

ORIGINAL

LEGAL SERVICES CORPORATION

OPERATIONS AND REGULATIONS COMMITTEE MEETING

Friday, January 20, 1989
Commencing at 9:00 a.m.

The Embassy Suites Hotel
The Renaissance Room
4700 Creedmoor Road
Raleigh, NC 27617

Board Members Present:

Robert Valois, Chairman
Lorain Miller, Member
Thomas Smegal, Member
Claude Swafford, Member
Michael Wallace, Member

Staff Present:

Terrance Wear, President
Timothy Shea, General Counsel
Suzanne Glasow, Assistant
General Counsel
Maureen Bozell, Secretary

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I N D E X

	Page
Presentation of General Counsel	7
Presentation of Nick Fountain	69
Presentation of Geoffrey Simmons	83
Presentation of Alan Houseman	89
Presentation of Deborah Greenblat	127

MOTIONS

	Page
Motion by Mr. Wallace	3
Motion by Mr. Wallace	5
Motion by Mr. Wallace	136
Motion by Mr. Wallace	138

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P R O C E E D I N G S

(9:10 a.m.)

1
2
3 CHAIRMAN VALOIS: It is ten after 9:00 and we have a
4 quorum. This is a meeting of the Operations and Regulations
5 Committee of the Legal Services Corporation in Raleigh, North
6 Carolina. It is 9:10, January 20, 1989 and we are at the
7 Embassy Suites Hotel.

8 I would like to welcome you all to Raleigh. As you
9 know, it is my home town and we are very glad to have you here.
10 I hope you enjoy your stay. If there is anything that we can do
11 for you in the short time you are here, let us know.

12 Allen Head (phonetic), the Executive Director of the
13 North Carolina Bar Association is here. I would like for
14 everybody to know who he is. He is one of my leaders. Lynne
15 Sternman is here from ABA.

16 The first item on the agenda is approval of the
17 agenda, if I might have a motion.

MOTION

18
19 MR. WALLACE: I move to adopt the agenda as printed in
20 the committee book.

21 MS. MILLER: Second.

22 CHAIRMAN VALOIS: All in favor of adopting the agenda,

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1 say aye?

2 (Chorus of ayes.)

3 CHAIRMAN VALOIS: The second item is approval of the
4 minutes. I would like to first attempt to get them approved all
5 in one fell swoop. I have inherited some from the archives of
6 the former Chairman of this committee, who is here.

7 MR. WALLACE: Mea culpa, mea culpa.

8 CHAIRMAN VALOIS: I have read them all and they are,
9 as I recall those meetings --

10 MR. WALLACE: Mr. Chairman, let me ask the secretary
11 one matter. I have been through them in detail. They are all
12 right except for January 28th of last year.

13 I cannot find, in January 28th of last year, where the
14 committee approved the change to Part 1607, which actually went
15 into effect, where we changed the words "the recipient" to "any
16 recipient".

17 If you will note, at page 51 of your board book at the
18 bottom, it says, "Chairman Wallace explained that Section 1607.6
19 on compensation was adopted by the full Board of Directors at
20 their meeting earlier in the day." That happened; I remember it
21 happening.

22 What I cannot find in these minutes -- and maybe it

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1 did not happen -- is where the committee adopted 1607.6 on
2 compensation. This was a two-day committee meeting. My
3 recollection is that on the first day of the meeting, which you
4 will find at pages 35 through 42, we adopted the recommendation,
5 the change to 1607.6 that the Board did the next day.

6 I see in the minutes where we debated it. I do not
7 see in the minutes where we adopted it. I stand to be corrected
8 by the secretary, but I do not find the vote in the minutes
9 anywhere.

10 MS. BOZELL: I cannot recollect at this time where
11 that is now, but I can look for it.

12 MR. WALLACE: Mr. Chairman, what I would like to do is
13 move the adoption of the minutes of November 18, 1988 and
14 December 18, 1987. I am afraid we may have to defer that other
15 one until the secretary has had a chance to look at the
16 transcript and find the missing vote.

17 MOTION

18 I would move the adoption of the December and November
19 minutes as printed in the committee book.

20 CHAIRMAN VALOIS: Is there a second?

21 MS. MILLER: I second.

22 CHAIRMAN VALOIS: All those in favor of adopting the

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1 minutes of November 18, 1988 and December 17 and 18, 1987, say
2 aye?

3 (Chorus of ayes.)

4 CHAIRMAN VALOIS: Those are adopted. We will then
5 defer the minutes of January 28, 1988 until Maureen Bozell has
6 studied those a bit further.

7 The third and final item on our agenda is the main
8 purpose for the meeting, consideration of Part 1609, fee
9 generating cases. I am going to ask our General Counsel to go
10 first on this. We have received a number of comments, which are
11 available to the public on that back table.

12 I know that Alan Houseman wishes to speak and that
13 Lynn Sternman does not. Dick, do you want to speak? Richard?

14 A PARTICIPANT: There are other people coming from
15 Raleigh that I thought were going to speak, but if they do not,
16 I may represent briefly when I understood they were going to
17 say.

18 CHAIRMAN VALOIS: Fine. Who else in the room would
19 like an opportunity to speak today, so that we can manage our
20 time more effectively? Martha?

21 MS. BERGMARK: No.

22 CHAIRMAN VALOIS: If the General Counsel's Office

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1 would proceed.

2 Presentation by General Counsel

3 MR. SHEA: Thank you. If I may, let me begin by
4 giving a brief background of the general tenor of the rule and
5 the basis for the change, the substance of the proposed rule. I
6 will summarize briefly the comments, and they are numerous, and
7 finally, I will explain some of the proposed amendments to the
8 text that we have, which try to deal with the substance of the
9 comments.

10 I might add I have available a brief memorandum that
11 deal with what I think are probably the preeminent issues, and I
12 have made that available to some of the public. I have several
13 copies here, not an unlimited number.

14 Very briefly, the LSC Act provides that no funds made
15 available by the Corporation may be used to provide legal
16 assistance with respect to fee-generating cases, except insofar
17 as the Corporation may permit, pursuant to guidelines.

18 The existing regulation, Part 1609, was an original
19 regulation adopted in 1976; it has been amended on several
20 occasions, but was last amended in 1984. Fundamentally, the
21 purpose of the regulation is to ensure that recipients do not
22 compete with private attorneys and, at the same time, to

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1 guarantee that eligible clients are able to obtain appropriate
2 and effective legal assistance.

3 The regulations, as currently constituted, prohibit
4 the taking of fee-generating cases, except where -- and it
5 provides various kinds of exceptions -- first of all, if a fee
6 referral is not possible, and a referral permits either referral
7 to a lawyer referral service or to two private attorneys.

8 It also permits programs to accept emergency cases
9 and, finally, permits programs to take cases where referral is
10 unavailable because no attorneys will take the case without
11 payment of a consultation fee.

12 There are other provisions dealing with acceptance of
13 co-counseling, acceptance of fees that are not really at issue
14 in terms of these proposed changes.

15 Our proposed rule, which was published in mid-
16 December, first of all, was intended to reinforce the
17 complimentary nature of the services provided by our programs.
18 That is, to the extent that the private Bar was willing and able
19 to accept fee-generating cases, our proposal is intended to
20 reinforce that, to begin with.

21 Moreover, it is intended to help rationalize the time
22 and efforts and resources of our programs so that those will be

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1 directed towards cases where private counsel is not available.

2 The preeminent features of the proposed regulation
3 were first to define -- maybe we should refer to our text of the
4 proposed rule. First of all, the definition of fee-generating
5 case was proposed to be amended to include any action brought on
6 behalf of a client under a contract or statute with a fee-
7 shifting provision.

8 The purpose of that change was that the prior
9 definition provided that fee-generating cases were those where a
10 fee may reasonably be expected to result. There was a concern
11 that leaving that decision exclusively with the programs may not
12 necessarily give the local Bar Association, the private
13 practitioners, an appropriate opportunity to express interest in
14 cases.

15 Accordingly, the definition was expanded. Instead of
16 relying on the expectations of the programs' counsel to say that
17 any case where there was a fee-shifting provision available
18 would be defined as a fee-generating case.

19 Secondly, in terms of the prohibition -- and these are
20 amendments to 1609.3 -- a presumption was provided that it
21 should be presumed that all cases undertaken by a recipient are
22 undertaken using LSC or nonpublic funds. There is a similar

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1 documentation provision further on in the regulation. That was
2 intended to deal with a rather difficult situation where it is
3 hard to tell how a case was funded, one way or another.

4 There are general requirements under our Regulation
5 1630 that the accounts from which expenditures come are funded
6 should be identified or the purchase of an item where there is
7 typically, or there ought to be, some sort of one-to-one
8 correspondence between an expenditure and an account.

9 For a situation where you are talking about an
10 attorney's time, unless there is something like functional
11 accounting of timekeeping that is preserved over time, we do not
12 have the same sort of one-to-one correspondence that would
13 associate a fund with an attorney's time.

14 The tenor of this change would be to require some
15 appropriate, contemporaneous documentation that would identify
16 the source of funding for a particular case.

17 There are also proposed amendments to how or when
18 representation in fee-generating cases was deemed to be
19 unavailable. Keep in mind the existing reg, and even under the
20 proposed changes, are fundamentally grounded in reality. There
21 surely will be situations where fees are theoretically
22 available, but they simply won't be attractive enough to

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1 interest private practitioners. That is intended to be
2 preserved in our regulation, as amended.

3 There was, first of all, a requirement to provide some
4 measure of documentation by an executive director as to the
5 undertaking of the case. Secondly, there was a proposal to
6 amend the provision that a referral was not available, such that
7 the referrals to a Bar referral service would be preferred and
8 then if, and only if, one was unavailable could the program turn
9 to two private attorneys.

10 The current regulation permits programs to elect, on
11 their own, whether they want to refer to two private attorneys
12 or to use a referral service.

13 Finally, the exemption that exists now in the
14 regulation for cases where recovery of damages is not the
15 principal object of the case and a request for damages is merely
16 ancillary was proposed to be eliminated, as well.

17 The net result would be cases that may seek injunctive
18 relief would nevertheless have to go through an appropriate
19 referral, whether that be through the Bar referral service or
20 two private attorneys, as the case may be.

21 MR. SMEGAL: Did you say that is still in there, or
22 not?

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1 MR. SHEA: No, the proposal would be to take -- that
2 is in the existing reg. The proposal in the proposed reg would
3 be to take that out, so that cases with purely affirmative
4 relief would nevertheless have to be proffered to either a
5 private practitioner or the Bar.

6 MR. SMEGAL: It would increase the number of cases
7 that have to be proffered?

8 MR. SHEA: That is correct. I might add that we have
9 some amendments to our proposal here that we think could deal
10 with some of the objections we have received in connection with
11 this, generally.

12 There is a provision as well for the governing body of
13 recipient to adopt written policies to guide the program in
14 determining which cases should be taken. Finally, and I think
15 the provision that I think evoked much of the commentary was a
16 provision whereby the fees generated by programs would be
17 credited towards the --- first of all, it would be accumulated
18 and it would be credited towards the grant checks that our
19 recipients would be getting on a quarterly basis.

20 Therefore, on a quarterly basis, recipients would be
21 reporting to LSC the amount of fees they received in that
22 quarter and in the next following quarter, the Corporation would

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1 set off that sum against other sums that would otherwise be made
2 available under their appropriate grants.

3 Those sums -- that is, the fees collected under that
4 -- would then be paid out to programs, would be distributed by
5 the Corporation to recipients with the lowest available funds
6 per poor person. In that sense, the fees, which historically
7 have been something on the order of six to seven million
8 dollars, would be distributed to programs with the lowest per
9 poor person funding rate.

10 I may add, by way of background, only a minority of
11 our LSC recipients generate anything by way of fees. The data
12 for the last two years suggests that only about 175 programs
13 received no attorneys fees at all. Another 52 programs reported
14 receiving less than \$5,000 in fees, so we are talking of
15 essentially 225 or so that get \$5,000 or less. Thirty-one
16 programs received fees over \$50,000 and I believe there were
17 some twenty programs that received fees of over \$100,000 and
18 that is for the year 1987.

19 Thus, the number of programs who would have
20 substantial sums of fees set off against their contracts
21 represent, oh, a small percentage, something on the order of
22 twenty percent, of our recipients generally.

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1 Let me speak briefly, if I may, then, to the nature
2 and the kind of comments we received. At this point, I do not
3 know that I know the number of comments received. There were
4 245 comments we received as of yesterday. They amount to almost
5 800 pages.

6 We received comments from recipients, from private
7 practitioners, from Bar Associations. We have received comments
8 from the American Bar Association and certainly from referral
9 services.

10 The comments overwhelmingly, I think it is fair to
11 say, resisted either the import or the specific provisions of
12 the regulation as proposed. We have some changes or amendments
13 to deal with some of those and I will address those in a minute.

14 Let me speak, if I may, briefly about the tenor of the
15 comments. A number of commenters urged that the Corporation
16 does not have any authority to do something like this at all.
17 There are fundamentally two or maybe three bases for that
18 assertion.

19 One, it was suggested that because Congress has
20 entertained the idea of doing this in the past, that that must
21 have meant that it was Congress' view that the Corporation
22 lacked authority to do so. I do not think that is so. I am not

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1 aware -- and no one has argued -- that when Congress entertained
2 this idea before, as it did in 1981 or 1983 or perhaps both--
3 that Congress made a finding that the Corporation lacked
4 authority to do it.

5 The fact, of course, that Congress did not pass the
6 legislation could be attributable to a number of things,
7 principally legislative priorities or other provisions of the
8 Act or a number of other reasons.

9 Number two, there were arguments that this proposal,
10 particularly the accrediting provision, would contravene the
11 funding formula that Congress has prescribed with respect to our
12 basic field providers. As you are aware, that funding formula
13 prescribes that the Corporation fund recipients at a specific
14 level per poor person within the geographical area served by the
15 recipient.

16 Frankly, I think that argument mistakes the procedure
17 for collecting the fees for the substance of what is going on.
18 Basically, we are not taking people's basic field money but what
19 we are doing is collecting the attorneys' fees. The issue as to
20 whether we have set it off against grant funds is somewhat
21 separate and I think really simply represents the fact that that
22 is simply a practical way of collecting the fees.

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1 CHAIRMAN VALOIS: Tim, if I could interrupt you for a
2 second, in my reading of the comments on this particular
3 subject, I got the idea that the people who were objecting to it
4 were confusing two things: one, whether or not we have the
5 authority to make a change in funding policy and, whether or not
6 this constitutes a change in funding policy, versus whether or
7 not it -- and this goes to the subject you are talking about--
8 whether or not it is wise to do so, to change it around from
9 what Congress has approved.

10 MR. SHEA: That is correct, and perhaps I should have
11 dealt with that first. That was going to be my third point,
12 that under the LSC Act, we do not have organic authority to do
13 that. I guess I was proceeding from what I thought was the more
14 specific to the more general.

15 First of all, of course, there are clearly arguments
16 that from a policy point of view, this is ill advised, but on
17 the authority proposition -- that is, do we have authority to
18 adopt a funding policy in this vein? -- number one, no one has
19 urged that there was a specific prohibition in the Act of this
20 nature.

21 Number two, no one has disputed and, in fact,
22 essentially all the commenters agree, that legal services

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1 programs generally should not be taking cases where a fee is
2 likely in any sense.

3 The argument is that it is a sound policy. We have
4 cited, I think, the case involving Clearinghouse clearly stands
5 for the proposition that LSC can take into account other funds
6 that are available in terms of making funding decisions for our
7 recipients, as well as even from a more generic point of view, I
8 think, what we are talking about is rationalizing resources to
9 provide services where the demand surely exceeds the supply.

10 Insofar as attorneys' fees are in the nature of, I
11 would say, a windfall in the sense that they are not something
12 that programs -- programs are not out for and no one intends
13 that they are intending to be generating fees with their
14 resources, per se. Insofar as they do constitute a windfall, in
15 some sense, they could fairly be redistributed to programs that
16 are funded on a lower level.

17 MR. WALLACE: Tim, do you know the practice of other
18 federal grant programs? We cannot be the only place where money
19 goes out from the federal government and the recipient generates
20 profits of some sort with those funds, intentional or
21 unintentional.

22 Do other federal grant programs have mechanisms for

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1 taking such windfalls into account?

2 MR. SHEA: There are circumstances where by contract
3 they do that. By regulation, I do not know that any leap to
4 mind to be perfectly honest.

5 MR. WALLACE: But, they do it by contract?

6 MR. SHEA: I am aware that it can be done by contract,
7 yes.

8 MR. WALLACE: I presume that you cannot do something
9 by contract that you would not have authority to do by
10 regulation?

11 MR. SHEA: I agree.

12 MR. WALLACE: All right.

13 MR. SHEA: There are some cases we have examined that
14 deal with similar kinds of issues, although they may be somewhat
15 ad hoc. There was some litigation involving the Department of
16 Education where there were grants made on a per pupil basis
17 across the country.

18 There were arguments about some questioned costs that
19 were questioned by the Agency and there were issues about
20 whether that was pursuant to a regulation that was reinforced in
21 the agreement. I think that precedent stands for the
22 proposition that Agencies can properly question costs, first of

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1 all, and then there were some issues about how the agency could
2 properly recover those questioned costs.

3 I do not think that as to the mechanism, there was no
4 dispute that they could question costs and effectively disallow
5 them and recover those funds by some appropriate means.

6 MR. WALLACE: That is exactly what we do in our
7 questioned cost regulation now, to set it off against the grant.

8 MR. SHEA: That is exactly correct. There are other
9 areas. In the PAI area, if programs do not, for some reason,
10 meet that PAI and do not have a waiver, we can also set off the
11 funds and there is a mechanism whereby we would supplement the
12 existing PAI arrangement so as to bring it up to the appropriate
13 level.

14 MR. WALLACE: To the best of your knowledge, has
15 anyone ever contended that those offsets are inconsistent with
16 the Congressional funding formula?

17 MR. SHEA: Actually, I think they have, as a matter of
18 fact.

19 MR. WALLACE: What have we told them?

20 MR. SHEA: Well, I think we have disagreed with it and
21 we are in the process of perhaps dealing with some of those
22 arguments more directly, even now.

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1 MS. SWAFFORD: Let me ask you a question.

2 MR. SHEA: Sure.

3 MS. SWAFFORD: In looking over these cases in the
4 material that was sent to us, it would appear to me that most of
5 these cases were against other federal agencies. Is that
6 overwhelmingly the case?

7 The reason I am asking that is I basically have some
8 concern about one federal agency permitting their lawyers to be
9 used to help to bring suits against other federal agencies, but
10 where they are against non-federal agencies, it would seem to me
11 there should be some distinction.

12 MR. SHEA: That is correct. There was considerable
13 argument in the record that under other circumstances, proposals
14 such as this have been rejected. Actually, my view of the case
15 law and the precedent is that it came up in situations where a
16 funder, such as a state, was a defendant and a losing defendant
17 in adversarial litigation about the way it provides welfare
18 benefits or something of the like.

19 In that context -- that is, a state having lost a case
20 on the merits -- the courts have been very reluctant to let them
21 avoid an attorneys' fee provision one way or another.

22 In our situation, first of all, we are not involved in

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1 merits litigation, at least on provision of benefits, with
2 respect to our recipients, number one. Number two, some of the
3 case law and one of the cases cited by the commentators arises
4 out of Hawaii. There, the court resisted the state's contention
5 that the state would be able to avoid paying attorneys' fees.

6 In a footnote, though, the court noted at some point
7 in the midst of the litigation, the State of Hawaii passed a new
8 funding law for the Hawaii Legal Services Program which said
9 that any fees awarded to the Legal Services Program, that the
10 appropriation should be reduced by the amount of any fees
11 awarded in litigation with the program.

12 It cited that legislation with approval, at least, as
13 I read it, so I think the tenor of the precedent, as I read it,
14 is that in merits litigation, the judiciary is reluctant to
15 recognize the contentions of losing parties, losing adversarial
16 parties, that they should avoid paying fees. But this is purely
17 a funding policy and this is not merits litigation with our
18 recipients.

19 I think I dealt with my third issue about authority,
20 which I would cite as a general proposition that we have
21 authority to make funding decisions, to appropriately
22 rationalize the resources available to the Corporation and to

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1 our recipients as long as, of course, it is not inconsistent
2 with the Legal Services Corporation Act. There was no specific
3 argument that it contravenes any specific portion of the Act
4 itself.

5 Moving on, there was considerable comment about the
6 policy basis for the proposal. There were numerous comments by
7 practitioners, by Bar Associations, that urged that our
8 suggestion that any case with fee-generating potential could
9 reasonably be identified as fee-generating and would trigger the
10 requirement that it be referred to either a private practitioner
11 or a referral service. The ABA specifically made that comment,
12 as well as a number of State Bars.

13 Frankly, upon reflection, I think there is
14 considerable weight to that and we have a proposal that will
15 deal with that comment. The general tenor of the comments,
16 though, were simply that there were certain classes of cases
17 that although they were theoretically fee-generating, they
18 practically speaking and experience told everybody in the
19 locality either that they do not generate fees or they do not
20 generate enough fees to attract private practitioners to take
21 such cases.

22 I have a proposal which we will deal with when we talk

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1 about specific text in a moment or two, which would suggest--
2 and this is consistent with the ABA's comments, but I would
3 leave my definition intact.

4 It would suggest that our programs sit down with the
5 Bar Association and they may rule out classes of cases as being
6 so unlikely to generate any private Bar interest that they would
7 not require referral.

8 The proposal would provide that a tentative or
9 proposed agreement would be worked up between the program and
10 the Bar; that some opportunity for notice and comment by the
11 membership of the Bar Association would be provided and then the
12 agreement would be furnished to LSC.

13 MR. WALLACE: Tim, let me say something about that now
14 and commenters can address it as they come up here. I
15 understand the thrust behind this, but I have some concern that
16 Bar Associations are not the best representatives of the kind of
17 lawyers who are most likely to take these suits.

18 Young lawyers who make a living out of criminal
19 referrals and scrambling for divorces and taking chances on
20 cases they may never get paid for are the kind of lawyers who do
21 not have time to go to Bar Association meetings and sit on
22 committees and respond to notice and comment procedures.

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1 I am not suggesting that any Bar Association would act
2 in bad faith, but I am suggesting that Bar Associations really
3 are more representative of big firms that have lawyers they can
4 send to committee meetings and are interested in these cases
5 than they are representative of people that are likely to take
6 the kind of cases our recipients are likely to be able to refer
7 out.

8 That is my concern about just circulating a piece of
9 paper and scratching categories of cases off the list. It is
10 more of a fact question than a policy question. Maybe some of
11 the Bar Association representatives in the audience can tell me
12 I am crazy later in the morning, but that is my concern with
13 your proposal.

14 MR. SHEA: Okay.

15 Let's see, there was some considerable adverse comment
16 as well about the crediting mechanism. Again, first of all, the
17 issue of authority was argued, number one; and, number two, the
18 issue about the whole policy itself.

19 The commenters generally urged that it would
20 constitute a disincentive for our programs to pursue the claims,
21 number one; number two, that the shifting of fees generated by
22 our programs from the programs that generated the fees to lower

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1 funded programs was unwarranted and would not reward the
2 programs that were presumptively providing good and vigorous
3 representation with the appropriate reward.

4 However, in context, I think it has been essentially
5 recognized -- all the commenters recognized -- that they were
6 not taking cases for the sake of the fees themselves. If they
7 do, indeed, in that sense represent something in the nature of a
8 windfall, I think they may -- it seems to me from a policy point
9 of view -- fairly be reallocated to other programs which,
10 presumptively, insofar as they are funded on a lower basis, may
11 need the funds more and that is what this proposal is about.

12 There were also arguments that the proposal was
13 retroactive. I am not so sure. There was nothing in the
14 provision, per se, that would make past conduct either unlawful
15 or inappropriate to the extent that once it became effective, it
16 would simply provide that funds received after its effective
17 date would be subject to the crediting mechanism and whatever
18 documentation requirements are put in place similarly would be
19 put in place thereafter.

20 Insofar as there was an argument that there was an
21 expectancy of attorneys' fees from past activities, again, that
22 is in the context that it is generally recognized that fees were

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1 not the motivating basis for our programs taking on a case. I
2 do not find that particular argument persuasive.

3 Finally, there were arguments that programs would be
4 discouraged from undertaking major litigation which is very
5 demanding on the talent and the resources of programs. I think,
6 again, the answer to that is that insofar as Legal Services
7 Corporation, LSC underwrites the activities of our recipients
8 whether they win or lose.

9 Insofar as programs are not using fees, it has been
10 essentially recognized that fees do not constitute the
11 motivating factor for taking on cases, I do not see how that
12 would work, really, as a penalty or should work as a penalty.

13 CHAIRMAN VALOIS: I think you can take that one step
14 further. If the passage of some version of what is on the table
15 now results in a program taking less, in number, less large
16 cases, and those are fee-generating cases, I do not quite
17 understand why that is bad.

18 Isn't that part of what we are trying to do, to serve
19 the greatest number of people?

20 MR. SHEA: Certainly.

21 CHAIRMAN VALOIS: And shift these fee-generating
22 cases, if we can, to firms who are willing to handle them?

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1 MR. SHEA: Well, that's right, and as well, there is
2 an incentive under the current regime for programs to actually
3 be distracted for the opportunity for attorneys' fees.

4 First of all, most fee-shifting statutes provide for
5 payment of fees at market rates. Typically, for the program,
6 their costs are below market rates. In that sense, not only do
7 they recover their fees; they recover whatever its internal costs
8 were, but that and some premium.

9 To the extent that this regulation would pool those
10 resources and then distribute them to other programs, perhaps,
11 it would constitute a disincentive for programs to be distracted
12 by the opportunity for taking fee-shifting cases as opposed to
13 other cases available to devote their time and resources to,
14 other cases which may have more merit but have less opportunity
15 for fees.

16 MR. SMEGAL: We seem to be jumping in and I apologize
17 if this is not the proper procedure, but I would like to join in
18 to whatever it is that is happening up here at the table.

19 MR. SHEA: Please do.

20 MR. SMEGAL: With respect to what Bob just said, and I
21 think there is a lot of motherhood and apple pie in here and I
22 think we all agree on that kind of stuff, to serve the greatest

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1511 K STREET, N.W. SUITE 547

WASHINGTON, D.C. 20005

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1 number of people.

2 I kind of like that, as we all do, but let me ask you,
3 Tim, how do you serve the greatest number of people? Do you
4 spend \$10,000 on a litigation that affects a thousand people,
5 ten bucks a piece, or do you spend \$250 or \$286, or whatever our
6 average is per case, representing one person? How do you serve
7 the greatest number of people with the bucks, as Durant likes to
8 say?

9 MR. SHEA: Let me tell you. If there were a thousand
10 people, I do not suggest that this attorney should pursue these
11 \$250 cases for those thousand, perhaps, class members one at a
12 time. There is nothing in this rule that would prevent this
13 counsel from making this case into a class case, if that is
14 appropriate, and pursuing it on behalf of a class. That is not
15 what this does.

16 If that is the most economical way to pursue it, he
17 should do that. In fact, we have other regulations that
18 specifically envision that programs undertake class cases. The
19 tenor of this would be that counsel would not be distracted by
20 the opportunity to pursue this case because it is fee
21 generating.

22 If it is a case with merit and if it is a case of

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1 importance for the clientele, it should be pursued and it should
2 certainly be pursued as a class action if that is the way
3 counsel is disposed.

4 MR. SMEGAL: I think we are in full agreement, but
5 that is not what I heard Bob say. Bob suggested that we should
6 be discouraging these kinds of cases because in this way, we do
7 not serve the greatest number of people.

8 If we direct all of our resources or a large segment
9 of our resources at one particular case that affects a lot of
10 people that happens to be, in retrospect, as a result of the
11 fee-generating, we could not do that. The transcript will
12 reflect that that is exactly what our Chairman just said. Maybe
13 he did not mean that, but that is what he said.

14 CHAIRMAN VALOIS: What is being overlooked in this
15 discussion is what this regulation is about and that is to
16 encourage, I think, private attorneys to take these fee-
17 generating cases rather than for us to continue to take them.
18 To that extent, I think we are doing what I proposed.

19 MS. SWAFFORD: Let me jump in a minute, Mr. Chairman.
20 I noticed on page 11 of Mr. Shea's memorandum, there is some
21 interesting information that appeared in the December 1988
22 edition of "The California Lawyer", which says that there are a

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1 hundred profit-making public law firms and lawyers in the State
2 of California who represent clients.

3 If that is the case, we would be serving the greatest
4 number of people if we encouraged those law firms, those public
5 interest law firms. Would that not be the case? I have been
6 more or less led to believe or caused to believe that there just
7 were not any lawyers out there who would be willing to take
8 these kinds of cases, but this is an interesting commentary.

9 CHAIRMAN VALOIS: Tim, if you will continue, we will
10 debate it later. Thank you.

11 MR. SHEA: Perhaps I should note here that the ABA
12 standards for providers of civil legal services to the poor, in
13 their commentary, generally, of course, support the notion that
14 Legal Services providers should refrain from representation of
15 clients in fee-generating cases.

16 It is both to prevent competition with the Bar and to
17 avoid the expenditure of limited resources on matters that would
18 otherwise be available. The principle is one on which I think
19 there is general agreement. The question is how to apply it,
20 what the mechanics are.

21 Let's see, I think at this point, I would like to go
22 through a description of the amendments to the proposed

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1 regulation that I would suggest which try to deal with a number
2 of the comments.

3 As I say, I was very impressed by the expression of
4 concern by a lot of the Bar Associations. The states of New
5 York, Maine, California and others expressed concern that the
6 tenor of the rule, as written, would require ping-ponging of
7 clients around and, surely, that is not what this regulation is
8 about.

9 Perhaps I could ask Suzanne Glasow, my Assistant
10 General Counsel, to go through these specific changes. I think
11 you have available to you an amended text and if we could walk
12 you through that step by step, that might be helpful.

13 CHAIRMAN VALOIS: Is that what we received today?

14 MR. SHEA: Yes.

15 CHAIRMAN VALOIS: Has that been made available to the
16 public?

17 MR. SHEA: It has been made available to certain
18 members of the public. I do not know how many copies we have
19 here. I know that Alan Houseman has a copy.

20 CHAIRMAN VALOIS: We are not going to go through the
21 changes on today's version?

22 MR. SHEA: Yes.

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1 CHAIRMAN VALOIS: Go ahead.

2 MR. SHEA: If I may refer to Ms. Glasow.

3 CHAIRMAN VALOIS: The only change here is the addition
4 of the phrase "and sub-recipients"; is that correct?

5 MS. GLASOW: Actually, go to the first page.

6 CHAIRMAN VALOIS: I am on the first page.

7 MR. SMEGAL: Excuse me. Could I ask for one further
8 overview before you get into the specifics, Tim? I heard you
9 say earlier, with respect to one of the justifications for this,
10 that the LSC underwrites whether these litigations win or lose.

11 I would like you to sort of give me a general idea of
12 the justification for the treatment of private fund litigation
13 versus LSC funded litigation in that statement, the statement
14 that you made. There are situations where there are private
15 funds involved and the LSC does not underwrite anything.

16 MR. SHEA: That is correct. You are right.

17 MR. SMEGAL: If I heard you correctly, that was a
18 justification for the recapture where LSC funds are used in a
19 litigation, but what about the private funds?

20 MR. SHEA: As a general proposition, private funders
21 make available funds, as well, under the assumption, and maybe
22 under the explicit provision, that the programs not be

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1 undertaking fee-generating cases.

2 MR. SMEGAL: That is between the private grantor and
3 the grantee.

4 MR. SHEA: That is surely true. It may well be the
5 case, but pursuant to, first of all, under 1010(c) as to private
6 funders, 1010(c) requires that they not be undertaking those
7 kinds of things.

8 First of all, I was dealing with your issue about what
9 the expectations of the private funders are, but I mean as a
10 general proposition, I am saying that the ABA standards and I
11 think their expectations generally are that the programs not be
12 undertaking fee-generating cases and, as well, 1010(c) provides
13 that.

14 MR. SMEGAL: Let me ask one followup question, if I
15 may. I was at a vice presidential debate in Omaha, Nebraska,
16 and I saw how this works, so let me try this.

17 MR. SHEA: Uh-oh, uh-oh. Is he a friend of yours,
18 too?

19 MR. SMEGAL: Excuse me. You have interrupted my train
20 of thought.

21 Looking at your comments, I can see -- you made the
22 point; you distinguished it -- the distinction where either by

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1 statute or some regulations we might promote and, in fact, the
2 statute sets out what kind of litigation the programs can engage
3 in, and I can see that. Certainly, there are prohibitions
4 against lots of things including fee-shifting cases and so on.

5 MR. SHEA: Right.

6 MR. SMEGAL: That still does not meet the point. I
7 think there is a distinction -- and you have made it in your
8 materials -- between telling the programs what they can do and
9 taking a credit against the programs for what they have done
10 with respect to fee generation. Again, I want to focus on the
11 private versus LSC. You kind of glossed that over in what you
12 just said.

13 MR. SHEA: You are certainly --

14 MR. SMEGAL: Again, for moment and for the purposes of
15 this discussion, I will accept that there is a basis for us
16 telling grantees what they can and cannot do by way of
17 litigation scope, what they can do, what kind of cases they can
18 take.

19 But once that has happened and once they have complied
20 with that, granted, even with the use of private funds, there
21 are some limitations on what they can do. I agree with that,
22 too. I agree that that is there and let's just accept that.

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1 Once you get to that point, again, I am back to your
2 premise that LSC underwrites and where LSC does not underwrite,
3 what is the justification for saying to the program, "Okay, you
4 have used purely private funds. You have used it in a way that
5 is authorized by our Act and our regulations and now we want a
6 credit."

7 MR. SHEA: First of all, there is no question that I
8 am not urging here that the Corporation should have been doing
9 that from day one or was required to do that; that is clearly a
10 policy question.

11 The issue is: If this represents what I am styling as
12 a windfall and given that we are rationing a scarce resource,
13 does it make sense -- I am urging that it does make sense -- to
14 redistribute that to providers who are lower funded?

15 You might keep in mind that there is a pretty broad
16 spectrum between the rates at which our recipients are funded.
17 It runs from between \$8.52 or fifty-three cents up to
18 approaching \$15 per poor person within the area served. That
19 disparity is pretty substantial. I suppose, to some extent, our
20 providers are able to adjust for that by seeking other private
21 funds.

22 I surely think that it is within the purview of the

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1 Corporation to do what it can to improve what is the funding
2 disparity among these providers and that is the tenor of the
3 crediting and the redistribution of these attorneys' fees.

4 Does that not answer your question?

5 MR. SMEGAL: No, it does not answer my question
6 because I am looking for some authority to do that other than
7 that.

8 MR. SHEA: You are saying why private, is that it?

9 MR. SMEGAL: Yes.

10 CHAIRMAN VALOIS: You can serve a greater number of
11 people if you recover private funds and redistribute them to the
12 programs, can't you?

13 MR. SMEGAL: You can serve a greater number of people
14 if you get more money from Congress or if you get more
15 foundations to make contributions or if the lawyers of this
16 country write bigger checks to Legal Aid Societies. You can do
17 it in a lot of ways.

18 I am asking you what is the legal justification for
19 doing this? I am asking for some authority if you have it. If
20 you do not have it, we can go on.

21 MR. WALLACE: Mr. Chairman, may I make a suggestion?
22 It seems to me that there are two primary legal justifications

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1 for what we are doing. One is almost a constructive trust
2 theory that we have talked about.

3 We send our money out; they make money with our money;
4 that money they make is ours. They are acting as trustees for
5 the taxpayers and the taxpayers are entitled to have that money
6 back. That applies to federal funds.

7 You are right, Mr. Smegal. It does not apply to
8 private funds if accounting means anything, you know, in setting
9 up separate ledgers.

10 There is another factor that I think is important and
11 that is our job as a law enforcement agency, because we all
12 agree, I think, that the law presently prohibits our recipients
13 from using private funds in fee-generating cases. That is not
14 anything new that we are doing here.

15 Congress did that in 1010(c) and it has been the law
16 for thirteen years. Congress prohibits the use of private funds
17 and our funds for fee-generating cases. In removing the fruits
18 of fee-generating cases from programs, regardless of the source
19 of those funds, you are removing an incentive to use funds in a
20 way that Congress has specifically prohibited.

21 It is not a constructive trust theory. It is a law
22 enforcement mechanism. We have an obligation, as well as a

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1 right, to enforce the law. That seems to me to be the primary
2 basis and the primary statutory authority for what we are doing
3 insofar as private funds are concerned.

4 Now, what we do with the money after we get it back,
5 to redistribute the funds is very good and I am all in favor of
6 it and I am perfectly happy to write it into the regulation.
7 But, the basis of our authority is there is a Congressional
8 prohibition out there and we have got an obligation to enforce
9 it. This looks to me like a good way to get this job done.

10 MR. SHEA: If I may supplement that, I thought you
11 were asking a policy question, but ask for a specific authority,
12 it seems to me the Clearinghouse case clearly stands for the
13 position that we can take into account other funds, including
14 private funds, available in making funding decisions. That is
15 what we are about here, it seems to me.

16 This is a rationalization. We are rationing
17 admittedly scarce resources. There is no question. There may
18 be other ways of doing it, as well, which may be complementary
19 or maybe perhaps arguably better. That does not mean that this
20 is, per se, impermissible.

21 MR. SMEGAL: Let me suggest that this whole exchange
22 brings to mind another possibility for a funding source. The

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1 grantees pay their staff salaries and they withhold, I guess,
2 under the normal process, federal income tax. Those employees
3 at the end of the year, as most of us do, file their tax returns
4 on April 15th.

5 I guess under those circumstances where the employee
6 got a refund on their annual tax withholding, we should take
7 that, too, because that is money that came from us and it is
8 available for us to recover. It was withholding we took out of
9 the employee's salary.

10 CHAIRMAN VALOIS: Tom, we are going to have a little
11 trouble with that analogy.

12 MR. SMEGAL: I will work on it a little bit, Bob, and
13 refine it a little bit and I will get to it next time.

14 I have one other comment. I would like to focus on
15 what Mike said. In his view, we are a law enforcement agency
16 and what we are doing here is penalizing programs who somehow or
17 another get into the corner of having to take a fee-generating
18 case, having complied with our Regulation 1609 that has existed
19 since 1976. They have done the things that that requires.
20 There is no one else to take the case. They have taken the
21 case; they have completed it; they get fees starting at some
22 point after these regulations go into effect with private funds.

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1 What Mr. Wallace would like us to do is penalize them.
2 We are going to provide this penalty because they have gotten
3 into the circumstance where a client came in, there were no
4 other lawyers available to handle the case. Is that where we
5 are? Is that what we are doing here? Is Mr. Wallace correct
6 that that is what is going on?

7 MR. SHEA: I think you will have to ask that to Member
8 Wallace.

9 MR. SMEGAL: I am just asking you if you agree with
10 that, if that is what we are doing here.

11 CHAIRMAN VALOIS: I am going to cut off the debate and
12 let Tim go ahead.

13 MR. SMEGAL: I'm sorry, Bob. I think that is a simple
14 question. I would like an answer to it. Mike Wallace stated a
15 view of what we were doing here. I am asking you if that is
16 what you think we are doing here.

17 MR. SHEA: I do not know that I can give you an answer
18 to that. That is a matter of opinion. I do not want to be in a
19 position of quibbling. If you are going to argue, you are going
20 to have to, with all due respect, argue between yourselves.

21 MR. WALLACE: Mr. Chairman, I like the word
22 "disincentive" better than "penalty", but that is what lawyers

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1 are paid for, to find unpleasant words to characterize each
2 other's positions. Mr. Smegal is well within the bounds of
3 advocacy.

4 MR. SMEGAL: I am not characterizing. I am quoting.
5 Mr. Wallace used the word "penalized" and I want to know whether
6 that is the view that we have in this room and that is what we
7 are doing here.

8 Are we trying to penalize programs for pursuing what
9 turn out to be, in retrospect, fee-generating cases? Is that
10 what we are doing?

11 MR. SHEA: I recognize that there is an issue of
12 incentives and disincentives. That is surely an element of it;
13 that's right. We have argued this and set this out, I think, in
14 our proposed rule.

15 Programs' decision making as to which cases to take
16 should not be driven by the opportunity for fees.

17 MR. SMEGAL: I think that is a given. We all agree on
18 that, even those who will speak later.

19 MR. SHEA: That's right.

20 MR. SMEGAL: That's not the point. The point is that,
21 because they take, because of the circumstances of no
22 alternatives for the client, they take a case which becomes, in

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1 retrospect, fee generating because of their success or whatever
2 other circumstances are involved, is our purpose here to
3 penalize them?

4 MR. SHEA: Well, look, I think what you are arguing
5 is: Is a penalty a disincentive? I do not know that there is
6 much else I can add to that.

7 MR. SMEGAL: All right. I appreciate your effort to
8 answer it.

9 CHAIRMAN VALOIS: Tim, let's go ahead and finish up,
10 please, so that we do not deprive others of an opportunity to
11 speak.

12 MR. SHEA: At this point, again, I was going to defer
13 to Suzanne Glasow to talk about the specific changes we have had
14 which were intended to accommodate the comments that we have
15 received.

16 MS. GLASOW: On page 1 of the handout, what we did, if
17 you see a word or a sentence or a phrase in bold, with a star
18 outside in the margin, that indicates a change in our original
19 proposed language. The language is either being added or
20 deleted from the language originally proposed.

21 MR. WALLACE: If there is no star, that is an addition
22 that was proposed in The Federal Register and we have seen it

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1 before; correct?

2 MS. GLASOW: That is correct.

3 MR. SHEA: Correct. The stars indicate the things
4 that, in effect, changed this morning.

5 MR. SMEGAL: I'm sorry, whether they are printed stars
6 or inked stars?

7 MR. SHEA: Correct.

8 MR. SMEGAL: On page 1, I have a printed star and on
9 page 2 I have an inked star, and they are all the same; right?

10 MR. SHEA: Yes.

11 MR. SMEGAL: I should treat those the same.

12 MR. SHEA: Yes.

13 MS. GLASOW: On page 1, section 1609.2 of the
14 definition, fee-generating case means any case, and we added the
15 word "contract or matter which if undertaken on behalf of an
16 eligible client by an attorney in private practice reasonably
17 may be expected to result in a fee for legal services from an
18 award to a client".

19 The reason we added "contract" was so that it, too,
20 would come under the definition for a case where it is
21 determined "reasonably may be expected to result in a fee".
22 Originally, we had proposed it to be in the next sentence, which

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1 is underlined, which said, "any action brought on behalf of a
2 client under a contract or", and we are now deleting "a contract
3 or".

4 Now, it will read "any action brought on behalf of a
5 client under a statute with a fee-shifting provision is
6 considered a fee-generating case."

7 MR. SMEGAL: Why did you make that change?

8 MR. SHEA: If I may intervene, there were comments
9 that contracts were -- that fee shifting provisions were
10 routinely included in contracts, where realistically, people
11 knew that they were unlikely to make awards.

12 By shifting it from there to the earlier sentence, it
13 is clear that it is subject to a reasonableness test. We
14 maintain the provision here that actions brought under a statute
15 with a fee shifting provision would still, by definition -- that
16 there was no reasonableness test written into the provision that
17 says that actions brought under a fee-shifting statute are
18 considered to be fee generating.

19 The point is, then, that contracts are now subject to
20 the reasonableness test, but the fee-shifting statute still
21 remains, by definition, as a fee-generating case.

22 MR. WALLACE: I understand it.

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1 MR. SHEA: We will deal with some of the comments
2 later on, on the issue about what the effect of the second
3 sentence is with respect to cases that the private Bar
4 presumably is not interested in pursuing.

5 MS. GLASOW: In Section 1609.3, prohibition, we have
6 added the two words "or subrecipient". The reason we did this
7 is because comments indicated that we had added "subrecipient"
8 in the purpose but we had not added it in the general
9 prohibitions.

10 We wanted to make it clear that the prohibition
11 against taking fee-generating cases, unless a referral is
12 attempted first, also applied to subrecipients.

13 MR. WALLACE: Suzanne, let me suggest as a matter of
14 drafting that it is not clear, unless you put "subrecipient"
15 after "recipient" every place it turns up in here. We may want
16 to think about adding a subsection B to the definitions section
17 that says the term recipient shall include subrecipient unless
18 you have got another thing here that says what subrecipients we
19 do not want to cover.

20 MR. SHEA: Correct.

21 MR. WALLACE: I think probably the best way to handle
22 both of those problems is in the definition section, to say that

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1 recipient includes subrecipients except for whatever language we
2 decide on.

3 MR. SHEA: I think that is well taken.

4 MR. SMEGAL: I have a little trouble understanding
5 this whole thing. Let me see if I can summarize my
6 understanding and you tell me whether it is right or not.

7 We have got a situation where under our PAI or
8 whatever, somebody else gets involved in some litigation that
9 initially came in through one of our recipients. Maybe it is
10 pro bono, whatever. Maybe some administrative costs are being
11 covered or whatever.

12 That subrecipient gets an award that does not flow
13 back to the recipient. It stays with the subrecipient, whoever
14 it is, some attorney fee award. Now, what this would do is this
15 would -- using Mr. Wallace's term -- this would penalize the
16 recipient by funds that have been received by the subrecipient
17 and have not flowed back to the recipient.

18 We are going to take a credit or an adjustment against
19 the recipient's next grant based upon funds received by the
20 subrecipient that did not flow back to the recipient. Is that
21 what is going to happen? Could that happen or would that
22 happen?

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1 MR. SHEA: It might happen. I would think that the
2 recipient would try to do the same thing with respect to its
3 subrecipient. In other words, you are assuming there would be
4 no flow back. I would say there should be a flow down, just as
5 between recipients and subrecipients in the same fashion.

6 MR. SMEGAL: What we want to ask our recipients to do
7 is in any subrecipient agreement, they have a condition that if
8 they get any fees out of this, they have to pass it back on
9 through to the recipient.

10 MR. SHEA: Correct. As to LSC derivative funds,
11 putting aside pro bono, which is somewhat different, that is
12 generally the case. The fees generated by a subrecipient are
13 available to be recovered, I think, by a recipient. They are
14 surely treated as LSC-derived and if they did not spend them,
15 they have to return them in some form or fashion.

16 MR. SMEGAL: That is all well and good for future
17 contracts, but what about all of those --

18 MR. HOUSEMAN: Let me see if I understand what you
19 said. Did you say fees by private funds from a subrecipient are
20 eligible to --

21 MR. SHEA: No, I did not say that, Al. I said LSC
22 derived.

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1 MR. SMEGAL: At the moment, I understand the effect of
2 this is not with respect to litigation. This is a little ex
3 post facto, in my view, but we will get to that some other time.

4 This does not apply to cases brought after the
5 effective date of these regulations, but it applies to fees
6 received. If we have got a case that started ten years ago with
7 a subrecipient and there is an award to the subrecipient that
8 gets collected in 1989, the contract is silent.

9 There is no requirement retroactively that the
10 subrecipient pass it back through the recipient, so not only are
11 we going to penalize our recipients, we are now going to, in
12 effect, double penalize them. Every time a subrecipient in that
13 case gets money, we are going to double penalize our recipients.

14 MR. SHEA: I don't know. To the extent that if it is
15 a penalty at all, it is a one-time penalty. I do not know how
16 it would be double. I think you are arguing it is retroactive,
17 in a sense.

18 MR. SMEGAL: The reason it is a double penalty, and
19 let me explain. Mike tells us it is a penalty because what we
20 are going to do is take away from them, in effect -- I mean, it
21 is an accounting process, I acknowledge, but we are going to
22 take away from them funds that result from fee-generating cases,

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1 payment of awards in fee-generating cases.

2 MR. SHEA: Yes.

3 MR. SMEGAL: We have got a situation now where the
4 subrecipient gets a fee award and the recipient never sees it.
5 The double penalty is that the recipient gets a debit for the
6 subrecipient's fee award. It is a double penalty, I think, if
7 you accept Mike's analogy that the first one is a penalty, which
8 I accept, so there are two penalties.

9 MR. SHEA: I understand. If it were LSC funds, first
10 of all, then I think either the program itself could -- if it
11 has a continuing relationship with the subrecipient, then it
12 could, I think, do the same thing with respect to its
13 subrecipient.

14 MR. SMEGAL: Do you mean: "If you want any more cases
15 form us, you had better pay us the money or we are not going to
16 give you any more cases"?

17 MR. SHEA: Or perhaps do a credit.

18 Now, there were arguments about -- I do not know if
19 you are arguing -- private funds to subrecipients.

20 MR. SMEGAL: That is another whole issue which I am
21 sure we will get into. I am just trying to understand it on the
22 LSC funds now.

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1 MR. SHEA: Then basically, the requirement would flow
2 down, I would say. The credit mechanism which we assert against
3 our recipient, our recipient would and could assert against
4 their subrecipient.

5 MR. SMEGAL: I think that is wonderful in theory, but
6 here we have got a subrecipient that takes on this big case, a
7 one timer, gets a big fee award. We are going to say to that
8 recipient, "Hey, your subrecipient got a big fee award and it is
9 too bad for you because now we are going to reduce your grant by
10 that amount of money."

11 MR. SHEA: In a sense, assuming the recipient has the
12 same recourse against the subrecipient, then it would have no
13 more harsh effect on the subrecipient than it does on the
14 recipient.

15 MR. SMEGAL: First off, the recipient does not
16 promulgate regulations like we do in this room so they do not
17 have the same rights that we do or the same process or anything
18 else.

19 MR. SHEA: The subrecipient would, of course, be
20 subject to all the other general requirements about the
21 prohibitions on fee-generating cases and things like that. I do
22 not think there is an argument about that.

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1 CHAIRMAN VALOIS: Let me, once again, try to get us
2 back on track. Let's get through these changes and let's hear
3 from Mr. Houseman. We are going to have plenty of time to
4 debate. Let's go on, Tim. Proceed.

5 MR. SMEGAL: Excuse me, Mr. Wallace (sic). I am not
6 debating anything. I am just trying to understand what we are
7 talking about here. My questions are of a general nature, based
8 upon the information I have been provided with and the
9 information that Mr. Shea is giving us now. I will debate
10 later.

11 CHAIRMAN VALOIS: Without debating whether we are
12 debating, let's go ahead and go through these as best we can.

13 MS. GLASOW: On the bottom of page 2, section 1609.4,
14 basically, the change means that we are not going to put the
15 full burden on the Executive Director to review and document
16 referral cases. We are going to make sure that any policies
17 created by the governing body will be known by the staff and
18 that a senior --

19 CHAIRMAN VALOIS: I understand. You are saying you
20 have the written policy and the Executive Director does not
21 personally have to execute it.

22 MS. GLASOW: A written policy adopted by the

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1 recipient's governing body. That basically is requiring the
2 governing body to establish policies.

3 MR. WALLACE: Can I ask you a question?

4 MS. GLASOW: Yes.

5 MR. WALLACE: Do our class action regulations
6 presently require the executive director to certify the class
7 actions?

8 MR. SHEA: I believe so.

9 MR. WALLACE: It is in the appropriations bill, my
10 president tells me. I thought it was. Is there a record that
11 that has been unduly burdensome for executive directors to
12 comply with the appropriations act?

13 It seems to me that what the original proposal was,
14 was to do in potential fee-generating cases exactly what
15 Congress already requires in potential class actions. We ought
16 to have a track record on whether that is a back breaking burden
17 for people to bear.

18 I have not seen them running up to Congress to say
19 that the executive director cannot look at these. Maybe you
20 have been. Maybe you will tell me.

21 MR. SHEA: The basis for our suggestion here was that
22 there are a lot of sort of ordinary -- a class action case, by

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1 definition, was one that was demanding on a lot of program
2 resources. These cases may not necessarily be, and in that
3 sense, we felt that some lower level of review would be
4 appropriate. That was the basis for my change.

5 MR. WALLACE: Okay, thank you.

6 MS. GLASOW: This part only extends to the point that
7 we are saying that the governing body must establish policies.
8 It takes out the part of the executive director's
9 responsibility.

10 On the next page, page 3 --

11 CHAIRMAN VALOIS: Let me ask a question. What is
12 Insert C? I have three pieces of paper.

13 MS. GLASOW: Where it says "section C" is the insert.
14 We had a hotel typist do this quickly and there are misspellings
15 and whatever, so I will have to correct it as we go along.

16 On (b)(1), (1) is an addition to our original
17 proposal, and this is the idea that Mr. Shea mentioned earlier,
18 that the Bar Association, which represents the majority of
19 attorneys in the recipient's service area and the recipient
20 would get together, come up with an agreement as to those types
21 of cases generally that would not interest the private Bar in
22 that area.

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1 The agreement would go out to the membership of the
2 Bar for notice and comment. The agreement would be submitted to
3 the Corporation for approval. If the Corporation did not
4 respond within 45 days after receipt of the agreement, the
5 agreement shall be considered approved.

6 Insert C, which is entitled Section C, says these
7 agreements shall not extend beyond three years. That is just
8 recognizing that there may be a change in the private Bar.

9 MR. SMEGAL: Excuse me, Suzanne. Is there any
10 definition of service area anywhere? Again, we have got the
11 problem that we have been discussing since last January 28th, if
12 we ever approve those minutes, with respect to whatever a
13 recipient service area where the recipient is not a Legal Aid
14 Society on the corner of Third and Main in Paducah, Kentucky.

15 How are we doing that? Are we creating another
16 incredible dilemma for a recipient whose service area is large,
17 national? What is a recipient with a national responsibility
18 supposed to do to comply with this?

19 MR. WALLACE: They probably can't. That means they
20 are just going to have to refer out the cases. This is an
21 exception to the general rule which permits a blanket deletion
22 of classes of cases if you can find a Bar Association

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1 representing a majority of lawyers in the area that will tell
2 you, "We don't want these cases."

3 For a national service area, I do not think any such
4 Bar Association exists, so this exception to the general rule
5 simply will not apply to people with national service areas. I
6 do not think we have got any problem on a smaller than national
7 service area, because every state has a State Bar Association.
8 You can always do business with those folks.

9 MR. SMEGAL: If they want to do business with you.

10 MR. WALLACE: Sure, but that is the nature of
11 contracts. Both people have to want to do business and this
12 clause is about a written agreement.

13 MR. SMEGAL: Why are we talking about some rational
14 service area, such as a State Bar? Why aren't we talking about
15 the majority of attorneys in the country now? We have been
16 through that, represented by our voluminous minutes of last
17 January 28th. I think that was the date, or maybe it was
18 February.

19 It seems to me you are just perpetuating a problem
20 that has been created in prior efforts to regulate our grantees
21 that have a service area that extends beyond a local Bar
22 Association, and you are doing it again here.

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1 I am saying this with the understanding that what you
2 are trying to do here is meritorious. I think this is a good
3 idea and I think this is a good exception, in that sense, but
4 you are creating another quagmire.

5 MR. SHEA: I think certainly for basic field
6 recipients, I think they know, as a general proposition, who
7 their Bar Associations are in their service area.

8 MR. WALLACE: If they can't find them, we can't give
9 them money. The McCollum Amendment says so.

10 MR. SHEA: That's right. Moreover, for most
11 providers, they have some sense of that. Now, this gets, too,
12 to the larger application for McCollum. There are some Bar
13 Associations who are doing that kind of appointing.

14 MS. GLASOW: Okay, 2(i) is the referral section and we
15 deleted the requirement for when the two attorneys are
16 consulted, you deleted the requirement that says they have to
17 have experience in the subject matter of the case.

18 We decided this would be too hard to determine for the
19 referral services and that they would not be in compliance if
20 they could not do it and that it would be an administrative
21 problem.

22 The next page, page 4, the only changes are numbers.

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1 On page 5, this is the section where we took out the
2 requirement for the executive director to approve and to
3 document. Now we are saying that a senior supervising attorney
4 can maintain the documentation in the case file. Because, in
5 paragraph (c), we have made that change, we suggest you delete
6 number (3) below.

7 On page 6 at the bottom as it goes over to page 7,
8 this is our requirement to report attorneys' fees received. It
9 is also a requirement that includes the setoff by the
10 Corporation of the fees received.

11 Basically, you have two Insert Bs. The one that is on
12 the page by itself is the first part and it says, "No reporting
13 or crediting will be required for attorneys' fees derived from
14 private funds for subrecipients that are Bar Associations or
15 foundations, pro bono providers, private law firms or any
16 subrecipient whose LSC funds represent less than twenty percent
17 of its total funding during the applicable calendar year."

18 On the other, Section B should be Insert B, and it
19 should read: "The attorneys' fees received, pursuant to this
20 section, shall be distributed by the Corporation" -- Corporation
21 needs to be capitalized -- "to those recipients" -- recipient
22 needs to be spelled correctly -- "with the lowest available

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1 funds per poor person."

2 MR. SMEGAL: Where does that go?

3 MR. SHEA: 1609.6.

4 MR. SMEGAL: No, where does (B)(2) go?

5 MS. SWAFFORD: Would you correct that section again?

6 MR. SHEA: We will read on the two sentences which
7 will be added on to the conclusion of 1609.6.

8 MR. SMEGAL: They flow at the end of 1609 on page 7;
9 is that right?

10 MR. SHEA: Right. Should we reread them?

11 MR. SMEGAL: No.

12 MS. GLASOW: I believe that's it. That's all the
13 changes to our original proposal.

14 MR. WALLACE: Let me ask you a question. It is the
15 intent of these revisions, as I understand it, that everything
16 in this regulation that applies to recipients shall also apply
17 to subrecipients except for the exceptions that you have just
18 read into the record?

19 MR. SHEA: Correct.

20 MR. WALLACE: Okay, I understand that.

21 CHAIRMAN VALOIS: With that in mind, at some point,
22 and I do not know whether this is the appropriate point or not,

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1 why don't we add that definition that Mike mentioned earlier,
2 under 1609.2, and make the first paragraph (a) and the second
3 paragraph (b), which says that "recipient" shall also mean
4 "subrecipient".

5 MR. SHEA: Yes.

6 MS. GLASOW: I can give you the wording now, if you
7 would like.

8 MR. WALLACE: I'm not the chairman anymore, but maybe
9 we ought to get testimony and give somebody a chance to talk us
10 out of it before we do it.

11 CHAIRMAN VALOIS: We might as well get it on the table
12 and we can always get rid of it later. Recipient shall also
13 mean subrecipient. Is that acceptable, if anything is?

14 MS. GLASOW: For the purposes of this part, recipient
15 includes subrecipients except for subrecipients that are Bar
16 Associations --

17 MR. WALLACE: Let me stop you right there. That's why
18 I asked my question. We have said that we are covering all
19 subrecipients except in part six. I think what we want to do is
20 say "recipient includes subrecipients" and then when we get to
21 six, we say subrecipients do not have to do the following
22 things, so the definition is pretty simple.

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1 MR. SHEA: That's right.

2 CHAIRMAN VALOIS: Do you have anything else, Mr. Shea?

3 MR. SHEA: No, I do not.

4 MR. SMEGAL: I have some questions of Mr. Shea, if I
5 may before he leaves.

6 CHAIRMAN VALOIS: All right.

7 MR. SMEGAL: Thank you.

8 Tim, I understood when you first started that section
9 1609 has existed in its present form since 1976?

10 MR. SHEA: No, it was amended in at least '84 and
11 perhaps other than that, too. It was revised in '84, I believe,
12 and probably 1978, as well.

13 MR. SMEGAL: Could I have some sort of a summary or
14 some explanation of what the changes have been since 1976, at
15 some point, not now?

16 MR. SHEA: Certainly, I would be happy to do that.

17 MR. SMEGAL: Thank you.

18 MR. SHEA: I can furnish those very promptly.

19 MR. SMEGAL: You were kind enough to give us, in our
20 packet, a memorandum you received from Robert Elgin setting out
21 several years of data with respect to fee awards.

22 MR. SHEA: Yes.

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1 MR. SMEGAL: Does this kind of data exist back to
2 1976?

3 MR. SHEA: It probably does, but it is not in a
4 readily available form. Actually, that is derived from -- maybe
5 I was too quick to say that it does, as a matter of fact. That
6 data is derived from funding applications. If we asked the
7 question, it would be available on the applications, but I do
8 not know how far back in time we asked those kinds of questions.

9 MR. SMEGAL: We used to get a summary of the
10 activities of grantees that showed the number of cases closed.
11 I have not seen any of those in three or four years. My
12 recollection is that the last time I saw one of those, what we
13 were looking at was the million or so matters handled by
14 grantees, some number like that.

15 Assuming, for the purpose of my question, that that is
16 the kind of number we are looking at on an annual basis, what we
17 are talking about here is fees that would average out to six
18 dollars a case overall, for all our grantees?

19 MR. SHEA: Whatever the number would be.

20 MR. SMEGAL: Something like that, but that is six or
21 seven million divided by a million would be six or seven
22 dollars, if one were to look at it that way.

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1 MR. SHEA: Most of those cases are not fee generating
2 cases, I assume. He does have average figures he sets out for
3 programs, which would be some approximation, I think, of what
4 you are asking.

5 MR. SMEGAL: None of the cases are fee generating
6 cases, though, if you lose; right?

7 MR. SHEA: Correct, not so far as I know, anyway.

8 MR. SMEGAL: Your material to Bob Valois includes a
9 reference to some legislation, H.R. 3480, that was around awhile
10 ago.

11 MR. SHEA: Yes.

12 MR. SMEGAL: Could I have a copy of that legislation
13 and any legislative history there may be with respect to it?

14 MR. SHEA: Certainly. I do not have that available
15 with me now.

16 MR. SMEGAL: I am not asking for it now, no; at some
17 point, maybe before next Friday.

18 MR. SHEA: Okay.

19 MR. SMEGAL: Can you tell me, from your recollection,
20 and I am not going to hold you to your recollection, how that
21 particular legislation either differs or would conform to the
22 regulations we are now proposing?

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1 MR. SHEA: There were other features of it, to begin
2 with, of the bill, and I do not remember what those were. There
3 was a provision that was similar to this, but it specifically
4 addressed costs that may be assessed, which is something that we
5 do not address here. We just talk about fees. That is the only
6 thing that leaps out in my recollection.

7 MR. SMEGAL: Again, with respect to this memorandum of
8 January 18 to Mr. Bob Valois, at page 4, under II, Issues, (a)
9 Authority, it contains a statement. I assume you are the author
10 of this or you adopt this statement as your position, which is
11 the following:

12 "In addition, the Corporation has the authority to
13 make funding policy to decide within Congressional guidelines
14 how its limited funds will be distributed."

15 Now, what we are focusing on here are fee awards. Do
16 you believe that the Corporation has the authority to make
17 funding policy with respect to grantees' contributions from
18 foundations? Let's assume an offset. One of our grantees gets
19 some money from a foundation. Is it your view that the
20 Corporation has the authority to take an offset for that?

21 MR. SHEA: Actually, I think that is what we did do in
22 Clearinghouse, to be perfectly honest.

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1 MR. SMEGAL: How about United Way? Do you think if a
2 grantee gets a United Way contribution, the Corporation has the
3 authority to offset that against their next grant?

4 MR. SHEA: The Corporation may have authority to take
5 account of that, I think. That would be my position. I am not
6 certainly arguing that it would necessarily be prudent to do so
7 or how to do so, but I think the Corporation could take that
8 into account.

9 MR. SMEGAL: How about if the grantee has a
10 fundraising activity and raises some money? How would you treat
11 that? Does that fit into this authority that you state the
12 Corporation has?

13 MR. SHEA: Again, I think it would.

14 MR. SMEGAL: And, again, if I make a contribution to a
15 particular grantee?

16 MR. SHEA: I think, as well.

17 MR. SMEGAL: So, what you are saying, then --

18 MR. SHEA: You are asking me, I think, really, could
19 the Corporation take into account all available resources to a
20 specific grantee in making certain kinds of funding decisions,
21 and I think the answer is it might. The answer is it can.
22 Again, I think that is what we did in Clearinghouse.

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1 MR. SMEGAL: Is it your position, then, according to
2 this memo -- and I am only focusing on this -- that the
3 Corporation has the authority to say to a grantee: The amount
4 of money you get to practice law is the amount of money we give
5 you, and if you raise one other cent in any other way, we are
6 going to take a credit against that grant.

7 MR. SHEA: Surely, this proposal does not purport to
8 do so. Obviously, to the extent that Congress prescribes how we
9 make available funds, we can, should and must follow that.

10 This proposal here simply is a way of, in effect,
11 redistributing what I have described as a windfall to programs
12 that are poorer, that are lower funded programs.

13 MR. SMEGAL: I understand that term. I have a
14 definition of windfall. Isn't a foundation grant a windfall or
15 a United Way contribution a windfall or a check from Smegal a
16 windfall?

17 MR. SHEA: Arguably, it is.

18 MR. SMEGAL: I am looking at the section that you have
19 called "authority of LSC". I am correct that we could sit here
20 next week or next month and discuss those issues?

21 MR. SHEA: I suppose; I suppose.

22 MR. SMEGAL: Whether my contribution to a grantee

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1 should be offset, my personal contribution by way of a check or
2 the United Way contribution that they may be able to persuade
3 their local community to give them. Those are all things that
4 we have the authority to offset against their LSC grant?

5 MR. SHEA: I do not know in all purposes. I think we
6 have the authority to take those into account, but I am
7 reluctant to say that for all purposes and for every -- I am not
8 trying to say for any purpose. I cannot deal with a
9 hypothetical, I guess.

10 MR. SMEGAL: I am not giving you hypotheticals. I am
11 giving you actuals. I write a check. That's pretty specific.

12 MR. SHEA: The question is for what purpose and I
13 don't know. You need to tell me. What I have here is a
14 specific proposal that we are going to take into account for
15 certain purposes and for all those purposes, the funds will be
16 collected and made available to programs that are lower funded.

17 I am saying I think we do have authority for other
18 purposes, just to take it into account. I do not know that I
19 can deal with it in a vacuum. I don't know what other purpose
20 you are giving me. Even if you are talking about your check,
21 there may be some circumstance under which we can take account
22 of that.

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1 MR. SMEGAL: I'm sorry. Let me apologize, because I
2 have not given you the assumption that I guess I have, which is
3 that irrespective of the funding source, the purpose of the
4 funds is to provide the grantee an opportunity to represent the
5 poor, and that's all that I am talking about.

6 I am talking about whatever the source of those funds
7 is, we are whipsawing the issue of looking back, in retrospect,
8 at a case that is successfully handled and for some reason
9 generates some fees. The point is: When I make a contribution,
10 it is to a group of lawyers who are going to practice law on
11 behalf of the poor.

12 When a foundation makes a grant or when the United Way
13 makes a grant or when there is a fundraiser and people
14 contribute, that is the purpose of the funding. That is the
15 money I am talking about.

16 MR. SHEA: Okay.

17 MR. SMEGAL: That is the same kind of money that this
18 Corporation gives them. It is for the purpose of representing
19 the poor in civil matters, and that's the only kind of money.
20 It goes into one pot. As a result of that pot, the lawyers are
21 paid, paralegals are paid, staff are paid, lights are kept on,
22 whatever.

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1 MR. SHEA: Sure.

2 MR. SMEGAL: That's the money, that kind of money. I
3 am asking you -- I look here in your memo and I see "Authority
4 of LSC" and I have read the statement that you have here. I am
5 asking you do you think we have the authority to say to a
6 grantee, "Hey, you got a hundred bucks from Smegal. We are
7 going to take a credit."

8 MR. SHEA: The question is: What are we going to do
9 with the credit? My answer is: If it is for purposes that are
10 otherwise consistent with the Act, then I think we can and that
11 is the other half of the equation that I don't have.

12 Here, in this case, we do in the sense that we know
13 what we are going to do with these funds.

14 MR. SMEGAL: Well, are we, in effect, then, saying to
15 the grantee, "Don't get any other funds because if you do, we
16 have got the authority to take them away from you, in effect,
17 the authority to take them away from you"? We are doing that
18 here with respect to one source of funding. There are several
19 other sources that I have now mentioned -- my check or the
20 United Way.

21 Isn't that just another source of funding?

22 MR. SHEA: I suppose the question would be: Would

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1 that be prudent? We are surely not at that point. We may have
2 authority to do that. I think that is correct.

3 MR. SMEGAL: That is all I am trying to get to at the
4 moment.

5 MR. SHEA: We may have the authority to do so; that is
6 right.

7 MR. SMEGAL: It is your position that we have that
8 authority?

9 MR. SHEA: That's right, and I think that is what we
10 did do in Clearinghouse.

11 MR. SMEGAL: Thank you.

12 CHAIRMAN VALOIS: If there is nothing further, Mr.
13 Shea, I am going to permit Nick Fountain (phonetic) to speak.
14 Alan has graciously said that was all right him. Nick wants to
15 get back to work and make some money.

16 Nick, are you appearing on behalf of the Wake
17 (phonetic) County Bar Association?

18 MR. FOUNTAIN: Yes.

19 Presentation of Nick Fountain, Esq.

20 MR. FOUNTAIN: Good morning. I am Nick Fountain with
21 the firm of Bailey and Dixon in Raleigh. I am president of the
22 Wake County Bar Association and the Wake County Bar. I am also

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1 president of the Tenth District Bar, but I appear here today
2 only in my capacity as president of the Wake County Bar.

3 We include in our membership a thousand members. We
4 have the largest local Bar in the State of North Carolina. We
5 have a long tradition of support for legal services in this Bar
6 which antedates the creation of the Legal Services Corporation.
7 We were operating a Legal Services office before there was
8 funding and attempting to meet the need in that way.

9 We have a Volunteer Lawyers Program in this county
10 which has three or four hundred members in it, out of the one
11 thousand members of the Bar Association, and we think we are a
12 credit to the profession, generally, in attempting to meet the
13 needs and in the level and percentage of participation in those
14 programs which we have.

15 We believe that Legal Services through the Volunteer
16 Lawyers Program is shifting as much of the burden of providing
17 this service as it reasonably can, and we believe that the local
18 Legal Services Program will shift as much of the burden of cases
19 which are fee generating or not fee generating, as they possibly
20 can because of the shortage of personnel which they have.

21 Our Board of Directors reviewed the regulations which
22 you are proposing to adopt or which have been proposed to you

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1 for adoption, and our Board of Directors passed a resolution
2 directing me to come here today and to express opposition of the
3 local Bar to a recapture proposal.

4 We have not reviewed, of course, the latest drafts but
5 are aware, generally, that the proposal would recapture fees
6 which were earned by the local program and would permit
7 utilization of those funds in Idaho or wherever rather than in
8 the local area where it was generated.

9 I think that I understand something of the funding
10 process, though I am by no means expert as you are. I was, at
11 one time, appointed by the state-wide Bar Association as a
12 member of the board of Legal Services of North Carolina and
13 wound up being the chairman of their finance committee with the
14 responsibility to look over their budget and attempt to make
15 sure that the money was spent wisely.

16 In that capacity, I became aware of the recapture
17 mechanisms which already exist in terms of dealings between
18 Legal Services of North Carolina, as one of your grantees and
19 the Legal Services Corporation specifically. I mean the ten
20 percent cap and recapture of funds in excess of ten percent.

21 I have not been on that board now in two, three or
22 four years, but we were at that time I was on it attempting to

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1 develop a program which would extend over the five hundred miles
2 of North Carolina and to provide for mechanisms which would
3 provide adequate funding in areas where the programs were
4 previously in existence and in areas where the programs were
5 just being established.

6 I think we understand the problems that you face in
7 attempting to provide funding in all of those areas, because
8 just as we have that problem in North Carolina, you would have
9 it in other parts of the country, as well.

10 Nevertheless, we believe that the cases which may on
11 the surface appear to be fee generating really are not and that
12 the private Bar does not want any more of them than it already
13 has. We do not think that they are reasonably expected to
14 generate fees.

15 We turn down cases all the time in our office from
16 people who indicate that they are prepared to pay fees in some
17 measure, because either the cases are not really going to
18 generate the fee on a contingency basis or because the fee which
19 a client could reasonably expect to pay in a given case will
20 not, in any measure, compensate at a reasonable level the time
21 and resources necessary for that case.

22 We do not think the private Bar wants more of those.

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1 We think the private Bar is doing all it can reasonably be
2 expected to do. We applaud the regulations which would allow a
3 mechanism for categorization of cases and a determination that
4 those cases are not, in reality, fee generating because it will
5 cut down on the amount of paperwork and the process of going
6 through and clearing with three attorneys or clearing with the
7 local lawyers or state-wide lawyers referral program.

8 There is an awful lot of that paperwork process that
9 we are required to go through and when I have been called
10 numbers of times to take a particular type of case and it is
11 readily apparent that it is just not going to be economic and
12 except as a pro bono matter, the case could not in reality be
13 considered, it is a waste.

14 We applaud that desire to clear up that paperwork
15 because all of us can spend our time better on delivering
16 services, whether compensated or not.

17 We do think that the recapture of fees earned on
18 monies privately generated, the recapture of that money and the
19 reallocation to some other part of the country, will kill
20 incentive to collect those fees.

21 We believe there is a market mechanism in most sectors
22 of our economy and that we are all affected by the market method

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1 of allocating resources and that, say what you will, it would
2 have an impact on the effort to collect such fees and get them
3 into the system.

4 We think that if there is no way to keep the money or
5 a setoff against it, that it will kill incentive and will reduce
6 the collection of those fees.

7 We think, also, that one of the consequences of this
8 regulation would be that the local Bar, such as the one which I
9 presently serve as president, will be asked to pick up the tab
10 because, at the present time, the local Legal Services Program
11 budgets and expects to get fees from some of these cases,
12 although they have no idea which ones.

13 There will unquestionably be a revenue shortfall which
14 results from the loss of those funds, simply because we have a
15 program which has been able and fortunate enough to occasionally
16 get some fees and that, in the aggregate, those amount to some
17 significant dollars over the course of the year.

18 We believe that they will be at our door asking us to
19 make up the money which you have taken under this proposal and
20 sent elsewhere to aid a program which has not been effective in
21 getting money from private sources or from cases which turned
22 out to have a fee award.

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1 I might point out, also, that in reviewing this
2 proposal, we were cognizant that within our own board are
3 persons who act as counsel to agencies or operations against
4 whom fee awards have been made in the past. These persons also
5 oppose taking those awards, which have come out of their clients
6 pockets, and shipping those funds to Washington and then to
7 other parts of the country.

8 If the award is going to be made, let's take the money
9 and use it for some appropriate purpose in the geographic area
10 where the money was generated and hope that it will do some
11 good. Some of those funds, as you may be aware, come out of the
12 tax coffers of the State in certain types of cases. Certainly,
13 we would rather that our state tax funds be utilized within the
14 borders of North Carolina, and not washed out by reduction of
15 other funds and expenditure of those funds elsewhere.

16 We think that the fee-generating nature of the cases
17 is a useful concept which ought not to be diminished by these
18 types of regulations. We think, in general, that the guilty
19 ought to pay. If there is a finding that they have done
20 inappropriate things and an appropriate fee award is made, they
21 ought to be paying.

22 We, as the local Bar, ought not to be asked to pick up

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1 the tab out of monies that we have earned for paying clients and
2 cover that money in order that those funds be sent elsewhere.

3 I think that I have hit the principal points that I
4 meant to cover. I will be happy to try to answer questions, but
5 in summary, we applaud the fee-generating concept and the fee-
6 shifting concept and we do not want to pick up the tab
7 ourselves.

8 We do not want to kill incentive to collect those fees
9 and we would oppose regulations which have the effect -- direct
10 or indirect -- of reducing funding for Legal Services. We, in
11 the private Bar, are doing all that we really can do in this
12 regard.

13 One of you made a comment earlier and I will address
14 that, that the Bar Associations tend to include primarily or
15 speak primarily for larger firms or lawyers who are doing well
16 and can afford to send people to hearings such as this or to
17 spend their time working on Bar Association committees.

18 Our Board of Directors, on the contrary, represents
19 predominantly small firms, downtown attorneys. We are finding,
20 and I think this is true statewide, that many of the larger,
21 bottom line oriented firms, in fact, have some tendency to
22 discourage their people from being active in Bar work. We

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1 regret that development, as the profession has become more
2 business-oriented and competitive.

3 While we have numbers of people on our twenty-member
4 board who are from larger firms, including Bob Valois' firm, we
5 have, I think, a number from government and from small, private
6 firms which would take a case which is truly fee generating at a
7 reasonable level, without question.

8 Therefore, I think these are not ivy tower persons
9 wearing their hearts on their sleeves, but quite to the
10 contrary, I think I speak for a board and for an association
11 which wants to see legal services delivered but also is fully
12 capable of accepting and taking a case which will truly generate
13 money.

14 CHAIRMAN VALOIS: Thank you, very much.

15 MR. WALLACE: Mr. Chairman, can I ask a question?

16 CHAIRMAN VALOIS: Sure.

17 MR. WALLACE: Since we are talking about how you have
18 got a very representative board, if we asked you to sit down, as
19 this proposed change to the regulation would do, and draft up an
20 agreement listing categories of cases that you consider not to
21 be fee generating, so don't bring them to us, don't waste our
22 time, what would be on that list here in Wake County?

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1 MR. FOUNTAIN: Well, I am not sure of all the
2 categories of cases which might be involved, but domestic
3 violence cases, for example, where there might be, in a typical
4 domestic situation, there may be mechanisms, supposedly, where
5 one spouse is supposed to pay, but the reality is, in those
6 kinds of cases, that neither spouse has got any money and maybe
7 the lack of money is part of the reason for the violence, but it
8 is not fee generating, even though it may theoretically be so.

9 I think the other thing is that there are other types
10 of cases involving litigation with the state, litigation with
11 agricultural programs or otherwise, where the small firm or sole
12 practitioner, while even if theoretically could produce a fee,
13 the capital and resources required to handle it would render it
14 not fee generating for practical purposes for those firms. They
15 cannot handle them, anyhow.

16 MR. WALLACE: Let me ask why that is different from
17 personal injury cases which plaintiff lawyers fund every day.
18 The only civil rights cases I am familiar with in North
19 Carolina, because I do voting rights law, are the voting rights
20 cases, all of which -- a lot of them have gone to the Supreme
21 Court.

22 As far as I know, they have all been done by private

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1 law firms and since the state got beat like a drum every time, I
2 suppose all those private law firms got paid. Is it really that
3 hard for private attorneys who can learn how to examine doctors
4 and collect from insurance companies, is it that hard for them
5 to learn how to try civil rights actions against the state?

6 MR. FOUNTAIN: Well, I think that some of the personal
7 injury cases to which you refer would be beyond the scope of
8 attorneys who might be attempting to handle some of these
9 matters. I think that in those kinds of cases, we often find
10 counsel who have built up a practice to a level where they have
11 those kinds of cases in volume and can carry the cash flow or
12 the lack thereof with other files.

13 At that point in their careers, those people may be
14 too busy to give any significant time to these and may find that
15 the compensation for suing doctors or for handling major
16 personal injury cases simply precludes their contribution of any
17 significant time to these kinds of efforts.

18 MS. SWAFFORD: It wouldn't be the same lawyers doing
19 that work.

20 MR. FOUNTAIN: That's what I am saying. I do not
21 think it would be the same lawyers. I think these others who I
22 am talking about who would like to help are less likely to have

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1 the time and resources and, essentially, the capital, to handle
2 them.

3 MR. SMEGAL: Isn't there also a difference between the
4 personal injury case that Mr. Wallace referred to where it might
5 take a deposition or two, some expense for a court reporter, and
6 the kind of cases we are talking about that are impact cases
7 that involve just a tremendous amount of out-of-pocket
8 resources.

9 It is one question to go and spend your time in a
10 contingency matter where if you hit one out of five, or whatever
11 this group of lawyers believes is a good average, they are
12 making out. It is another thing to go to the bank and borrow
13 the money to pay for all of the out-of-pocket expenses that come
14 along in these cases.

15 Let me give you an example. I have been involved in
16 the Legal Aid Society of San Francisco for many years, funded by
17 lawyers, the United Way and that kind of thing. There was a
18 case in San Francisco that no private attorneys would take,
19 involving an employment discrimination matter with respect to
20 one of our large department chains. Nobody would take it.

21 It was going to be a ten-year case and it was going to
22 involve hundreds of thousands of dollars. In fact, it was a

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1 ten-year case and it involved three hundred thousand dollars.
2 It literally bankrupted the Legal Aid Society of San Francisco.

3 There was not any private firm that would ever
4 undertake something like that. That is not a personal injury
5 case, where you take a doctor's deposition and you get another
6 opinion and you get a couple of reports.

7 Those kinds of cases are the kinds we are talking
8 about. Mr. Wallace is probably correct. There are lots of
9 lawyers out there who are willing to take personal injury
10 matters or some other relatively simple matter where they won't
11 have to go out of pocket a whole bunch of money and go mortgage
12 their house at the local bank.

13 Isn't that a distinction that we can make between
14 these kinds of cases, as you understand them?

15 MR. FOUNTAIN: That's right. I think, also, that many
16 times in the personal injury field, the out-of-pocket expenses
17 can be covered by the client. In these types of cases, often,
18 there is nothing to cover anything.

19 MR. WALLACE: Let me just get back to the voting
20 rights litigation here in North Carolina. Those were private
21 firms. They had to go all the way to the U.S. Supreme Court
22 before they got paid. They won and they got paid. Those are

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1 civil rights, fee shifting, statute cases, right at the heart of
2 what we are doing. You did not need Legal Services to do it in
3 North Carolina because the private Bar would do it.

4 Why is that different from some of the other against-
5 the-state civil rights litigation that is covered by fee-
6 shifting statutes?

7 MR. FOUNTAIN: I think the preparation of a brief or a
8 petition for service to the U.S. Supreme Court is a matter that
9 can be handled within the library of the lawyer with reasonable
10 expenditures of time.

11 I worry more about the extensive fact development and
12 discovery requirements that precede any trial whatsoever. In
13 the types of cases that involve lots of that, we have got
14 problems. In many of these cases, there is no prestige or
15 public recognition that is going to come to the lawyer, as may
16 be the case with some of the voting rights matters. The guy is
17 not going to get famous for doing it.

18 CHAIRMAN VALOIS: Thank you, very much. We are going
19 to take a ten-minute break, no less and no more.

20 (A short recess was taken.)

21 CHAIRMAN VALOIS: We are back on the record.

22 Next, we will hear from Geoff Simmons, also of the

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1 Wake County Bar Association.

2 Presentation of Geoffrey Simmons

3 MR. SIMMONS: I am the president-elect of the Wake
4 County Bar Association and the Tenth Judicial District Bar
5 Association, the same Bar Association represented by Nick
6 Fountain earlier.

7 I am also the Chairman of the Wake County Volunteer
8 Lawyers Program, the program that has four hundred plus members
9 who are lawyers in private practice or who work with the public
10 sector, who have agreed to take at least three cases a year to
11 supplement the work that Legal Services and other such
12 organizations are doing in this community.

13 I also come before this group as the president of the
14 Board of Directors of the North Carolina Legal Services
15 Organization, the LSNC. I likewise come before the board as a
16 member of the Wake County United Way Board of Directors. I am a
17 member of one of the smallest law firms you are going to find
18 anywhere in this country or anywhere on the face of this earth.

19 I am a sole practitioner, a sole practitioner who is
20 also a young lawyer, as the category we abide by with the ABA is
21 concerned. I won't be in that category after next year. I am
22 also a lawyer who has a very small staff. I have one paralegal,

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1 who is also a secretary, in my office.

2 I have no retainer clients and I guess I would be put
3 in the category of a scrapping young lawyer who also tries to do
4 something with the Bar Association and with the community and
5 with public service and pro bono types of programs. Where I
6 found the time to do it, I don't know, but we just try to find
7 the time to get the job done.

8 I come here to say that the proposed regulation
9 regarding fee-generating cases is a regulation, as Nick Fountain
10 said earlier, that is one that I am opposed to. It is one that
11 is opposed by many of the people that I associate with, many of
12 the members of the Bar Association, many of the members of the
13 Wake County Volunteer Lawyers Program.

14 We do not think that this particular proposal will do
15 anything to enhance the delivery of services to low-income
16 individuals. We do not think that the proposed regulation will
17 do anything to make it better for lawyers in private practice to
18 enhance their practice or to get the kinds of cases or
19 experience they feel that they need to continue with their
20 professional duties.

21 I heard one comment made earlier concerning voting
22 rights cases and how those cases, if a lawyer became specialized

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1 in them, could bring them the same kinds of funds as personal
2 injury cases.

3 Well, I do specialize in personal injury cases and
4 real estate work. I get calls from time to time from
5 individuals who are interested in me handling these types of
6 cases, voting rights cases and discrimination cases. For the
7 last nine and a half years I have been in private practice, I
8 have not taken these kinds of cases because I do not have the
9 time or the resources or the experience or expertise to get a
10 good job done on these cases.

11 I do not want to subject myself to professional
12 liability lawsuits because I am not proficient in these areas.
13 These cases are either referred to the Legal Services
14 organization or to the handful -- and it is just a handful -- of
15 law firms and attorneys in this state who are willing to do this
16 type of work.

17 Most of those firms, or two of the firms that I know
18 of, are firms that have worked for many, many years, probably as
19 many as twenty years, on these types of cases. One firm that I
20 can mention is the firm -- the former chair's firm in Charlotte.

21 The difference about that type of firm is the fact
22 that they have had support over the years from organizations

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1 like the NAACP Legal Defense Fund that provided manpower from
2 different states, provided resources from different states,
3 provided the kinds of funds necessary to go in and get the
4 expert witnesses and to put the law firm in the position where
5 they would not lose money while they were trying to wait for
6 cases to be handled.

7 Several people who went to law school with me are now
8 working for that law firm and they have told me that they have
9 worked on cases that they have won that have gone to the Supreme
10 Court that took place maybe eight to ten years ago and they have
11 not been paid for the cases yet.

12 As days go on, when people have to be paid, expenses
13 have to be met, and they are discouraged, but they know that
14 down the road, they may get paid, but they have other resources.
15 They have a stronger firm. It just has not been really that
16 practical for lawyers to take those kinds of cases. I differ
17 with some of the speakers that spoke earlier about those kinds
18 of cases, respectfully differ with them about that.

19 I asked for two minutes and I think maybe I have taken
20 up a little bit more than two minutes, but I am willing to
21 answer any questions that anyone may have. The main point I
22 wanted to make is that there are sole practitioners who are

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1 young, who work with the Bar Association who are interested in
2 pro bono work, who feel that this particular proposal and
3 proposals like this proposal will do nothing to aid the people
4 who really need the help, and that is the poor people out there
5 in the community who are not getting the legal services that
6 they deserve, which they desperately need.

7 Right here in Wake County and in North Carolina, there
8 are so many people we cannot reach who are in the rural areas,
9 who do not have lawyers and we do not have the firms to set up
10 satellite programs for them, as well, because of reduced funding
11 and because of the kinds of problems we are having now that this
12 particular regulation will probably exacerbate.

13 I would like to say that one of your former members--
14 I do not know if he is still a member of this panel or not--
15 Paul Eaglin, was a law school classmate of mine. I share his
16 interest in trying our best to reach as many poor people as we
17 can so that they can get the legal services that they need.

18 CHAIRMAN VALOIS: Thank you, Jeff. Paul Eaglin is
19 still a member of the Board and he is just not here today. He
20 is not on this particular committee.

21 Are there any questions of Mr. Simmons?

22 MR. SMEGAL: If I may just make a comment, my

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1 experience has been with the San Francisco Bar. I think I would
2 just like to echo what you have said, Jeff, that the panels, the
3 lawyer referral services panels -- at least, my experience in
4 San Francisco has been that they are relatively young lawyers
5 looking for a practice, contrary to what Mr. Wallace said
6 earlier.

7 The Bar Association of San Francisco, a big
8 metropolitan Bar, does have a lot of young lawyers who take
9 these cases. They are not the major Bar Association with senior
10 partners who are on our referral panels in San Francisco. They
11 are young lawyers who are attempting to develop a practice.

12 We certainly do not exclude, as you do not exclude
13 here, Jeff, that kind of group who participate.

14 CHAIRMAN VALOIS: Thank you.

15 MR. SIMMONS: Thank you, very much.

16 CHAIRMAN VALOIS: Alan, if you are prepared to go
17 ahead, I have asked Alan to try to address the issues that he
18 has raised in his correspondence to us. I have read it and I
19 suspect that everybody at the table has read it.

20 In particular, I want to get to the differences we
21 have on the draft that is on the table. I would like to take a
22 vote before we leave today and get this up to the Board so that

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1 it can be considered before the Board.

2 Presentation of Alan Houseman

3 MR. HOUSEMAN: Thank you.

4 I first want to make some comments about all of the
5 issues here. Secondly, I want to try to answer some of the
6 statements that have been made, which I may do as I go through.
7 Third, I will turn my attention to the latest staff draft as
8 well as our own proposals. Our own proposals appear at the end
9 of Volume II here.

10 As you know, I represent PAG and NLADA and through
11 them, the Legal Services Programs. I want to say at the outset
12 that there is an extraordinary number of extremely good comments
13 that talk and focus on the reality and the adverse consequences
14 of this proposal.

15 I do not think we should, in any way, limit ourselves
16 to an assumption which sometimes is made that the PAG and NLADA
17 comment canvasses the water.

18 CHAIRMAN VALOIS: What is attached to your comment is
19 the same thing you referred to as being in the book?

20 MR. HOUSEMAN: Yes.

21 CHAIRMAN VALOIS: There is nothing different between
22 them.

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1 MR. HOUSEMAN: No. It is the last thing in the book
2 and the attachment was left out inadvertently when the comment
3 was originally sent.

4 CHAIRMAN VALOIS: It is the second version, then.

5 MR. HOUSEMAN: It is the second version. It is the
6 last page but I am not going to focus on that yet. I will focus
7 on that when we get there.

8 MR. SMEGAL: It is the four pages following the
9 seventeen pages of comment.

10 MR. HOUSEMAN: Yes, that's correct.

11 Let me say that I do not think this issue is about
12 whether fee-generating cases should be taken by the private Bar.
13 There is no doubt about that: They should.

14 There are two issues. The first issue is: What types
15 of cases, which are not generally viewed as fee generating and
16 which the private Bar has not been taking. In those cases, what
17 changes, if any, should be made and what procedures and referral
18 processes should be made with them.

19 The second issue is this offset issue, credit issue,
20 recapture issue, however you want to talk about it. Buried in
21 both of these is a significant policy question with regard to
22 private funds and public funds of recipients and the reach of

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1 the Corporation with regard to private funds and public funds of
2 subrecipients that come directly to the subrecipient and not
3 from the recipient. I want to talk about all these things as we
4 start this.

5 Let's begin with the offset. There are, it seems to
6 me, two or three policy responses to the offset and some legal
7 argument, which I won't get into in any great depth other than
8 to answer some points that have been made. Let's be quite clear
9 what will happen with this offset.

10 If you impose this offset as it is currently imposed,
11 you will reduce the resources for Legal Services. There is no
12 doubt about it. Why, in their right mind, would any program
13 bother to spend the hours and time it takes to put together a
14 fee petition, to go through the litigation that it always takes,
15 when it is going to lose that money?

16 It will not, in the future, happen. The consequence
17 of this action will be to reduce the resources available for
18 Legal Services, not to increase them, not to redistribute them,
19 but the ultimate consequence will be to reduce them.

20 It seems to me that as a practical matter, that is
21 foolish. Fees earned by recipients should be left with those
22 recipients that were effective enough to earn them, both in

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1 order to ensure the continuity of those effective and efficient
2 programs and to create incentives for them to maintain their
3 effectiveness and efficiency and for other programs to model
4 after them.

5 There is no doubt that if this happens, the amount of
6 fees that programs seek will go down and there will be fewer
7 legal services provided because of the offset, as it is
8 currently written, including the staff.

9 Second, this provision limits the leverage and ability
10 of poor clients to effectively enforce their Constitutional
11 statutory rights. The reason it does that is that there will be
12 fewer settlements, there will be longer delays, there will be
13 less compliance with the law -- both statutory and
14 Constitutional -- by defendants because the ability, the
15 incentive, the knowledge that programs will not bother with the
16 fee, to pursue the fee, is there.

17 It will undermine the purposes of the fee-shifting
18 statutes, particularly the Civil Rights Act statutes, which were
19 to assure compliance to Civil Rights law. That is the second
20 consequence of this offset provision.

21 There is a lot that we can say about the authority
22 issue. I do not want to go into it in great length, but I want

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1 to make a couple of comments about it and a couple of comments
2 about some other things that were said.

3 First of all, Section 1007(b)(7) of the LSC Act
4 nowhere suggests that you have the authority to recapture
5 attorneys' fees that are earned by a program. It is not a
6 prohibition, Mike. It is not. It says that fees can be taken
7 pursuant to guidelines issued by the Corporation.

8 It has been historically viewed not as a prohibition
9 but as a vehicle to permit certain cases to be taken. There has
10 not been controversy about this provision in the history of
11 Legal Services back to the beginning. Programs have always sent
12 fee-generating cases to the private Bar.

13 This section merely confirmed what were the standing
14 rules of OEO. We proposed this section in the legislative
15 battles in 1973, not Mr. Nixon, not anybody else. We did. It
16 is not a prohibition.

17 Secondly, there is an issue, it seems to me, that
18 cannot be so easily dismissed -- as General Counsel has -- with
19 regard to past efforts of Congress to regulate some of the fees
20 in some of the ways you are proposing here. I want to point out
21 that all of those bills and the two that are mentioned by
22 General Counsel -- I think there may be a third that neither he

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1 nor I mentioned -- all related to LSC funds, not to private
2 funds, not to public funds and not to funds of subrecipients.

3 In all cases, they permitted the program to take into
4 account the expenditures of time and resources that they had
5 made before the money was turned back over to LSC. That is a
6 substantial difference, first of all, from this proposal but,
7 more importantly, it suggests to me that Congress did not think
8 LSC had the authority to do it in the first place.

9 Finally, we get to the funding issue. This proposal,
10 as written, seems to me to clearly violate the Congressional
11 funding formula that is in effect now. We have briefly briefed
12 this in our comment.

13 You never proposed to Congress that you would take
14 into account private or public funds. You never proposed to
15 Congress that you would take into account attorneys' fees when,
16 in your budget proposal to Congress, Congress clearly presumed
17 that the money that they were going to give out was LSC funds to
18 grantees under a formula. It seems to me you cannot proceed
19 along these lines to do that.

20 Now, there has been a lot of discussion around the
21 Clearinghouse case. I want to make a couple of points about it.
22 One is that Clearinghouse only dealt with LSC funds and LSC-

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1 derived funds. Secondly, in the Clearinghouse case, there was
2 not a rider in effect that mandated the Corporation to give the
3 Clearinghouse so much LSC money. There was not that in effect
4 during the time the Clearinghouse case covers. Here, we have a
5 rider that does so.

6 If the question is: Could the Corporation, if there
7 was not a ban, take into account private and public funds, that
8 is a harder issue. Probably, it could; I would want to reserve
9 some room to examine the history again. Probably, it could, but
10 it never has.

11 This was discussed in 1976 at length in Congress and
12 everybody agreed that the Corporation would not take into
13 account private and public funds of recipients. That is clearly
14 the Congressional understanding of the funding situation.

15 There were a number of issues that were raised that
16 either relate to authority or what other federal agencies do. I
17 want to be careful about this because I am not positive that I
18 can speak to what other federal agencies generally do, although
19 my recollection of the OMB circulars that we talked about ad
20 nauseam in 1963 is that attorneys' fees received by federal
21 grantees do not offset the federal funds.

22 Certainly, private funds and public funds received by

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1 other federal grantees do not offset other federal funds in that
2 particular contract, but with regard to Legal Services, neither
3 the AOA funding, the Title XX funding, the CDBG funding or all
4 of the federal funding sources, in none of those situations, are
5 attorneys' fees received by any provider in Legal Services
6 offset against the federal grant.

7 Finally, there was some discussion about you do this
8 with regard to questioned costs and PAI. First, that has never
9 been challenged. Secondly, in the cases that I know, you have
10 asked the program to turn back the money and I think that is how
11 you have gotten it back so far.

12 Third, that only dealt with LSC funds and it was in
13 the context of which the recipient allegedly did not do with the
14 LSC funds what they were supposed to do, not where they did with
15 LSC funds what they were supposed to do. It was where they did
16 not. It was a penalty. It was a penalty because they acted
17 improperly or not pursuant to regulations. There is a
18 difference between those situations.

19 I would point out one case that may be relevant on
20 this legal argument that I have made in the context of the Civil
21 Rights laws and others. It is Shadis v. Beal. This is a case
22 where the State of Pennsylvania had a contract with Legal

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1 Services providers, including some LSC recipients and some non-
2 LSC recipients, which precluded them from bringing attorneys'
3 fees suits against the state.

4 The Court struck that down finding that that violated
5 the Civil Rights Act, the Civil Rights Attorneys' Fees Act, and
6 it did not matter whether they had a contract or not. The
7 public policy of the Civil Rights Attorneys' Fees Act overrode
8 it. That, it seems to me, is an analogous situation, not
9 totally, but analogous to the situation we have here.

10 Now, I want to turn to what is, it seems to me, a
11 second issue that we are faced with here. This issue is the
12 issue of the procedures that should be used, the types of cases
13 that should be covered, the processes that should be in place
14 when we are dealing with fee-generating cases. Of course, we do
15 not start with a blank record.

16 We have in front of us now a fee-generating case
17 regulation. It has been in effect since '76 with only very
18 minor changes, mostly accounting changes, in '83. It has worked
19 particularly well. I know of no issue that I know of, there is
20 none that has been presented to us, where there is a problem
21 with the case.

22 There is no evidence in the record that I know of that

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1 there are problems that programs have had. I have read at least
2 fifty to sixty monitoring reports over the last year. I cannot
3 recall a monitoring report where the issue of fee-generating
4 cases came up. There is no Bar Association that I know of that
5 has been pushing this.

6 I do not think we are writing on a slate where there
7 has been some significant problem raised and we have to correct
8 it, or where there has been some Congressional enactment and we
9 have to respond, or when there has been -- as in the alien
10 regulation -- some proposed Justice Department regulation or
11 some changes in the law, like IRCA, where we have to respond.
12 None of these are true in this case.

13 The question then becomes, aside from the offset
14 issue, what kinds of changes should be made in the procedures
15 around fee-generating cases and why and what are the
16 consequences of them.

17 The proposal that has been originally made by the
18 staff, I presume, seemed to me would have a number of
19 consequences for poor people. First of all, it is going to
20 cause delays in case acceptance, maybe even denying
21 representation, because of the added administrative clients we
22 referred to lawyer referral services, and wait until they see a

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1 lawyer through their lawyer referral services.

2 In most of the cases in which they were going to be
3 referred that are new, they are not going to be taken by that
4 lawyer. Many times, those people are not going to come back to
5 the program or, if they come back, they are going to be
6 frustrated.

7 That is the consequence of, it seems to me, and the
8 records before you document that overwhelmingly, of a change in
9 procedure that would go through the lawyer referral service. It
10 is going to create frustration between the Bar and Legal
11 Services. It is not going to increase private attorney
12 involvement.

13 Involve, depending upon how certain issues are
14 resolved around PAI programs, as a number of comments point out,
15 as the ABA comment points out, it may undermine and adversely
16 effect PAI programs. Many programs refer cases now through two
17 PAI panels, PAI pro bono panels, not to the lawyer referral
18 service. It is going to change all that if it is read.

19 There is an assumption here that bothers me a lot and
20 it is the assumption that somehow, there are cases that Legal
21 Services are taking that would be taken by the private Bar if
22 only the Legal Services program would get those cases out.

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1 I do not know on what basis that assumption is made.
2 There is no evidence, there is no record, that suggests that.
3 There is an overwhelming record that suggests that it is not
4 true.

5 What I have heard so far are two statements. First, a
6 statement in Mr. Shea's and Suzanne's presentation -- I do not
7 know who wrote it -- that California has hundreds of profit-
8 making public interest law firms who take cases under fee-
9 shifting statutes.

10 I think it is useful to read that article. It does
11 not say that, first of all. Second of all, the terms are mixed
12 up. A public-interest law firm if characterized properly, first
13 of all, there are not hundreds of them. I am one. There is a
14 national association of them. There are twenty-two in the
15 United States that are public interest law firms under the IRS
16 Act, three in California that I know of.

17 The article, as I remember it, and I read it briefly
18 about three weeks ago, referred to a number of small
19 practitioners who took on employment discrimination cases and
20 cases of that nature, what I would call typical individual 1983
21 kinds of cases, not institutional cases, for sure, very few of
22 the kinds of cases that Legal Services does. They took them on

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1 in situations where there is a very certain and very strong
2 possibility of a recovery.

3 The public interest law firms that I know in
4 California do take on fee-generating cases which have a
5 potential but they are very strict on which ones they take. I
6 have tried for years to get public interest law firms interested
7 in welfare cases, housing cases and the like.

8 They have no interest in them not because Legal
9 Services are taking them but because they do not see a
10 significant enough fee quick enough for them to take those on
11 and they do not do it. They have not done it and they do not do
12 it.

13 I do not think this is very useful information anyway,
14 but I think if you examine carefully what is done in California
15 by those groups, you will find out they do not take the kinds of
16 cases that are involved in this issue before us.

17 Secondly, Mike, you made reference to Mississippi and
18 North Carolina. Now, I do not know all the facts about this but
19 I would say a couple of things. I know that most voting rights
20 cases are subsidized by either Legal Defense or the Lawyers
21 Committee.

22 MR. WALLACE: Sure.

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1 MR. HOUSEMAN: There is not that much money out there.
2 I have been trying to get the Legal Defense Fund and the Lawyers
3 Committee involved in welfare, housing in a series of cases. I
4 cannot do it. They do not have money for it. They do not get
5 grants for it. They cannot get grants for it. They are not
6 going to subsidize these cases.

7 Prison cases. I think in Mississippi, if I am right,
8 there is a Prison Fund that funds a lot of these cases. It is
9 subsidized again. Legal Services do not take voting rights
10 cases in those cases in those states. They take cases where
11 there is not a source of subsidy and that is what we are talking
12 about here.

13 Now, in other states, there may not be a source of
14 subsidy like there is in Mississippi or for voting rights cases
15 but where there are, Legal Services refers them out. It is
16 replete with information in these comments that say, "If we can
17 refer it out, we do." There is no suggestion anywhere that they
18 do not.

19 I think what we are dealing with here are cases that
20 are not going to be taken by the private Bar generally; that
21 efforts in the past have not got the private Bar to take them;
22 and, that what we are trying to do is to change a procedure that

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1 does not need to be changed and to create additional hurdles and
2 burdens for programs that do not need to be changed in order to
3 deal with these cases.

4 I want to make a couple of other points and then I am
5 going to come back to the cases. One of the consequences of the
6 original proposal is that it is going to overwhelm the lawyer
7 referral services. The ABA comment, our comment, a number of
8 comments, talk about lawyer referral services.

9 They serve moderate income clients, most charge
10 consultation fees, most attorneys won't participate unless there
11 is a fee likely and quickly. Most have small staffs, often
12 clerical. Very few attorneys participate. Many of the kinds of
13 lawyers that might take some kinds of fee-generating cases do
14 not participate in these panels.

15 I think to burden down the lawyer referral service in
16 this setting, with the evidence in front of you, with the
17 statements that have been made about it uncontradicted, makes no
18 sense whatsoever.

19 If we are going to move in some new direction under
20 this reg, I strongly support the notion -- if we are going to
21 move, I strongly support the notion -- of some kind of a plan
22 with the private Bar. I do not think there is a reason to move,

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1 however. We would urge you not to take any action and change
2 any of the procedures.

3 This proposal -- either the new private Bar one,
4 although there will be less of a problem there or, certainly,
5 the lawyer referral program -- is going to increase the
6 administrative burdens on programs.

7 There has been a lot of discussion about class action,
8 including your discussion about class actions. There are very
9 few class actions taken in Legal Services. I did a study in
10 1981. It was point-two percent, not two percent, but point-two
11 percent of the cases were class action. I doubt if that has
12 gone up. I have not seen any data, but I doubt it, honestly.
13 That's class actions.

14 What about this proposal? Well, in many states, as
15 written, this proposal is going to overwhelm programs.
16 Wisconsin, the Legal Action of Wisconsin writes that given the
17 fee-shifting contracts and statutes in their case, which under
18 the new definition would apply, they estimate that a majority of
19 their cases would now be fee-shifting and if the director had to
20 review all of these cases, first of all, they would have to be
21 referred out to a lawyer referral service that has very few
22 attorneys in it, as the comment points out, and the director

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1 would have to review all of these cases. She is going to be
2 spending all her time reviewing these cases.

3 A comment from Massachusetts says between fifty and
4 sixty percent of the total case load, under the definitions in
5 the proposal, would be covered. We are not talking about a
6 minor administrative burden similar to class actions. We are
7 talking about a major administrative burden of significant
8 proportions in a number of states, given the definitions that
9 are used.

10 Finally, in terms of the issues that are before us, is
11 the question of recipients, subrecipients, private funds, public
12 funds, and this cluster of issues, which is working throughout
13 this regulation. I think we ought to be quite clear what it is
14 we are talking about here with regard to subrecipients.

15 I think we ought to be quite clear what the original
16 proposal and the modified proposal, if I understand it
17 correctly, tries to do with regard to private funds and public
18 funds of subrecipients. Then I want to come back and talk about
19 private and public funds of recipients, but let's just start
20 with subrecipients.

21 As I understand the proposal, what it attempts to do
22 is to say that if a subrecipient -- and this is clarified by the

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1 way and made clearer by the proposed changes; it was not as
2 clear on part of this before, but it is made clearer by the
3 proposed changes.

4 If a subrecipient has private funds from an
5 independent source or if a subrecipient has public funds from an
6 independent source -- I'm sorry, I mean private funds from an
7 independent source, they now cannot use those private funds to
8 undertake the fee-generating cases without following our
9 procedures, even though it is private funds from an independent
10 source and this is a subrecipient.

11 What kind of people are we talking about that are
12 subrecipients? Who are we talking about here? We are talking
13 about PAI, pro bono and Bar programs, of which there are a
14 number of subrecipients, some of which now have private funds
15 and other funding sources and do work in cases.

16 We are talking about a number of Legal Aid Societies
17 that are subrecipients, like the New York Legal Aid Society,
18 like the Legal Aid Society of Hartford, neither of whom are
19 direct recipients, both of whom get a small percentage of LSC
20 money. All of a sudden, all of their private funds -- a
21 majority, in a number of these cases, all of their private funds
22 -- now must be used pursuant to this procedure.

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1 I am not talking about their LSC funds. I am talking
2 about their private funds. They are now subject to this
3 procedure. Moreover, under this procedure, with the offset, if
4 they get an attorneys' fees award from their private funds or
5 their public funds, the Legal Aid Society of New York or the
6 Legal Aid Society of Hartford gets an attorneys' fees award from
7 their public funds or their private funds, those attorneys' fees
8 awards are going to be offset against the recipient awards and
9 the recipient is going to lose money.

10 Well, the first thing that is going to happen is quite
11 clear for the Legal Aid Society of Hartford and the Legal Aid
12 Society of New York if this thing goes into effect. They are
13 going to give up their LSC funds because they cannot afford that
14 consequence.

15 Maybe that is what you want. It strikes me as
16 absolutely the wrong consequence. There are other kinds of
17 subrecipients. You got a comment from one of them. There are
18 other kinds of programs. There is a Farm Workers Legal Services
19 Program in Pennsylvania. It started a long time before it got
20 any LSC money. It started in '76 and did not get any LSC money
21 until '83. It gets a little bit of LSC money.

22 You are telling it that its private funds, which it

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1 gets from a variety of different sources, now must go through
2 this fee-generating case situation. It makes no sense to me.

3 Finally, there are LSC-created subrecipients, not a
4 great many anymore, by the way, very few. This is not what we
5 are talking about when we are talking about subrecipients. Most
6 of them are state-supported and there are a couple that are not.
7 There are very few of them anymore.

8 LSC, yes, had something to do with creating them.
9 This was back in the late '70s. What has happened since then?
10 First of all, many of them now are funded by a variety of other
11 funding sources. They are not solely dependent on LSC. Most of
12 them have developed far beyond their original purpose.

13 Yet, even here, you are going to say that their
14 private and public funds which they got independently and do
15 other things besides what they get LSC funds for are now going
16 to be tied up by this regulation.

17 There are, in addition, a series of practical problems
18 which this regulation does not address with regard to
19 subrecipients, which the proposals by the staff do not cure.
20 For example, which director is it that has to review the fee-
21 generating case? Is it the recipient's director or the
22 subrecipient's director? Which procedures have to be followed?

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1 CHAIRMAN VALOIS: Excuse me, Al. Have you received
2 the amendments that were offered up today?

3 MR. HOUSEMAN: Yes.

4 CHAIRMAN VALOIS: Doesn't that change some of what you
5 are saying?

6 MR. HOUSEMAN: No, it does not change what I am saying
7 now. It still applies.

8 MR. WALLACE: Does it change what you said before?

9 MR. HOUSEMAN: It doesn't change with Hartford and I
10 am not sure about the Legal Aid Society.

11 CHAIRMAN VALOIS: Did you get the insert for 1609.6?

12 MR. HOUSEMAN: Yes. It does not change Hartford or
13 the Legal Aid Society. It does not change Farm Workers Legal
14 Services. Those are the three that I -- I have not read all the
15 comments. I did not get them, some of them, until this morning.

16 CHAIRMAN VALOIS: I am not talking about the comments,
17 though.

18 MR. HOUSEMAN: I know. It does not change the
19 situation for the Legal Aid Society of Hartford or the New York
20 Legal Aid Society or for the -- I don't believe. I think they
21 get more than twenty percent of their funds from LSC and it does
22 not change Farm Workers, which I think gets more than twenty

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1 percent of their funds from LSC.

2 There are two parts, remember, to this. One is the
3 offset and one is the procedure. Under your procedure, if you
4 let Suzanne add the thing that she was about to add, that might
5 have helped on some of the procedural issues, but you did not.

6 The way it now currently reads, with the amendment, it
7 would cover subrecipient private funds, like the Legal Aid
8 Society of New York or Hartford.

9 MR. SMEGAL: Alan, are you saying that a subrecipient,
10 let's assume that a subrecipient in 1989 gets a fee award. It
11 was a case that was filed in 1975 when they were not a
12 subrecipient and they were a private law firm or whatever they
13 were.

14 MR. HOUSEMAN: Right.

15 MR. SMEGAL: As you understand what we have before us
16 here now, that is going to be offset, also, some case that was
17 filed ten years ago?

18 MR. HOUSEMAN: Yes, that's right.

19 MR. SMEGAL: Now, because they are a subrecipient
20 under some other matter, that fee award gets into this part,
21 also?

22 MR. HOUSEMAN: That's correct. That fee award gets

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1 in, as it is currently drafted, as the revision is drafted.
2 That is what you are dealing with here.

3 Now, unless you modify this, you still have the
4 question, aside from the offset issue -- remember there are two
5 issues here, the procedures that subrecipients must use with
6 regard to fee-generating cases with LSC private or public funds,
7 and the offset.

8 You still have to decide, which this reg does not,
9 which director it is that is responsible, which procedure to
10 use, which board makes the policies, all of those kinds of
11 issues that are not addressed in this regulation. They have got
12 to be addressed somewhere.

13 There is a practical problem here. Some of this could
14 be cured by just not applying this to subrecipients, which would
15 be our preference and our position.

16 Now, I want to make a couple of statements about
17 contracts. I think the rest of these can be made in the context
18 of the staff proposals and our proposals. If I might, let's
19 focus on those. You asked me to and I will.

20 One other thought, however. There were a number of
21 other issues that came up -- windfalls, retroactivity. I have a
22 lot to say about those. I am not going to say as much. I am

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1 going to say a couple of quick comments about it.

2 Retroactivity: I think there is a significant
3 retroactive issue if you apply this reg to awards received after
4 it comes into effect as opposed to cases brought after it goes
5 into effect. If you apply it to cases brought after it goes
6 into effect, we have no retroactivity problem whatsoever.

7 If you apply it to awards received after this reg goes
8 into effect, I think there is a significant retroactivity
9 problem. I will be glad to brief it for you. I did not, except
10 to mention one case, which was a distinction in the General
11 Counsel's office and does not wash, I think, if you carefully
12 examine the case, but I will get into that separately.

13 Windfalls: First of all, we have absolutely no
14 evidence before us that any program anywhere has gotten a
15 "windfall", as I understood it was described by Mr. Shea. That
16 is, we have no evidence before us -- none -- that the programs
17 received more money than the time and resources they expended on
18 the case would have entitled them to, not under any market value
19 theory, just on what they actually spent.

20 There may be some programs that did, but we have no
21 information as to that. I think if we look carefully at the
22 facts, what we will find is that in most of the fee-shifting

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1 situations, the programs get back less money than they actually
2 spent in time and resources, not under some market theory, but
3 just in most of the fee-shifting circumstances we are talking
4 about.

5 Under the Equal Justice Act, that is likely to be true
6 in most cases. It is likely to be true, as well, in most of the
7 non-1983 to 1988 civil rights case, in 1983-1988 fee-shifting
8 cases. There are usually fees provided by statute that are low
9 and, in most of the circumstances, are not going to be enough to
10 cover the time and expenses that programs have spent on this.

11 I think -- and I do not know how to estimate, because
12 we do not have this -- my guess would be six out of the seven
13 million is not going to be windfall money that we are talking
14 about here, assuming that data is correct, which I just saw
15 today. I have my doubts about it.

16 Now, let's turn, then, to the proposals of the staff
17 and our proposals. The first issue, obviously, is
18 subrecipients. Our view is clear. The easiest and probably the
19 only sensible way to deal with this issue is to remove
20 subrecipients from this entire thing.

21 I think not to do it is going to get us bogged down in
22 a series of issues and complexities and exceptions that are

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1511 K STREET, N.W. SUITE 547

WASHINGTON, D.C. 20005

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1 going to create more of a problem to implement than not, and we
2 are still going to cover some subrecipients that I think most of
3 us agree would not be covered. I think you ought to eliminate
4 that.

5 Second, the definition of fee-generating case. This,
6 you have to read both the definition section and you have to
7 understand what went on by the staff in the Section 1609.4, so
8 you have to read the two together.

9 What the staff now proposes is to add the term
10 "contract" in the first sentence so that the phrase, which has
11 been historically in this regulation, the phrase "reasonably may
12 be expected to result in a fee" modifies the term "contract".
13 Well, that modification, with a couple of other comments I want
14 to make in a second, may address some of the problems that we
15 have with the term "contract". It does not address all of them,
16 however.

17 That modification makes it clear that in contracts
18 where there is very little likelihood of a fee, just because
19 some statute or some contract has some fee-shifting provision in
20 it, this change would mean that if it reasonably may not be
21 expected to result in a fee, you do not have to refer. That may
22 take care of some of the examples in the comments.

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1 I will point out there are many state statutes which
2 provide for some fee shifting, in consumer contracts,
3 landlord/tenant contracts, and a host of other kinds of
4 contracts, but fees are very unlikely in these cases, very
5 unlikely. The private Bar does not take these cases and does
6 not want these cases.

7 If you read the comments, you will see example after
8 example where programs write in about how they have tried to get
9 the private Bar to do it and they won't. If what this
10 modification does is removes all of those kinds of cases from a
11 referral, then we have made progress.

12 There is another problem here and that is, what does
13 the term contract mean? Many programs have contracts with state
14 or other organizations to provide representation in SSI and SSA
15 cases, for example, to provide representation in domestic
16 violence cases, to provide representation in unemployment
17 insurance cases, to provide representation for the homeless, to
18 provide representation for nursing homes. I could go on and on
19 and on.

20 MR. WALLACE: Aren't those public funds and aren't
21 those excluded from the scope of this regulation? We may have a
22 drafting problem that I am not aware of, but there has never

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1 been any intention -- 1010(c) does not cover public funds. We
2 are not trying to tell you you cannot have a contract to collect
3 public funds, or I do not think we are.

4 MR. HOUSEMAN: Well, I do not know, because you can
5 read this reg as saying that. It does not make that
6 distinction.

7 MR. WALLACE: It is in part three, where it says, "You
8 shall not use these funds or any nonpublic funds." That is all
9 the prohibition of this whole part applies to, is LSC and
10 nonpublic funds. If the definition somehow makes the
11 prohibition obscure, then maybe we need to clean up the
12 definition.

13 The purpose here of the whole part is to leave public
14 funds out of the equation.

15 MR. HOUSEMAN: First of all, there are two problems
16 with what you said. The first problem is that some of these
17 contracts are private funds; that is, you may have organizations
18 -- homeless organizations, nursing home organizations -- that
19 give you money.

20 I had some when I practiced in Michigan, not homeless,
21 but nursing homes, which came out of a private organization, to
22 provide legal services for the people. You may have grants from

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1 private organizations to provide legal services for a range of
2 people and it may be a contract form of a grant.

3 I had a contract with a number of organizations and I
4 have some now in my current practice, so I think we have got to
5 clean that up. If it does not mean what I said, fine. I am
6 saying that the record here and the way it is written does not
7 make that crystal clear.

8 If we are all agreed that if a program has a contract
9 with an entity or an organization or somebody to do certain
10 work, whether it is publicly funded or not, and that is not
11 covered by the term "contract", fine. I assume we are.

12 MR. WALLACE: Unless my staff tells me differently or
13 unless the chairman of the committee tells me differently, I do
14 not think that is what we are after here.

15 Whether you get your private funds in the form of a
16 grant or a contract does not seem to me to be determinative.
17 What we were talking about here is a contract between you and
18 the person you are suing that says if you win, you collect.

19 MR. HOUSEMAN: Okay.

20 The second problem we have with the definition is that
21 it keeps in the last sentence here, which means that it says
22 that any action under a fee-shifting provision is considered a

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1 fee-generating case. Our proposal is to stay consistent with
2 the current law and to put that modifying sentence up in the
3 first sentence.

4 As you see from our proposal, on page 376, Volume II,
5 a fee-generating case means any case or matter including so-and-
6 so that reasonably may be expected to result in a fee. That is
7 the current law. Let's be clear about that. That is the
8 current law. Everybody understands it is the current law. It
9 is working perfectly fine. Let's do that.

10 This changes it and it says any action, regardless of
11 whether it reasonably may be expected to result in a fee that
12 has some possibility of a fee-shifting provision in the statutes
13 now must be referred out. That makes no sense. Our proposal is
14 to put this back in where it belongs and keep the phrase
15 "reasonably may be expected" in there as a modifier on that. By
16 doing that, you have addressed one of the most basic problems
17 with this part of the regulation.

18 Let me turn to 1609.3. Aside from the issue now of
19 subrecipient and the private funds issue that remains here--
20 oh, private funds issue is okay, but the subrecipient we still
21 object to. We have a serious question, although it does not
22 rise to the level of some of our other concerns, about why we

1 need this language about presumptions and what the notion
2 "contemporaneous documentation" really means.

3 We have on the books today 1630. We struggled with
4 1630, as you know, Mike, for a long, long time. 1630 is an
5 extensive accounting provision. 1630 requires that recipients
6 separate their funds, in an accounting sense, and that requires
7 either timekeeping or some other method that accountants and
8 auditors would agree upon, to separate out activities that are
9 permissible, activities that are restricted, activities on which
10 restrictions apply.

11 Also, the audit guy, as I read it and understand it,
12 does the same thing. Programs are now coming into compliance
13 with 1630. If there was any doubt about it, I think it has been
14 straightened out in the last year in terms of their accounting
15 procedures and systems.

16 I, for the life of me, do not understand why we need
17 this. If it adds something that is not in 1630, which nobody
18 has been able to quite answer for me, I would like to know why
19 and what it is that it has added. If it does not add something,
20 why don't we just reference 1630 here?

21 MR. WALLACE: Having worked on 1630, I think this is a
22 restatement of the law under 1630. I do not think it changes

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1 the law. I think it is always advisable to remind people that
2 they have got the burden of proof on these issues, but I think
3 that is all it is.

4 Now, the General Counsel may tell me if there is
5 something else here that we are missing, but as far as I can
6 tell, it is just basically a restatement of what the law is, at
7 least in this federal grant program. You have got the burden of
8 showing what you did with the money.

9 MR. SHEA: There is a separate issue, as 1630 has to
10 do with the question of cost. This is a question of was it a
11 public cost or was it a private cost. Whose account was it on?
12 1630 may or may not deal with that, so this does reinforce that
13 requirement.

14 It also deals with the proposition, as I indicated,
15 that costs are one thing for items which are, as I described,
16 there is some kind of a one-to-one correspondence between a
17 check and something, you know, some item coming into the
18 building or whatever it is.

19 For time, we do not have that same relationship
20 between the attorneys' time, necessarily, and what cases they
21 are working on. That is the purpose of this provision. You do
22 not know whether they are being funded by the public, whether

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1 attorneys' time is being funded by public funds or private
2 funds. That is the rationale there.

3 MR. HOUSEMAN: Actually, under 1630, you do. You have
4 to separate out those funding sources.

5 MR. WALLACE: Tim, would you check with the accounting
6 people on it? I do not know whether 1630 covers this or not,
7 but my recollection is that it probably does, but accounting
8 gives me a headache every time I think about it.

9 This, as far as I am concerned, is just a burden of
10 proof matter. That is all it is intended to be. If you can
11 show us -- that is basically what 1630 was, as far as I was
12 concerned.

13 MR. SHEA: I do not disagree in that respect.

14 MR. WALLACE: If you will talk to the people at the
15 accounting office and tell us if this is different, is something
16 else is needed, because that is all I think we are trying to do
17 here, is to say "You come up with the paperwork and show us you
18 have done right."

19 MR. HOUSEMAN: With regard to the next section, 1609.4

20 --

21 CHAIRMAN VALOIS: Is that not cured by the revision?

22 MR. HOUSEMAN: Well, (a) is cured by the revision.

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1 CHAIRMAN VALOIS: Okay.

2 MR. HOUSEMAN: On (b), I think you would be better off
3 and you will have less of a problem if you stick with the
4 current system of either local area referral or two attorneys in
5 private practice.

6 If, for reasons that I cannot fathom, you want to
7 change this, at least this kind of an approach -- taking account
8 of some of the clarifications that need to be made in it with
9 regard to the Bar Association, et cetera, at least this kind of
10 approach is preferable and addresses the concerns that have been
11 raised about the lawyer referral service.

12 Yet, I do not think you need to do this but if you are
13 going to do something, this is a preferable approach. I just
14 saw this language today. I think we need to address Tom's
15 question and some other questions that may come up afterwards,
16 but that can be done. I think it is tinkering.

17 If what we are talking about is the Bar Association in
18 the service area of the recipient and the recipients sit down
19 and develop a procedure for fee-generating cases, standards,
20 criteria and the types of cases that are going to be referred
21 and not, I think that is -- if we are going to do something--
22 at least a preferable way to do it.

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1 I think the documentation issues that we were most
2 concerned with were cured by the staff's proposal, which I think
3 is essentially the same as our proposal, if I am right. Yes,
4 under (c), 1609.4(c).

5 However, there is one other issue here and that is,
6 our proposal to put back in the question of whether you need to
7 refer a case where the principal object of the case is equitable
8 or other nonpecuniary relief and the request for damages is
9 merely ancillary to such an action. I have restated what is in
10 the current reg, to make it clear what we are talking about, but
11 it is the language of the current reg with a little greater
12 clarity than the current reg.

13 Our view would be that you should stick with our
14 proposal and not with the private Bar proposal. If you have got
15 to go to the private Bar proposal, I think that is better than
16 the original staff proposal, but I do not want you to forget
17 this issue.

18 The reason this is important is because many cases
19 brought by Legal Services are for equitable or other
20 nonpecuniary relief. They are not damage actions and, having an
21 automatic provision where you do not refer those cases makes
22 life much easier. It prevents administrative hassles and makes

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1 it quite clear what the rules are. We have been operating under
2 those rules very effectively. As I said, there is no indication
3 that there is any reason to change.

4 The next provision is a restatement of the statute and
5 I agree with it, 1609.5.

6 On 1609.6, we disagree entirely. I think the
7 amendments by the staff help a little bit to ameliorate the
8 problems with it. Again, this twenty percent limitation, it
9 seems to me, is far too low as an amendment matter, but in our
10 view, there should be no offset for attorneys' fees awards. It
11 is a wrong policy. There are questions about its legality and I
12 urge you not to move in this direction at all.

13 I certainly hope, in addition, you do not want to
14 reach the private funds. Here, you reach, it seems to me, the
15 public funds, as well, of subrecipients and here, you also reach
16 the private funds and public funds of recipients with regard to
17 the offset, so let's be clear what you are doing here.

18 If you adopt the staff's proposal, as revised, first,
19 you are reaching the public funds and the private funds of
20 recipients. That is, you are saying that if public funds of
21 recipients or the private funds of recipients were used to
22 generate attorneys' fees, that those would be offset against the

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1 LSC grant. That is what you are doing. That is a profoundly
2 new funding policy, but that is what you are doing.

3 Secondly, you are saying that for those subrecipients
4 who are not excepted by this provision, that if a subrecipient
5 has private funds and its private funds produce attorneys' fees
6 that are awarded during the grant of the subrecipient, that
7 those are offset against the LSC funds, even if they are not
8 derived at all from the LSC funds. That is what this does.

9 If you have a subrecipient who gets an attorneys' fees
10 award, based on private funds, that award comes in. Actually, I
11 think it is based on public funds, too. If a subrecipient that
12 is not excepted here gets an attorneys' fees award based on
13 public funds or private funds, that is offset against the
14 recipient. That seems to me, insane.

15 What you are going to do is you are going to force the
16 subrecipients out of the business, like the Legal Aid Society of
17 Hartford and a lot of others providing assistance. That is
18 going to diminish, not increase, the amount of legal assistance
19 that is provided. Those are my comments. There may be some
20 questions.

21 (No response.)

22 MR. WALLACE: Alan, lack of questions does not

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1 indicate lack of interest, maybe more a lack of time, but I want
2 to say I have read your comments. I know Bob has. As to some
3 of the technical questions that you have addressed, I think the
4 staff has dealt with a lot of them so far.

5 I think that between now and the time the Board votes,
6 whenever that is, if there are any other technical glitches that
7 are not fixed here, you all have a history of working together.
8 We can fix the technical stuff. I think we are down to the link
9 log over whether these funds ought to be recaptured or whether
10 they should not.

11 I do not know that all the debate in the world is
12 going to resolve that. We have got views and each of us has a
13 view, I imagine, and I do not know that taking any more time to
14 talk to you today about those views will make a difference.

15 I appreciate, as always, your help in pointing out the
16 things that do require technical work. We are going to clean
17 some of those up today, I think, and maybe we will clean more of
18 them up between now and whenever the Board votes.

19 MR. HOUSEMAN: Thank you.

20 CHAIRMAN VALOIS: Deborah, how much time did you want?

21 MS. GREENBLAT: About five minutes.

22 CHAIRMAN VALOIS: You've got it.

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1 Presentation by Deborah Greenblat

2 MS. GREENBLAT: Notwithstanding, Mr. Valois, your
3 earlier comment that you hoped to get this thing passed and be
4 out of here by a certain hour today and, Mr. Wallace, your
5 statement that you made that everybody has views and that all
6 the debate in the world is not likely to change them, I do
7 appreciate the opportunity. This is an open process and I am
8 glad to have the opportunity to try to persuade you to the
9 contrary.

10 CHAIRMAN VALOIS: Don't misunderstand our process.
11 This is not like the last thing that happens when we deal with
12 regulations.

13 MS. GREENBLAT: I understand that.

14 CHAIRMAN VALOIS: There will be a few more words said,
15 I guarantee, next week.

16 MS. GREENBLAT: I want to speak specifically with
17 regard to 1609.6, which is the recapture provision. I want to
18 tell you a little bit about my program and how this provision--

19 MS. SWAFFORD: I did not get your name.

20 MS. GREENBLAT: My name is Deborah Greenblat and I am
21 with Carolina Legal Assistance. We are an affiliate of Legal
22 Services of North Carolina. My program is a special client

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1 program which represents individuals with mental disabilities.

2 My program is a small program. It started out funded
3 through the ABA and only later got LSC funding. Since 1982,
4 when the first budget cuts came, however, we have been cutting
5 staff, tightening our belt and trying to run a very tight ship.

6 We have a small staff. We have three lawyers. Two of
7 us work part-time so that, in fact, we have 2.4 lawyers. Our
8 staff is very dedicated. They are very competent and they are
9 very underpaid.

10 In fact, I laugh when I tell people and they ask me if
11 I work part-time. I say, "I am paid to work part-time." In
12 fact, our program and Legal Services is subsidized by the
13 families of the people on my staff.

14 I want to tell you, in particular, about a case that
15 we have been involved in since 1982 and it became a class action
16 in 1983. It is one of those dreaded class actions that we are
17 talking about. We represent a class of individuals who are
18 mentally retarded and who have been in the back wards of state
19 psychiatric hospitals for many years, some of them twenty and
20 thirty years.

21 We have in this class people, for example, a woman who
22 has been for the past twenty years tied up in four-point

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1 restraints, spread eagle to her bed, because there was not
2 enough money in her patient account in 1957 to purchase a boxing
3 glove for her to prevent her from picking at herself and
4 injuring her eyes. Instead, they tied her up for the next
5 thirty years, until we brought this lawsuit.

6 We have other people in this class who came into these
7 institutions with some higher skills, people who could speak,
8 people who could express themselves, who ten years later are
9 listed on their medical records as being nonverbal. They lost
10 the skills that they had, which is a common thing for people
11 with mental retardation who do not get the training and so on
12 that they need.

13 We have had some higher functioning people in this
14 class, people like one of our named plaintiffs, who went out
15 from the hospital every day to a sheltered workshop where she
16 received very good reports and had very few problems and yet,
17 each night when she came back to the state psychiatric hospital,
18 she was a severe behavior problem and had to be restrained all
19 the time.

20 Her own doctor, a state doctor, said in her reports
21 that her problem was that, as a mentally retarded person who was
22 in a psychiatric hospital which had nothing to offer her, all

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1 she knew to do was to model the behavior of the people with
2 psychiatric problems who she lived with.

3 So, this was the class action that we brought. For a
4 number of years, our board authorized this action and has
5 adopted budgets over the years which reflected the necessity to
6 put enormous resources into this case. We needed to have
7 medical experts. We needed to take depositions. We needed to
8 look at hundreds and hundreds of medical records, enormous
9 resources.

10 Our board did it because it is a very important case.
11 It is a case that needs to be brought. Because we had a certain
12 amount of faith in the merits of the case and in the fact that
13 we would ultimately get these expenses back and get our staff
14 time and so on back when the case was won in the matter of
15 attorneys' fees.

16 After five years, we won the case. The day before
17 Thanksgiving, we got a decision and we won the case this past
18 November of 1988. Our effort paid off. Our investment paid
19 off.

20 Our board adopted, also in the latter part of last
21 year, a budget in which we face a \$40,000 deficit and that is
22 with no fat in the budget, I can assure you, none. They did so

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1 because we won the case and they knew that we would be getting
2 these fees.

3 We anticipate relying on these fees in order to
4 eliminate our budget deficit so that we won't have to make
5 further cuts in our staff. There is no place else to cut the
6 staff and basically wipe out our program. With 2.4 lawyers,
7 there is very little else where we can cut.

8 We anticipate, with this fee, to erase that deficit so
9 that I won't have to lay people off mid-year. We anticipate,
10 with this money, to be able to put resources back into this
11 case, to implement and monitor this case. It has already, in
12 the few months since the case has been decided, taken enormous
13 resources and will continue to take enormous resources to follow
14 up and implement.

15 This was not a case for monetary damages. This was a
16 case for injunctive relief. We asked and we got relief that
17 said "Don't treat these people this way anymore. Come up with a
18 system in which the conditions under which these clients are
19 kept are improved." To monitor those conditions and to monitor
20 that implementation is going to take continued legal resources
21 of our staff.

22 The third thing we were hoping to do with these

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1 attorneys' fees was to give attention to a number of priorities
2 that did not get the attention they needed during the pendency
3 of this case because we did not have the resources.

4 Our clients do not have equal access throughout the
5 state on a geographic basis because we do not have the
6 resources. Our only hope to providing equal access to all the
7 institutionalized mentally handicapped people in the state is to
8 be able to use resources from attorneys' fees.

9 We feel, with our board and our planning process and
10 everything that we have undergone for the past several years, we
11 feel that for Legal Services Corporation to take away the money
12 that we would get from these fees is really to break faith with
13 the agreement that we have had over the years, with the fact
14 that we have invested our resources in a case that we felt
15 needed to be brought for very vulnerable people -- people who
16 are not going to the private Bar, people who the private Bar
17 does not know exist.

18 We urge you not to break faith with us in that way by
19 penalizing us for having done a good job. I can tell you that
20 my staff -- and I know from other staff people I have talked to
21 in this state -- that this proposal was looked at as very
22 punitive and for no other purpose.

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1 Someone commented to me, "Well, they want it to look
2 like we are taking the cases, but they do not want us to win the
3 cases." I could not say anything back to the staff person who
4 said that to me.

5 I also want to say, and I said this in my written
6 comments, that I think that this particular proposal, .6, is
7 really contrary to legal professionalism as we know it in this
8 country. It is contradictory to our cultural values, to our
9 political values in our society.

10 George Shultz and other foreign policy people have
11 recently, for example, applauded the Chinese because they are
12 beginning to see the light of free enterprise. They are
13 beginning to recognize incentive and to reward incentive and to
14 reward hard work.

15 This proposal, 1609.6, does exactly the opposite. It
16 penalizes you for hard work. It penalizes incentive and, in
17 fact, is a disincentive to do the work that we need to do. I
18 strongly urge and hope that you will reconsider this and that
19 you will abandon this recapture provision.

20 MR. WALLACE: Mr. Chairman, I have a question. Are
21 you a subrecipient of Legal Services of North Carolina or are
22 you a component of Legal Services of North Carolina? I never

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1 get your corporate relationship straight.

2 MS. GREENBLAT: We are not a subrecipient; we are a
3 component.

4 MR. WALLACE: You are a component. Okay.

5 CHAIRMAN VALOIS: Any other questions?

6 MR. SMEGAL: Did I understand you to say, Deborah,
7 that you have funding other than from the component aspect of
8 Legal Services Corporation?

9 MS. GREENBLAT: What we have done since 1982 is we
10 have hustled every way that we can. In 1983 and 1984, we had to
11 lay off some people when the budget cuts came, but we had some
12 attorneys' fees from a case at that time. We supplemented what
13 we got from Legal Services and lived on those attorneys' fees
14 for two years.

15 Then we had to make more cuts when that ran out. In
16 1987 and 1988, we have had some foundation grants. Those have
17 run out. For 1989, we are back to the point where we are facing
18 this deficit.

19 The majority of our funding, about seventy percent of
20 our funding, is from Legal Services Corporation. We get about
21 seven or eight percent, maybe six or seven, something like that,
22 the same percent that everyone else gets.

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1 Then we have had some foundation grants for special
2 projects. The foundation grants have not funded this
3 litigation. We had a foundation grant for representing people
4 in nursing homes and rest homes and other groups of people who
5 we were not able to reach out to with the resources that we had.

6 MS. SWAFFORD: Could you tell me who the foundations
7 are?

8 MS. GREENBLAT: We had one grant from the Z. Smith
9 Reynolds Foundation and one grant from the Mary Reynolds
10 Foundation. Then we got a very small grant, I believe, from the
11 Campaign for Human Development for a small project.

12 MR. SMEGAL: Were there any restrictions on those
13 grants on receiving attorney fee awards?

14 MS. GREENBLAT: No, none.

15 CHAIRMAN VALOIS: Thank you.

16 MS. GREENBLAT: Thank you.

17 CHAIRMAN VALOIS: There are no more people who have
18 asked to speak. I understand that this is going to be before
19 the Board if we vote it out today in some form or fashion.

20 I suppose, in the interim -- I hope in the interim--
21 there will be some discussion between Mr. Houseman and the
22 General Counsel. There are a couple of points here which I

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1 think need some adjustment, in fact, I am sure there are, and I
2 have some ideas about them.

3 MOTION

4 MR. WALLACE: Mr. Chairman, I move that we propose to
5 the board the adoption of Part 1609 as presented by the General
6 Counsel this morning, including the definition in subsection
7 (2)(b), "for purposes of this part, the term recipient includes
8 subrecipients."

9 CHAIRMAN VALOIS: Is there a second?

10 MS. MILLER: I will second.

11 CHAIRMAN VALOIS: The motion has been made and
12 seconded to report out to the Board as amended what is contained
13 in General Counsel's version of this date, as just amended
14 further by Mr. Wallace's motion, I suppose.

15 MR. SMEGAL: Mr. Chairman, if I may, I believe the
16 record will reflect that your introductory comments were
17 somewhat inconsistent with Mr. Wallace's motion, unless he, in
18 effect, adopted your preamble, so to speak.

19 I understood you to say that the evolutionary process
20 of Part 1609 is ongoing and that you expected not only our
21 General Counsel, but I believe you invited Mr. Houseman to
22 continue this dialogue --

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1 CHAIRMAN VALOIS: That is correct.

2 MR. SMEGAL: -- up until the Board should deem it
3 appropriate to take this matter up and vote on it, and I did not
4 hear any of that in Mr. Wallace's motion.

5 I am wondering if, in fact, Mr. Wallace intended to
6 include that and just by oversight did not.

7 MR. WALLACE: I do not think it is part of a motion.
8 What we have before us is a document that we either adopt or we
9 do not adopt.

10 As the Chairman of this committee has explained, this
11 committee's recommendation is not the end of the road. I do not
12 think there is any member of this committee who does not adhere
13 to what the Chairman just said, which is that if the staff and
14 other interested parties can make corrections to this language
15 that can be proposed as clean-up amendments at the Board level,
16 that we will be happy to accept those amendments when it gets to
17 the Board level.

18 Nobody has moved that we shut off development of
19 legislation. In Congress, the committee does something and work
20 keeps on going. This is not uncommon.

21 MS. SWAFFORD: Does that include revisions, Mike?

22 MR. WALLACE: The staff does not have authority to

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1 revise what we do here, but when we go to the Board level, the
2 staff has authority and we are encouraging the staff to present
3 revisions for the Board to consider.

4 I say right now I will be prepared to support
5 revisions if the staff and other interested parties can agree on
6 revisions that need to be made.

7 CHAIRMAN VALOIS: If I agree with them, I will vote
8 for them, exactly what is the usual process.

9 We are going to call the question. Those in favor of
10 the motion, say aye.

11 (Chorus of ayes.)

12 CHAIRMAN VALOIS: Those opposed?

13 (Chorus of nays.)

14 CHAIRMAN VALOIS: The motion passes three to two.

15 There is no further business to come before this
16 committee that I am aware of.

17 MOTION

18 MR. WALLACE: Move to adjourn, Mr. Chairman.

19 CHAIRMAN VALOIS: Thank you.

20 MR. SMEGAL: I'm sorry. Before we adjourn, and I
21 apologize for being a little late, but I think Mr. Wallace has
22 gotten a letter from Congressman Kastenmeyer of the House of

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1 Representatives. I believe the letter relates to this subject.

2 I have seen a copy of that letter and I understand
3 that the Congressman asked for our response, collectively, I
4 guess -- I do not know that Mike personally has to respond -- by
5 January 24. I would like some assurance, if it is possible,
6 from either Mr. Wear or Mr. Wallace, that that, in fact, will be
7 accomplished, and that at the time of our Board Meeting next
8 Friday, all of us will have the benefit of that response.

9 MR. WALLACE: The letter is addressed to me personally
10 and, of course, I cannot speak for the Board, nor can Mr. Wear.
11 I will tell you right now that I plan to call Congressman
12 Kastenmeyer when I return to my office on Monday morning and
13 talk to him about what it is he wants and what it is we can do
14 for him.

15 I will give you that much assurance and after he and I
16 talk about it, I can tell you what we have said.

17 CHAIRMAN VALOIS: Mr. Smegal, you seem to be favored
18 with a copy of the letter that I have not seen.

19 MR. SMEGAL: I am only favored with having seen it in
20 front of Mike.

21 MR. WALLACE: It has been sitting here in plain view.
22 That passes any 4th Amendment test that I know of.

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