO: Where you do have it, though, is
8 in 1609.3(b)(1).

9 MR. McCALPIN: Say that again.

10 MS. GLASOW: But that's dealing with the
11 referral, but it's the fee-generated aspect, though.

12 MR. McCALPIN: 1609?

13 MS. WATLINGTON: Yeah, but it doesn't address
14 the question of whether you can take fees, though.

15 MS. MERCADO: But you don't have to refer to
16 the math, which I guess conversely means you can keep
17 them.

18 MS. GLASOW: Fee generating is much broader
19 than attorneys fees. And the only thing that the Fee-
20 generating Rule deals with is whether you can take
21 these cases without referring them out to the private
22 bar first, whether you can take the case or not. And

1 fee-generating cases would include a broader type of
2 case. Some of them would be cases with social security
3 or other types of cases, but that's all that rule deals
4 with.

5 Now, the issue comes up, can you take fees?
6 In 504(a), whatever, says we can't take attorneys fees.
7 We've defined attorneys fees in Part 1642 as only being
8 fee shifting where the losing party pays the winning
9 party. That does not include social security fees
10 because those are fees from clients. So as published
11 as an interim rule, the rule did not deal with that
12 issue.

13 The comments raised the issue, and we asked
14 for comments on that in the commentary Part 1642
15 because at that time people were asking us, please
16 don't define these inside the definition of attorneys
17 fees for the purposes of the new legislative
18 restriction.

19 We don't read the legislative restriction as
20 including social security fees, so the issue comes up
21 that whether -- I mean, that raises the issue, which I
22 think everyone is here for, can recipients take fees

1 from clients? We read the LSC Act as raising a very
2 strong interpretation of legislative history as saying
3 that we are supposed to provide with LSC funds free
4 legal assistance, and that's the next issue, in
5 essence, that's before this committee and whether, one,
6 it wants to deal with that issue in 1642 or not and
7 then how they will deal with it.

8 MS. WATLINGTON: Doesn't 1642.6(a) deal with
9 it?

10 MS. GLASOW: Well, we did add some language in
11 here to deal with it, but it was not in the Interim
12 Rule, so now the issue that is before you is, do you
13 want to build that kind of language in here? I've sort
14 of summarized our legal analysis. Maybe this would be
15 a good time for visitors to --

16 MS. BATTLE: Bill is going, "me, me first."
17 Okay. We're -- the board with regard to this issue,
18 and I think that Suzanne has carefully laid out to us
19 how this issue comes to us so that we're clear about
20 it. Number One, this is a new issue; it was not
21 included in the original Interim Rule that we
22 published. So to the extent that we are giving any

1 consideration to this, this is the first instance in
2 which this language will have been made public. If we
3 do adopt it, it has to go out as an interim rule, it
4 seems to me, because even though people raised the
5 issue, it was not envisioned in the language that was
6 contained in the original publication. Bill?

7 MR. McCALPIN: In my judgment, 1642, as it is
8 before us, fatally flawed for at least two reasons.
9 First, I think it proceeds, as I have maintained
10 consistently for several years in this discussion, on
11 an unjustified interpretation of the Legal Services
12 Corporation Act over the years by the Office of General
13 Counsel. I don't think the opinions rendered by that
14 office over the years are justified as a legal matter.

15
16 I think that it is entirely possible to
17 construe the Legal Services Act by its terms as it
18 would be in a court of law without any finding of
19 ambiguity and thus resort to supplementary assistance
20 in the construction, interpretation of the statute. I
21 don't think it's warranted. I recognize, however, that
22 we are not dealing with interpreting the statute in a

1 court of law, that we are living in kind of a magic
2 kingdom where things are not always what they appear to
3 be, and that the interpretation might be made by others
4 by members of the judiciary used to dealing with these
5 matters as a matter of law.

6 But, in my judgment, even if you resort to the
7 legislative history of the Act, it is inconclusive on
8 the subject, and I think that we have begun to see that
9 for the first time when we have begun to see a
10 different analysis of the Act and the legislative
11 history in some of the comments that have come to us in
12 the last 10 days or so, not as a result of anything
13 published, but as a result of your memorandum which I
14 circulated to other people.

15 I don't think that the Office of General
16 Counsel properly construes or interprets the Legal
17 Services Corporation Act as they say, and for that
18 reason, I think this regulation is flawed.

19 Secondly, but I think easier to demonstrate,
20 is the fact that we have never given any notice of the
21 breadth and reach of what is proposed in 1642.1 or
22 1642.3(b). All of the discussion, all of the

1 publications have been in terms of contingency fees in
2 social security cases. And what you would say here is
3 not just fees in social security cases, but in those
4 cases in a representation funded by LSC money, may any
5 charge ever be made that goes against a client. You
6 would not even authorize what Legal Aid in Chicago did
7 in the depth of the Depression in the 1930's and charge
8 clients 25 cents for representation. You would bar
9 that under the interpretation that you have here.

10 No notice has ever been given as to that. It
11 violates every fundamental tendency or rule making to
12 put out a regulation which has not had notice given or
13 opportunity for comment. It is fatally flawed, in my
14 judgment, in that respect. I just don't think you can
15 possibly -- and I don't think you can adopt it as an
16 interim rule because the basis on which we adopted
17 interim rules early on was that they were mandated by
18 the Appropriations Act, --

19 MS. BATTLE: You may be right about that.

20 MR. McCALPIN: -- 504 and so on.

21 MS. BATTLE: Yeah.

22 MR. McCALPIN: There is nothing in that Act

1 which would mandate prompt adoption of a rule on this
2 subject. This is a subject which has been around for
3 years. We've been debating it for more than two years.

4 MR. TULL: I heard your reference to "interim"
5 as inadvertent. You meant published --

6 MS. BATTLE: You meant proposed, yeah,
7 proposed.

8 MR. McCALPIN: Sure. As a bare minimum, if
9 anything like this is undertaken by this corporation,
10 it has to be published for comment. The first notice I
11 had of it was in the memorandum of November 21, when it
12 was suggested that it might be included in the preamble
13 to a rule or in a program letter.

14 The last option is simply not available. It
15 is not within the authority of staff to publish this
16 kind of policy, which is so controversial, which is
17 contrary to 1609.5, which is still on the books, and
18 has not had any public viewing.

19 Let me see. I have one other basic difficulty
20 with what you're doing. Let me see how to say it. As
21 I understand it, you are saying that a program can take
22 a contingent fee in a case, social security or

1 otherwise, which is not funded to the LSC, not funded
2 by any funds coming from us, but that it may not take a
3 fee from a case which is supported by funds received
4 from this corporation.

5 You interpret the Act as precluded programs
6 from taking a fee in a case funded by the Legal
7 Services Corporation. On page -- I think it's nine of
8 your memorandum, you say that the sections of the Act
9 limiting legal assistance to free legal assistance are
10 not prohibitions. I suggest to you that that is sheer
11 sophistry. You can't say you can't do it but it's not
12 a prohibition; and if it is a prohibition, then you
13 can't use private funds either under Section 504(d)(1)
14 of the Appropriations Act.

15 The program would have to notify the supplier
16 of the private funds that they could not be used for a
17 use which is not permitted under the Act. And if you
18 can't fund a social security case under the Act, then
19 you can't use private funds either under 504(d)(1).

20 So I think that you are inconsistent in
21 suggesting that you can fund these -- that you can't
22 receive a fee for anything funded by the LSC, but you

1 can receive a fee from something otherwise funded I
2 think is contrary to the Appropriations Act. I think
3 that this regulation has got to go back to the drawing
4 board.

5 MS. GLASOW: May I make a couple of before
6 comments? The memorandum you're discussing is a draft,
7 and much of it has been revised as the final. I don't
8 disagree with your second point on that there may be a
9 need to publish this, and we have been discussing that
10 because it is a new issue and it doesn't necessarily
11 belong in 1642 and may need to go out for public
12 comment because it is a new issue.

13 And when I was saying that provision of legal
14 aid under LSC funds, that the LSC Act authorizes only
15 the provision of legal assistance, it's provided free
16 of charge, and it's not prohibited, what I meant is
17 it's not a prohibited purpose under Section 1010(c) of
18 the LSC Act because the corporation has defined what
19 prohibited purposes are, so it's the difference between
20 being a prohibitive purpose that then reaches a
21 recipient's private funds and just being beyond the
22 statutory authority of a corporation to do a particular

1 activity or something.

2 So that's where I was making that -- I was
3 distinguishing between that. So it's a prohibited
4 purpose for the purposes of 1010(c) of the LSC Act, not
5 that it doesn't preclude doing something.

6 MS. WATLINGTON: When this first came about, I
7 questioned it because I didn't understand it then. I
8 have a better understanding now because those clients -
9 - I am very much opposed to monies coming from the
10 clients as the Legal Services Act is supposed to be,
11 but the monies that's not coming from the clients,
12 that's a different story.

13 So I remember when this first came up, I
14 brought that out then because I wanted a clarification
15 because I knew in Pennsylvania that we did get those
16 monies, but it's not the monies from the clients but
17 from the welfare department, their monies; that's where
18 money -- it's in a contract when they provide these
19 cases, service to these clients.

20 And I don't know, you know, the legality of
21 the rules and laws, but I've always interpreted that a
22 legal services program is supposed to provide service

1 to clients without a fee.

2 MR. McCALPIN: Let me make it clear what my
3 position is. I am not advocating that we do anything
4 which would cause a program to charge a client. My
5 view is that the LSC Act leaves that issue open for a
6 determination at the local level by the local board in
7 the light of the conditions prevailing there. I am not
8 in favor of doing anything to make it appear that we
9 want to charge a client, but I think that is within the
10 prerogative of the managers of the local program, and
11 some will, and some won't.

12 MS. MERCADO: And some have.

13 MR. McCALPIN: And some have.

14 MS. MERCADO: I'm sorry. If I can, I think
15 Roger's hand was up a minute ago.

16 MR. McCOLLISTER: Madam Chair, the field has
17 come to give their comments, and they came to give
18 comments on the published regulations. We've had
19 considerable discussions externally on this. As a
20 matter of fact, at the NLADA Convention there was a
21 rules meeting of PAG, which I was at and Ms. Perle was
22 at, and the PAG Rules Committee, the consensus was to

1 come here and support the regulations as published.
2 The staff and apparently Ms. Perle's version that
3 you've got here is totally new to us in the field. We
4 have come here -- excuse me, Ms. Perle.

5 MS. PERLE: It's not my version.

6 MR. MCCOLLISTER: We have come here today to
7 respond to what's published, and we have testimony, and
8 we'd like to respond to it. I totally agree that we
9 are at a loss to be able to debate the new proposed
10 changes which are just now being given to us. And so
11 we would very much like to table that and be able to
12 respond to what we traveled two days to get here for,
13 some from Arizona, Kansas -- we have a client
14 representative.

15 MS. BATTLE: That gets me to where I am. I
16 hear what you're saying, Roger, and I do have some real
17 serious, deep, and immediate concerns. Some have been
18 expressed by Bill about us at this juncture in large
19 measure because what we are attempting to do with this
20 entire group of regulations is to respond to 504 and
21 our responsibilities thereunder, that we take this
22 particular issue, which is a separate issue from a 504

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1 issue, and deal with it in the broader context of some
2 other issues that we must address around this whole
3 question of what LSC policy is on that matter, separate
4 from this.

5 And so I would suggest that this Committee
6 consider talking this recent proposal out of this
7 discussion and taking the provisions that pertain to,
8 in 1609, the last statement that we discussed and on
9 charging fees to clients for LSC-funded legal
10 assistance in paragraph (c) in 1609.3 out and taking
11 out of 1694 -- 1642 references to "and fees from
12 clients," references in 1642.1, the Purpose section,
13 the last bolded statement, taking that out; and, as
14 well, taking out the provision in (b) on the top of
15 page 16, "no recipient shall take fees from a client
16 for any LSC-funded legal assistance." Take all of that
17 out.

18 That's a discussion that doesn't pertain to
19 504, it seems to me; it pertains to some other issues
20 that this corporation will need to address. And let's
21 get to the commentary from the public on what was
22 published and the issues -- and I think we probably

1 have had more public comment on this issue than
2 anything else about some of the concerns that were
3 raised in the regulation as it was published.

4 MS. PERLE: I just want to state for the
5 record that I agree with most of what Bill said. I
6 agreed with Suzanne's last comments with respect to
7 Section 1010(c) and the application to private funds,
8 but I didn't have an opportunity to make a statement on
9 behalf of the Regulations Working Group, which is
10 consistent with what Roger said, and I just don't want
11 it on the record to state that I necessarily support
12 what the staff has said, and I think they were aware of
13 the fact that I was not going to support that position.

14 MS. MERCADO: And I think the problem arose
15 from looking at all those comments -- a lot of comments
16 that came in kept dealing with those issues that
17 weren't published, and they still kept dealing with it,
18 and I guess in trying to clean up the rules, that that
19 has been a primary purpose, to clean up the rules and
20 deal with the new restrictions that we have had, and in
21 the process that we're dealing with that somebody can
22 be able to have a fairly succinct order that grantees

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1 are supposed to run their programs, and the way I saw
2 it is that we had all these comments and where do we
3 put that input?

4 And maybe procedurally, as a process, we
5 should have just waited and dealt with all those
6 different areas that LaVeeda has just excluded from
7 dealing with it in part of the rule. We thought it
8 would be quicker since we're here, we're doing it, and
9 perhaps as far as a process, as far as giving notice to
10 the public, you know, that maybe it's just better to go
11 ahead and have that done. But by no means should that
12 be held by our constituents out there in the public
13 that anybody was trying to do anything that was not
14 meant to get any input from the field or anything of
15 that nature.

16 The fact is that we had all that input from
17 the field in all the comments that we got and that
18 there was never any before plans to include those
19 provisions without letting the public know. There was
20 nothing of that kind not from the board, not that we
21 are aware of from the stuff that we've gotten. It was
22 all a matter of trying to deal with all those volumes

1 of comments that came in on subject matter for which
2 things had not been published for.

3 And I commend our staff for doing above-and-
4 beyond research that actually under what was published
5 they weren't required to do, but in trying to answer to
6 the field's comments. And, really, I think that
7 probably the best way to handle it at this point is to
8 go ahead and just wait and publish all this new
9 comments that we have dealing with provisions that
10 LaVeeda has dealt with, and then people will feel
11 comfortable that at least the folks out in the field
12 that thought that we were going to deal with it today I
13 guess will have another opportunity to deal with it
14 again at a future meeting.

15 MS. WATLINGTON: I heard what Bill was saying,
16 too, and I've also been trying to get an understanding
17 that came from those public comments of looking at both
18 sides of fee generating or not, and his suggestion of
19 saying that if we make it a rule that there can't be
20 some people that want to and some can't when we just
21 put it on a rule that you can't.

22 So I, too, would like for it to go back that

1 it can come up with a compromise that programs that
2 want to and others can't do, but that in no way would I
3 ever, without some type of compromise, go along with
4 those poor clients that their fees come from that is
5 some kind of way that people want to do it and others
6 don't want to. But there is always a compromise in
7 anything else, and that came out of a clear
8 understanding of what came out before I have now from
9 those public comments that I didn't have before, an
10 understanding of how that worked and a ruling that said
11 that.

12 So once that comes out and then everyone is
13 aware of what it is, then we need to go back and then
14 compromise or work out something that's going to
15 benefit the local programs in a way that they all can
16 work the way it is best for their constituents.

17 MS. GLASOW: The Interim Rule raised the issue
18 of whether social security fees or attorneys fees and
19 whether we could charge them under that. If there is
20 something that keeps them from taking fees from
21 clients, it's not the attorneys fees provision but some
22 other authority, and that's we're discussing now that

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1 probably needs to go out as a proposed rule. Some
2 other way at some other time to discuss whether it's --

3 MS. BATTLE: I want to go on record because I
4 differ with Bill on this, that my understanding when we
5 visited 1642 for other reasons as a Committee, was that
6 there has been an historical interpretation, which Bill
7 disagrees with, by our general counsel regarding this
8 issue of fee-generating cases. And this board has
9 never met and made a decision on that issue, and where
10 we are right now is attempting to implement 504, and in
11 doing so, setting the stage by making our decisions
12 clear on the issue of fee generating and clear on the
13 issue of attorneys fees and placing this issue in the
14 context of several other issues.

15 For example, I believe we're looking at
16 competition now in this environment, and we're looking
17 at the prospect that under our competition regulation
18 attorneys who are in private practice may apply for
19 grants for legal services, which gets you into a
20 situation where you've got an entity that's in private
21 practice, a for-profit entity applying for a grant.
22 Now, that -- we're going to have to face, it seems to

1 me, this whole issue in a much broader context, given
2 some mandates that we've gotten from Congress.

3 And my position is right now, I think, before
4 this board as a board takes a position on this, that we
5 must get more information, we must take this issue and
6 put it in that broader context of what Congress has
7 asked us to do in the area of competition and other
8 areas, and resolve it there and not here.

9 So I want to make sure that at least I'm clear
10 as a member of this board on where I am on this, and I
11 think that now, by taking the language out here, we
12 reserve for another day the opportunity to look at this
13 in that broader context of some of the other issues
14 that we have to address this for.

15 MR. TULL: Can I follow up on this one thing
16 with that, --

17 MS. BATTLE: Sure. Okay.

18 MR. TULL: -- which is to say I think that's
19 absolutely correct? I think it is correct that the
20 application of this question, whether a fee can be
21 taken from a client in this narrow context of social
22 security cases, opened the door onto a very large field

1 of policy. And the proposed language does implicate
2 that whole broad field of policy, and I think it's
3 absolutely right that this should be approached
4 understanding the implications in a whole range of
5 things, including what you mentioned, which is brand-
6 new kinds of recipients as we get competition,
7 successful competition from private firms, etc.

8 We're the staff of OPO, the newly renamed OPO.
9 We, in fact, have a group of people which Antoo is a
10 staff -- which Antoo is the head of, to look at a
11 variety of issues that arise in the context of the
12 changed world we exist in in competition and with the
13 new scheme for restrictions.

14 And one of the issues that they are looking at
15 is the range of questions that arise in the context of
16 a variety of entrepreneurial efforts, ones which would
17 be imported because they are already in place with
18 free-market, private law firms and ones which are
19 current grantees in seeking ways to leverage their
20 funds begin to look for another experiment.

21 And we feel that we have an obligation as a
22 corporation to understand the implications of those and

1 to be prepared to respond and help or provide guidance
2 or whatever is appropriate and, most particularly, to
3 come to the board with the policy implications of that
4 on issues such as this one.

5 So I think the suggestion to wait is also
6 particularly appropriate because I think there will be
7 a much more thorough and thoughtful and helpful
8 analysis which will come from a different place than
9 from where this came, which was a very narrow, legal
10 issue -- a very important legal issue but a narrow
11 legal issue which Suzanne researched and came, as
12 general counsel, to an opinion about, which she feels
13 is an accurate one but which does have policy
14 implications which, obviously, the board has a strong
15 feeling about.

16 MS. MERCADO: In following up with the comment
17 that John just made, in looking at a broader spectrum
18 of issues that you're going to have to deal with, in a
19 lot of these you said we're going to have to deal with
20 that. Maybe we haven't gone into as much detail about
21 how everybody feels, is that because of competition
22 when you have these private law firms that are going to

1 be bidding for some of these grants, then we get into
2 the whole issue as to all these restrictions as to the
3 kind of cases that it can handle, as to time keeping,
4 that they can do all these issues that affect them, and
5 we haven't -- we've written regulations as far as PAI
6 attorney in the sense that we understand PAI situation,
7 but not in the sense of having a grantee, if you will,
8 that is a private firm that has a whole business of
9 their own, and are all of these restrictions that are
10 attached to it now going to come in with them?

11 I mean, we sort of have peripherally dealt on
12 some of that, but I think it's even further than just
13 whether or not you charge fees to clients and whatever
14 else --

15 MR. TULL: Oh, yes. Absolutely. Right. And
16 that is that whole array of questions as well.

17 MS. BATTLE: And I'd like for other members of
18 the public, if you have some observations that you'd
19 like to share with us, to please feel free to do so.

20 MR. McCOLLISTER: I'd like to do so. I want
21 to bring you something, and it's a nice pretty cover.

22 MS. BATTLE: Thank you.

1 MR. McCOLLISTER: I'm glad you're talking
2 about competition because what we've tried to do in
3 Kansas is make ourselves competitive, and you hit on
4 the exact thing that we have to deal with, which is
5 basically people that might apply for our grants who
6 don't have the same restrictions we do that are out
7 there charging some fees to clients, but on the other
8 hand, wanting to get a grant from the Legal Services
9 Corporation so they can put that into the mix and can
10 be competitive with us, we have to have the ability to
11 be flexible and do the same things that they do in some
12 situations on the same level, and so that's one of the
13 reasons I'm very concerned about not having
14 restrictions on us that will make us less competitive.

15 Our feelings are that the regulations, as
16 written and as interpreted right now, work. They work
17 for us. They might not work for California or New
18 York, but the beauty of it is, is it gives us the
19 freedom to design something that works for us and be
20 competitive and deliver a lot of services in Kansas.
21 And I've talked to you before a couple of times, and
22 I've got a little paper that explains the things that

1 we do.

2 The second section is our analysis of the law,
3 which is very much like Mr. McCalpin's but you can read
4 that at your leisure. I think we've discussed that
5 enough for a while. Our position is, is the law is
6 clear. It's flexible. There is no mandate that you
7 cannot take fees; and, quite frankly, Congress has had
8 several occasions to deal with this issue. It's been
9 before them a lot of times.

10 Every time you look at congressional intent
11 there's been at least three times that I can read in
12 the congressional language that they have had a chance
13 to deal with this but have not -- but they have found a
14 way to put sanctions on us regarding lobbying,
15 regarding aliens, regarding past actions. They have
16 been specific. They have directed us to write
17 regulations. They have directed us to inform our staff
18 about those regulations but not about attorneys fees.
19 And the last time was when H.R. 2076 was up, and it had
20 a prohibition against attorneys fees, and Congress
21 voted it down.

22 If they wanted to impose sanctions on

1 attorneys fees and be this restrictive as is proposed
2 and analyzed by the staff and the people, they would
3 have done it. Congressional intent is not to do that.
4 The congressional intent is, I think, to leave it open
5 and flexible.

6 So what's the problem? The problem is really
7 just reaching out and doing something new and running
8 the risk; and to do that, you have to do something new,
9 and I just wanted to let you know what we've done.

10 We've got a \$6.4 million program. About 33 percent of
11 that is from LSC funds. We actually get \$623,500 in
12 fee approvals for Title II cases outside of our state
13 contracts in a year's time --

14 MR. McCALPIN: From clients?

15 MR. McCOLLISTER: -- from clients, \$623,500
16 this year. Of that, -- and now we also have a \$912,000
17 multiple grant from the state to do social security
18 disability advocacy in SSI cases.

19 Now, SSI is different than SSDI. SSI is the
20 welfare side; you don't have a work history. SSDI is
21 the one that's the Title II where you have a work
22 history. But, of course, those are mixed sometimes,

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1 and you have people who have partial work histories and
2 partial not, so it's an SSI/SSDI claim, and we get a
3 lot of that also.

4 But we'll get \$623,000 in fees from
5 retroactive awards this year. Totally, we'll get the
6 whole mix of all the funding, about 1,440 cards, social
7 security claims actually established. We have a whole
8 bunch of other cases we might fail on. You have to
9 have some way to fund that, which is another problem if
10 you just shunt it off to private funds.

11 How does a program that doesn't have these
12 other funds get started? Where do they fund the
13 losers? How do they fund getting started up? A lot of
14 programs don't have 60 percent, 70 percent non-LSC
15 funds to fund the startup. So it's important. It's
16 important to a lot of programs out there.

17 There is a great benefit to the state. They
18 get about -- oh, millions of dollars. So far, we've
19 gotten \$18 million in retroactive awards in clients'
20 pockets since we started this thing.

21 MS. WATLINGTON: How much of that other comes
22 from the agency and not from the clients?

1 MR. McCOLLISTER: Some of the cases are done
2 by agency, public cases, and some of them are done by
3 the clients. The SSIs, the welfare side of it, is done
4 by state contracts. The SSDI, where you have a work
5 history, is done -- paid for by the clients out of the
6 retroactive award. Nobody gives us money up front.
7 It's always if we get you a retroactive award, and we
8 charge 20 percent, not 25 percent, which is the
9 maximum.

10 And we've rebated routinely in hardship cases,
11 and the managers have the authority in the field to do
12 that, and we would love not to charge any situation.
13 But the fact of the matter is these SSDI cases, which,
14 by the way, are all LSC eligible, they might have had a
15 work history, but now they are poor -- all of these
16 people, we would not be able to represent if we didn't
17 charge a small amount in back award because we don't
18 have the funds.

19 It's not a question of doing the case with LSC
20 funds or charging them; it's a question of doing the
21 case or not doing the case, and that's the thing people
22 don't seem to understand, that you've got to have this

1 flexibility to generate these funds or you're just not
2 going to do the case.

3 MS. BATTLE: And then more of the money comes
4 off of the clients than the agency.

5 MR. McCOLLISTER: No. More of the money comes
6 off of the agency than the client. Many times, for
7 instance, with the agency contract, if it's a dual
8 award, for instance, we will never take more than
9 \$1,375 in any one case, but sometimes, say, half of
10 that is paid by the agency and half of it comes from
11 the retroactive award, and that's a very common
12 situation, most of the cases that happen.

13 So in the Title II cases you will have people
14 who have a little bit of a work history and the rest
15 not, and so it's an SSI/SSDI dual case; some of it is
16 paid by the agency, and some of it is paid by the
17 client. And then we have a lot of others that are just
18 Title II cases, but they are all income eligible; it's
19 just that we could not reach out and do this unless we
20 could charge some people.

21 Now, what do we do with the excess money? We
22 make out of that \$295,000 excess revenue over expenses.

1 What we do with that -- and that's the difference
2 between us and the "competition" is that that goes
3 right back into helping those people with durable
4 powers of attorney, landlord/tenant problems, consumer
5 problems, domestic relations, and so on and so forth.

6 Our competition, which, by the way, is not
7 generally the private bar, except in some areas of the
8 country, is primarily paralegal groups for hire, other
9 nonprofits who have no problem doing this, and
10 occasionally some private attorneys. But the private
11 attorneys have all the business they want in most
12 areas, certainly in Kansas because there is so much
13 demand, that the few private attorneys that are willing
14 to do this just don't take the cases.

15 The problem seems to happen that people feel
16 that if you charge fees, your whole program will just
17 go down the tubes and you will just be plunged into a
18 sea of avarice and greed. And that seems to be what
19 the feeling is, or at least the mystique. And what I'd
20 like to show you is this chart, and I think it tells it
21 all. It's -- of the testimony. It shows our cases
22 from 1986 to 1996. If you look at the bottom there, in

1 1986, we served 15,000 people.

2 In 1996, we will serve about 27,000 people.
3 Actually, that could be a little bit higher, but
4 because in '95 and '96 we thought the funding might go
5 away all together, we began ratcheting down a little
6 bit so that we could not be too strung out if we lost
7 all of our federal money. So now we're picking it back
8 up again.

9 But if you look at these categories here, yes,
10 disability went up dramatically, from 1,300 to 5,300,
11 but all of our categories have risen since 1986. We
12 have had no major layoffs, we have had raises every
13 year, we have added staff every year, and we have
14 plunged all of the money from this and other activities
15 into more services for poor people.

16 Every single person on this page is eligible
17 for LSC funding, except we don't have the money. And
18 if you allow a program to have the flexibility, as the
19 law is written, as the regulations are written right
20 now, without changing them, I can continue to do this
21 and probably double it or triple it in the next 10
22 years if you will not mess with it now. And we will be

1 competitive with other people who want to come in who
2 have avarice on the side that also want the federal
3 money, and we will be able to serve more poor people.

4 This system works, and I guess what I'm here
5 today to tell you is that I've watched this issue
6 develop for a number of years, and I am totally
7 convinced that with this type of flexibility we can
8 continue to serve people and increase it. But if you
9 take that flexibility away and you start tinkering and
10 you start putting in restrictions that nobody in their
11 right mind could impute to Congress, we are going to
12 have a lot of trouble. We are not going to be able to
13 do this. Please give me the chance to continue to do
14 this. Don't change it.

15 MS. MERCADO: Well, in fact, Congress has -- a
16 lot of the congressional members have said that they
17 want Legal Services to think up creative ways of coming
18 up with money to fund their own programs, for creative
19 ways to do that.

20 MR. MCCOLLISTER: I've been in Legal Services
21 since 1970. It is the only thing I've done since law
22 school. I'm 52 years old. This is my career, and I

1 would never in any of my wildest dreams want to charge
2 somebody if I didn't have to. I don't want to do it,
3 but this is reality. Legal Services will go away if we
4 don't look at these things with an open mind, and not
5 only look at them with an open mind, but encourage
6 them.

7 MS. WATLINGTON: As a client, I guess I look
8 at what you're saying, you know, what you're doing is
9 giving jobs, you know, for your Legal Services
10 attorneys, but also that client, they would not have
11 been able to buy him a home or, you know, to get -- so
12 I look at things a little different, and I guess I
13 always will as long as I'm a poor client. But I'm
14 also looking at the surface, too. It's just that, you
15 know, there should be some way that we can work out and
16 be innovative.

17 So I'm just being realistic on, you know, how
18 you look at -- we know those services are needed and
19 hope it can be more innovative like we have been in
20 Pennsylvania to take it from the part that does not
21 come from the clients more so than it does from, you
22 know, their money that they could --

1 MR. McCOLLISTER: And I'm working on that side
2 of it also. We recently got a grant from the state, a
3 filing fee add on, that will give us an extra \$800,000
4 a year to do domestic relations advocacy, and that's
5 not -- we're just now working that into the system, and
6 nobody is going to have to pay anything for that. I'm
7 working just as hard to get that kind of fund also;
8 it's just that this is part of the mix, and it helps.

9 I have with me one of our former clients that
10 maybe you would like to meet and hear who is one of our
11 former social security clients, Mr. Fred Akerman, and
12 Marilyn Harp is the head of our Wichita office, our
13 largest office, and maybe you would like to hear what
14 his experience has been using our service.

15 MS. HARP: Well, just as a way of
16 introduction, I'll say that the Legal Services office
17 in Wichita has been working with Frank beginning about
18 five years ago. Frank has been willing to come here
19 today and tell you about how he feels about the service
20 and also very directly the issue about being asked to
21 pay a portion of his back attorneys fees awards as part
22 of that, so I'll turn it over to you, Frank.

1 MR. AKERMAN: Okay. My name is Frank Akerman,
2 and I didn't use the Legal Services disability help to
3 get my settlement. The way I got affiliated with LAM
4 was my attorney, Bill Cather, in Wichita, he felt even
5 though he has been my closest friend for 25, 30 years,
6 that he could not give me appropriate to what they
7 could, and so for better service on my disability case
8 he referred me to the Legal Services.

9 I do have a disability that was caused from a
10 skull fracture as a kid, plus I have permanent brain
11 damage and some other things. For a long time I had
12 trouble reading and writing totally. I still have
13 extreme trouble. My speech is totally gone. Back when
14 I went through their program -- and I've been working
15 with therapists since then, and I have come a long ways
16 thanks to them helping.

17 And but the difference in my life is without
18 Legal Services, I would have been out of luck on the
19 street. And so I have no problem with them requesting
20 money. If they had wanted me to pay up front, I
21 couldn't have. And so I would not have had the
22 services that they were able to help me with, and I

1 appreciate it so much.

2 And because of this, I have found that there
3 are a lot of other persons who have a lot of the same
4 problems I do, and so I have been doing volunteer work
5 with the Commission for the Status of People with
6 Disabilities on a local level and a SANCHO board, which
7 is there to help place people with disabilities and low
8 income in homes and help them have a better life. And
9 Mike Morgan, which is one of the attorneys for the
10 Legal Services, is very active and keeps a lot of other
11 good people in our community very active with helping
12 our people, and it takes people such as Legal Services
13 to help us, and so I don't see -- a percentage to help
14 other people make it in the future.

15 MS. HARP: Frank, I want to ask you a couple
16 of questions. How far did your disability case go in
17 the process?

18 MR. AKERMAN: I had to go all the way through
19 the field stage.

20 MS. HARP: Okay. And so you were represented
21 by Legal Services at a hearing, --

22 MR. AKERMAN: Yes.

1 MS. HARP: -- and then you also were
2 represented at the next appeals stage called the
3 Appeals Council.

4 MR. AKERMAN: Yes.

5 MS. HARP: How much of a back award did you
6 get from social security when you were successful in
7 getting your case?

8 MR. AKERMAN: I believe around \$17,000.

9 MS. HARP: And how much did you pay the Legal
10 Services office for representing you?

11 MR. AKERMAN: I believe around \$950.

12 MS. HARP: What were you able to do with the
13 \$16,000 you got?

14 MR. AKERMAN: I was able to continue a
15 reasonable life style. I used it to work on my home
16 and try to keep my children and myself with the home
17 that we have. We still have it at this time.

18 MS. HARP: Okay.

19 MS. BATTLE: Okay. Are there any other
20 comments from any other members of PAG?

21 MR. FERRY: I'm Mike Ferry from Legal Services

22 --

1 MS. BATTLE: I'm sorry?

2 MR. FERRY: Mike Ferry from Legal Services of
3 Eastern Missouri. I'm going to completely change what
4 I planned to talk about because I had planned to spent
5 most of my time talking about the law, and we've sort
6 of moved away from that, and you indicated you don't
7 really want to address that fee issue, the underlying
8 issue of free services.

9 I should mention that the staff position --
10 the staff has moved a considerable distance toward the
11 position that the programs have been advocating here,
12 and I just wanted to say we recognize that and
13 appreciate it. We do take the position that the Act
14 does not bar programs from taking fees. It's very
15 clear that it does not do that. And we take the
16 further position that it's not ambiguous in that
17 respect. A statute that is silent -- a statute that
18 does not bar an action is not ambiguous with respect to
19 that action; it just does not bar it.

20 If you want to go ahead and look at the
21 legislative history, we take the further position that
22 it's, at most, inconclusive and certainly not a

1 dispositive question, but like I said, I'm not going to
2 talk about the law, and I won't talk about the law.
3 What I do just want to mention, though, briefly is on
4 the comments that were received on this, I think that
5 it's not necessarily clear from the memo that you were
6 given the different weight and range of comments that
7 were received on these issues. In fact, the majority
8 of the comments that were received did support these
9 regulations, 1609 and 1642, in their present form.

10 The difference in range is quite striking. I
11 think of the official comments that I saw at the time
12 that they had been collected at that time eight
13 programs had weighed in in favor of these regulations
14 as opposed to only two that had any complaint about
15 them. I understand that more of them received some
16 positive since then. The only national bar
17 association, the American Bar Association, SCLAID, to
18 comment weigh in in favor of these regulations. The
19 only local bar association to comment, the St. Louis
20 bar, weighed in in favor of the regulations.

21 One of the things the relative scarcity of
22 comments from these bar groups tells you, I think, is

1 this is not a hot-button issue out there. This is not
2 causing a lot of consternation. When you realize these
3 regulations were not only published in the Federal
4 Register; they were posted on the Internet, copies were
5 sent with request for comment to every state bar in the
6 country and, I think, every major local bar in the
7 country, and you get a grand total of two comments
8 back, that's an indicator, I think, that this is not an
9 issue that's making lots of people angry out there.

10 The only -- to the extent that you're
11 concerned about congressional reaction, the only
12 congressional input that you got from the minority
13 leader of the House of Representatives supported these
14 regulations. The private attorneys who commented were
15 essentially split.

16 You received, I think, seven negative comments
17 from people who do this kind of work and don't want
18 legal aid programs to be competing with them. On the
19 other hand, you received five comments from private
20 attorneys who said that, yes, we do this kind of work,
21 and no problem; we're not concerned about this at all.

22 You received comments, I think, from three

1 paralegals from the same for-profit, paralegal firm who
2 were concerned about competition. Let's see. You also
3 got outside the official comment process, you got
4 letters from several other programs when this issue was
5 first raised that were all supportive: Native American
6 programs, programs from all parts of the country. Also
7 the support -- I think you received the supporting
8 letter now from the Management Information Exchange,
9 which is an organization of programs that support these
10 kinds of creative efforts and also the vote of support
11 from the California program directors of the California
12 program.

13 So the comments -- the weight and the depth of
14 the comments, I think, in favor of these are really
15 much more than the breadth of the comments against
16 them, and I just wanted to make sure you understood
17 that.

18 MR. McCALPIN: Let me just give a footnote to
19 what he said. If you look at these comments, there is
20 something here that would not jump out at you. On page
21 12 of the thick list is the comment of Tom Burke, the
22 president of the Bar Association of Metropolitan St.

1 Louis, and on page 115 is the negative -- the first one
2 was positive; the second one, 115, negative, is from
3 Nancy Mogab. And you would wonder what the dinner
4 table conversation is at night, since they are husband
5 and wife.

6 MS. BATTLE: We've got two board members who
7 have got to take a rest stop, a break, but we're going
8 to continue our discussion in just a moment. Let's
9 take five minutes.

10 (Whereupon, a brief recess was taken.)

11 MS. BATTLE: What I'd like to do is, I know
12 that -- is Bill someplace?

13 MS. GLASOW: I couldn't find anybody. I don't
14 know where they all went.

15 MS. BATTLE: I said five minutes. We've had
16 more than five minutes. We're going to go back on the
17 record and take the rest of the public comment unless
18 there are members of the public that just won't give
19 their comment until Bill gets back.

20 MS. PERLE: John and Bill are in the hall
21 talking. They will be here momentarily.

22 MS. BATTLE: Okay. I did notice a few other

1 hands up. Mike, I recall that your hand was up to
2 speak, and I wanted to give you that opportunity to do
3 so.

4 MR. MILLEMAN: Again, my name is Michael
5 Milleman, and I'm representing SCLAID, the Standing
6 Committee on Legal Aid of Indigent Defendants.

7 We sent a letter in in support of the
8 regulation as it was drafted prior to the additions,
9 and what the chair of SCLAID said in that letter, and I
10 would endorse it strongly here, is that we thought that
11 the regulation without the conditions was trying to
12 strike, and had successfully struck, a balance between
13 the expected interests that are affected by Legal
14 Services programs charging fees in social security
15 cases. We thought the balance was struck in that prior
16 regulation, and I listened with great interest to Mr.
17 Akerman's comments today, and I'm very persuaded by
18 what he had to say personally.

19 SCLAID will certainly look again at the
20 regulations -- at the change, but, you know, our
21 initial approval of the regulation did not take into
22 consideration at all the larger new language,

1 obviously, and I repeat, we thought that the proper
2 balance was struck in a prior regulation.

3 Now, SCLAID has not had a chance to review
4 this. The Committee has not had a chance to talk about
5 it. We will. We will have a Committee position as
6 soon as we have with respect to the new regulation. Go
7 ahead, yeah.

8 MR. FERRY: It may turn out that what the
9 outcome is if there is no new regulation, and then that
10 language will be postponed for another day of further
11 discussion.

12 MR. MILLEMAN: Is it going out to Conrad?

13 MS. BATTLE: No, no. I think we made the
14 decision to take it out so that this group of
15 regulations, once we recommend and they are adopted by
16 the board, will not contain any of this language, and
17 this will be -- that language will be on a separate
18 track, as determined by the board.

19 MR. McCALPIN: I still say there is no reason
20 to discourage people from looking at the issue if they
21 want to.

22 MS. BATTLE: Oh, yeah.

1 MR. MILLEMAN: That's the reason -- I'm glad
2 to hear that, frankly. Just a comment, Ms. Watlington,
3 about the client perspective on this. I understand
4 what you are saying, but what I heard the Kansas people
5 to be saying is that if they are able to take 10
6 percent from your view, or there could be another Ms.
7 Watlington sitting up there, another client who is
8 served by the program, and I guess SCLAID'S overall
9 concern is about the clients or the client populations,
10 like your concern. And our view of the first
11 regulation is as initially drafted was it did protect
12 the clients and was a proper balance between the
13 interests of private lawyers, public lawyers, and
14 clients.

15 MS. BATTLE: Okay. Are there any other
16 comments from the public?

17 MS. TAYLOR: Yes. My name is Ellen Taylor,
18 and I am with DNA People's Legal Service, which covers
19 portions of Arizona, New Mexico, and Utah, and I also
20 brought pretty books and everything, and I brought a
21 copy of DNA's newsletter.

22 MR. McCALPIN: This is basically the Navajo

1 program, is it, Ms. Taylor?

2 MS. TAYLOR: It's Navajo Hopi. We also serve
3 Supai and Hualapai, and, I think, one Apache tribe, but
4 I'm not sure of that. I'm with what formerly used to
5 be Coconino Legal Aid, which just became a part of DNA,
6 and our offices are scattered all over. There are maps
7 in the back of that booklet which show the geographical
8 area that we cover, which is really wide.

9 Traditionally, we haven't given an emphasis
10 program wide to doing social security cases. We have
11 done studies, and we think that there are a lot of
12 people out there, especially on a reservation, who
13 should be eligible for social security disability and
14 SSI benefits. So we've made an effort to implement an
15 outreach and training program.

16 I think you're probably aware that the poverty
17 level on the reservation is really, really high. We
18 feel that proportionately there are many people out
19 there in our service area who are entitled to social
20 security benefits that aren't getting those benefits.
21 In order to provide services, we need to take fees from
22 clients so that we can make an outreach to all those

1 people; otherwise, we are going to continue as we've
2 been continuing.

3 I guess the private attorney consultation is
4 kind of moot now, but I'd like to note there are only
5 five private attorneys in Navajo, Apache, and Coconino
6 Counties who do social security work, so we don't have
7 private attorneys to do that job for us; we're going to
8 have to do it if it's going to get done.

9 The Social Security Administration itself does
10 outreach on the reservation. They had a program where
11 they paid one dollar to tribal governments for
12 potential recipients of social security, and so they go
13 out on the reservation, and they say, "You might be
14 eligible," and they give people an application.

15 As you might be aware, you don't get approved
16 on your initial application. You have to go through
17 the entire administrative process of initial
18 application, reconsideration, request for a hearing,
19 and sometimes appeal counsel. You have to do all of
20 that in a timely manner, and that's the only way you're
21 going to get benefits.

22 When people on the reservation, especially,

1 get a letter from the government, they think, okay, the
2 government says I'm not disabled. They give up. Okay.
3 We never even hear from them. And I've had people even
4 come in and say, oh, I get this letter, or this person
5 came in said I'm eligible for benefits, but then I got
6 this letter saying I'm not. What's the deal? So they
7 don't have any idea.

8 Most of the people I've represented have
9 applied one time at least before and oftentimes two or
10 three times. They just go back and keep applying and
11 think, well, if I didn't get it this time, maybe I'll
12 get it next time, so I'll keep trying.

13 I also think that the cultural traditions on
14 the reservation of noncompetition and cooperation, not
15 to mention the history of the relations between the
16 tribes and the government, mitigate against a lot of
17 people claiming their rights and benefits. There are
18 also language difficulties. There is a failure to
19 understand deadlines. There are forms which really
20 aren't culturally sensitive.

21 For instance, the questionnaires that are sent
22 out to people used by the state agency in determining

1 disability ask really silly questions. If you are a
2 person who speaks only Navajo, you haul your own water,
3 you heat and cook with wood, you never play bridge,
4 which is one of the questions; you have no access to
5 public transportation, you treat your health problems
6 in traditional ways, perhaps through seeing a medicine
7 man rather than going to a doctor; and the nearest
8 movie theater is 150 miles away.

9 So besides the obvious language differences
10 there are less obvious life style differences which
11 makes this difficult, and I think that we have trained
12 Navajo advocates who are the best people to be trying
13 to perform these services for clients because they
14 understand these traditions.

15 One, for instance: I represented a lady who
16 was 63; she was Navajo. She lived in an isolated hogan
17 on a reservation with her mother, who was about 102.
18 Her mother was getting social security. She had led a
19 traditional life for a Navajo woman and had woven rugs
20 for her living, but the Social Security Administration
21 didn't consider that to be work in the national
22 economy, so the fact that she had severe arthritis in

1 her right arm didn't mean that she couldn't do her
2 prior relevant work because she had no prior relevant
3 work. And so that had to be taken to a hearing.

4 So, in other words, to ensure that many people
5 in our service are get the benefits to which they are
6 entitled, they need our representation.

7 I think that we ought to provide outreach and
8 representation to these people so that they can learn
9 of the benefits and pursue the administrative process,
10 and I don't think they can do that without DNA's active
11 involvement. And, again, we can't do it -- we can't
12 start this program and implement this program unless we
13 have the fees to expand our program. We need to train
14 people. We need to get our libraries together. We
15 need to make a big effort to reach all these people.

16 I would also like to mention that in a lot of
17 social security cases we won't get fees. For instance,
18 in the SSI Children's Disability, 275,000 children are
19 going to get notices saying that they are being
20 reconsidered. Okay. And our aim in that would be to
21 keep them from getting terminated so we wouldn't have
22 any back benefits, and in order to do that, we really

1 need to get fees from other cases.

2 I finally would like to speak on more to your
3 concerns, and I think they are really important
4 concerns. I worked for Colorado Rural Legal Services
5 in 1976, and if anybody had said to me then we were
6 going to start taking fees, I would have said, "You're
7 out of your mind. It's horrible, terrible thing to
8 do," and I probably would have said that even until
9 about a year ago. I just think that we are being
10 forced to reconsider that issue and that if we can
11 charge fees in ways that don't substantially negatively
12 impact our clients and if by doing so we can help a
13 whole bunch of other clients, then that's what we need
14 to do.

15 Ultimately, I think we would like to be like
16 Kansas and start getting more money from the state for
17 interim assistance benefits and money that doesn't come
18 from the client, but even to do that we have to have
19 the startup money to begin with. And I agree that
20 given the length of time that it takes, people get
21 substantial amounts of back awards, and they can use
22 that money to make a down payment on a house or to buy

1 a pickup truck, which is really important on the rez --
2 you really have to have a pickup truck if you're
3 hauling your water.

4 I don't think that the fee that we are taking
5 is going to impact that, and I think, again, in
6 hardship cases we would consider that. So I strongly
7 urge this Committee to amend or modify the regulation
8 in any way that would prohibit or restrict us from
9 contracting with our clients for the recovery of fees
10 because to do so would restrict us in our efforts in
11 these difficult times to provide the best
12 representation for the largest number of people.

13 MR. McCALPIN: Could I ask her a question? Do
14 you know what proportion or percent of the funding of
15 your program comes from this corporation?

16 MS. TAYLOR: No, but I know that I've talked
17 to our director, and one of our main issues is that we
18 can't do this program if we use non-LSC funds, that we
19 don't have enough non-LSC funds to do it.

20 MR. McCALPIN: That's really what I was
21 getting at.

22 MS. TAYLOR: And I guess I could find that

1 information out.

2 MS. BATTLE: Okay.

3 MS. WATLINGTON: Can I clarify? I think there
4 has been some misunderstanding that they are saying
5 that I said. What I'm saying, in Pennsylvania we do do
6 that, but we found an innovative way to do it. I'm
7 only saying that clients should be charged as the last
8 resort --

9 MS. BATTLE: Right.

10 MS. WATLINGTON: -- because there are a lot of
11 monies out there in foundations and other monies in
12 use, and that's what I'm saying.

13 MS. BATTLE: Right.

14 MS. WATLINGTON: And not the fact that I do,
15 but be as innovative as you can, and as a last resort
16 charge clients because they need that money.

17 MS. TAYLOR: And I think that's what -- we'd
18 like to do more of that, but until we can actually have
19 the money to start reaching out to people and training
20 people -- for instance, we're going to go to, like, 78
21 of the Navajo Area Agency on Aging chapters and talk to
22 the people there, and social security issues are going

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1 to come up, and also this children's SSI, and so we
2 just feel like we need to take fees until we can get
3 our program and think of innovative ways that we might
4 not have to. So that's why we don't want to be
5 restricted.

6 MS. BATTLE: Thank you. Are there any other
7 comments from the public? Okay. Given that we have --
8 and I want to thank all of you for taking the time to
9 come and share with us insights that you have about
10 particular issues that we're going to have to address
11 based on your experience and weighty experience in
12 these various areas, I believe when we get back to
13 these two regulations, 6209 and 6242, which is what
14 we've got on the table before us, that we have
15 discussed the changes that we need to make to both of
16 those regulations. Is that correct?

17 MS. GLASOW: I believe so.

18 MS. BATTLE: Bill?

19 MR. McCALPIN: I'd like to ask a question sort
20 of for legislative history, and then I want to offer an
21 amendment. Suzanne, let me ask you. Suppose that next
22 week the Office of the General Counsel gets a letter

1 from a program saying that we propose to initiate a
2 program of representing clients in social security
3 cases using to support that representation funds
4 received from the corporation, and we expect to take
5 the fees which are applicable under the Social Security
6 Act or some fraction of them or something of that sort.
7 What will be the reaction of the Office of the General
8 Counsel?

9 MS. GLASOW: I believe what I'm hearing from
10 the board members is that you want this whole issue
11 reconsidered and a lot of other factors, and I think it
12 would be inappropriate at this point not to reconsider
13 all the policy through OPO's work and doing research in
14 policy issues and reconsidering the legal issues in
15 terms of whatever. The opinions we've been handed
16 today; maybe we should just put this in abeyance until
17 the time we reconsider and come before you with
18 something that can be adopted by the board.

19 MR. McCALPIN: May I understand that your
20 answer is you would not tell the program they could not
21 do it?

22 MS. GLASOW: At this point, yes, and I believe

1 OPO is not going to enforce it until we've reconsidered
2 all the legal and policy issues.

3 MR. McCALPIN: Okay. Now, let me offer an
4 amendment. As I said earlier this afternoon, --

5 MS. BATTLE: What you're amending -- we don't
6 have a motion yet.

7 MR. McCALPIN: No, no. I'm going to offer an
8 amendment to the regulation.

9 MS. BATTLE: Oh, okay.

10 MR. McCALPIN: As I said earlier this
11 afternoon, there is a tendency to think that this whole
12 issue is subsumed in social security cases when, as a
13 matter of fact, fee-generating cases are a much broader
14 field than that. I would like to suggest -- and I
15 don't think of any other place in 1642.4 -- and see,
16 although it's sort of contrary to the title of that
17 section, I would offer a new subsection (c), which I
18 have written in the margin at the top of page 17: A
19 recipient may receive a fee in a case undertaken in
20 compliance with the requirements of Part 1609.3.

21 In other words, if a fee-generating case has
22 come to a program, they have done all the necessary

1 referrals and determined that there is nobody else to
2 take it and that sort of thing and they take the case,
3 then just to be up front about it, they ought to be
4 able to take the fee.

5 MS. BATTLE: Let me get the rest of that
6 language. I'm going to take questions on this. A
7 recipient may receive a fee?

8 MR. McCALPIN: -- may receive a fee, and I
9 have deliberately not said "attorneys fee," because I
10 am staying away from the definition. A fee, in the
11 case undertaken in compliance with the requirements of
12 Part 1609.3. Now, I appreciate the fact that the
13 heading is application -- what?

14 MS. MERCADO: The problem you're going to have
15 with this is that that provision that you are now
16 mentioning indirectly is dealing with an issue that
17 we're not willing to deal with today because the
18 general public other than the people that are at this
19 meeting have not dealt with this issue. You can't
20 amend it that way.

21 MR. TULL: Well, we have not asked for, in
22 terms of adopting it as a regulation, we have not asked

1 for nor received any comment on the issue of, for
2 instance, whether in a contingent-fee case, which this
3 would include, a personal injury case, what the
4 implications are of the board explicitly in the
5 regulation saying that that is acceptable.

6 I understand your view is that it is, but this
7 is the adoption of a regulation which embodies that in
8 law, which I think does raise the same problem that the
9 proposal of the staff saying that LSC-funded cases
10 cannot -- I'm sorry -- that a fee cannot be collected
11 from a client in those cases, that it is a major policy
12 issue which really does need to be subject to comment.

13 MR. McCALPIN: Well, basically what we say in
14 1609 is they can take the case.

15 MS. BATTLE: Yes, but the fee piece, which is
16 what you're proposing to put in 1642, gets back to that
17 fundamental jurisdiction question that I think you
18 raised initially as it relates to whether or not we're
19 going to express anything in here today that relates to
20 whether you can take fees from clients or whether you
21 can take fees from particular cases going beyond the
22 scope of what we have noticed. And so my view is that

1 since we've made a preliminary decision -- and this is,
2 of course, for the Committee to decide -- that we are
3 going to deal with this issue of taking a fee in
4 another context, that we at this point defer your
5 proposal for consideration in that context.

6 MS. GLASOW: But in the supplementary
7 information to the final rule on 1642, that this
8 attorneys fee rule does not --

9 MS. BATTLE: -- address this issue.

10 MS. GLASOW: -- preclude the taking of social
11 security fees, because that was raised as a question in
12 the Interim Rule, and we can respond to that very
13 narrow, particular question.

14 MS. BATTLE: All right. Are there any other
15 questions? And then whose turn is it to move with
16 regard to what we have before us in 1609 and 1642?

17 MS. MERCADO: I'm not a member of the
18 Committee.

19 MS. WATLINGTON: I'll move.

20 MS. BATTLE: You will move?

21 MS. WATLINGTON: Yeah.

22 MS. BATTLE: Okay. It's been moved by

1 Ernestine. Is there a second?

2 MR. McCALPIN: Well, I want to make sure what
3 I'm doing. I'm going back and looking at -- the second
4 sentence of 1642.1 is out?

5 MS. BATTLE: The second sentence, the
6 additional information in 1642 --

7 MR. McCALPIN: -- point-one --

8 MS. BATTLE: -- yes, is out.

9 MR. McCALPIN: And 1643.3(b) --

10 MS. BATTLE: -- is out.

11 MR. McCALPIN: -- is out.

12 MS. BATTLE: Right. Yes.

13 MR. McCALPIN: Are there any other changes?

14 MR. FERRY: Is the motion to adopt interim
15 rules

16 as --

17 MR. McCALPIN: Pardon?

18 MR. FERRY: -- to adopt 1609 and 1642 as they
19 were published?

20 MS. BATTLE: There have been some changes.
21 The changes we discussed up until the last change which
22 dealt with this whole fee issue.

1 MS. MERCADO: Bill, I'm sorry. On page 16,
2 Section (b) is deleted also.

3 MR. McCALPIN: Section (b) is out.

4 MS. MERCADO: Yeah. That's what I'm saying.

5 MR. McCALPIN: Yeah, yeah.

6 MS. MERCADO: You're asking what other
7 provisions --

8 MR. McCALPIN: Are there any other changes
9 that we are making to this --

10 MS. GLASOW: -- 1642?

11 MR. McCALPIN: Yeah.

12 MS. GLASOW: We took out all the changes that
13 deal with taking fees in social security cases. If we
14 missed any, I will get them out.

15 MR. McCALPIN: That's the second sentence in
16 Part 1, and --

17 MS. MERCADO: The part of the title that says
18 "and fees from clients."

19 MS. PERLE: And Section (b) on page 16, and
20 that's it.

21 MS. BATTLE: I seconded it, and we're ready
22 for vote. All in favor?

1 (A chorus of ayes.)

2 MS. BATTLE: Opposed?

3 (No response.)

4 MS. BATTLE: Abstentions?

5 (No response.)

6 MS. BATTLE: All right. The motion carries.

7 MR. McCALPIN: Have we acted on 1609?

8 MS. BATTLE: Yes. We did them together. I
9 said at the beginning of the discussion we would do
10 them together. We did 1609.

11 MR. McCALPIN: And the only change in 1609 is
12 the elimination of that last part?

13 MS. BATTLE: Yes, yes. That's right. Okay.
14 Are there any other issues, or is there any other
15 business to come before this Committee at this time?

16 MS. WATLINGTON: Do you want a motion for
17 adjournment?

18 MS. BATTLE: Well, before we adjourn, I'd like
19 to commend our staff and stakeholders for all of the
20 hard work, the members of the public who have commented
21 for enriching this whole experience of reviewing these
22 very critical rules.

1 This has been a difficult task for this
2 committee and for this board, in that there are
3 restrictions that we are having to undertake that we
4 know will have some consequence in the field, and we
5 have tried to, in the best way that we could, remain
6 true to the intent of Congress and at the same time be
7 sensitive to implications that may come from many of
8 these restrictions and rules that we must promulgate to
9 the field.

10 So we very much appreciate your willingness to
11 participate in this process by giving us your insights
12 and your thoughts about it, and the stakeholders have
13 provided us a measurable help in this process of when
14 you're not here allowing us to hear through them and
15 their representation of you of your views about this
16 thing, and I can't say enough about the professional
17 result that we have gotten from this process and how
18 much I appreciate all of you, as well as the members of
19 the board, committee members or not, who take their
20 time out to get this all done.

21 So I wanted to express before I entertain a
22 motion to adjourn.