

ORIGINAL

LEGAL SERVICES CORPORATION

BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE MEETING

Open Session

Monday, July 8, 1996
10:30 a.m.

Legal Services Corporation
750 First Street, N.E.
Board Room
Washington, D.C. 20002

COMMITTEE MEMBERS PRESENT:

LaVeeda M. Battle, Chair
Hulett "Bucky" Askew
F. William McCalpin
Ernestine P. Watlington

STAFF PRESENT:

Alexander D. Forger, President
Martha Bergmark, Vice President
Victor Fortuno, General Counsel/Secretary
Suzanne Glasow, OGC
John Tull, OGC
Laurie Tarantowicz, Office of Inspector General

ALSO PRESENT:

Linda Perle, Center for Law and Social Policy
Alan Houseman, Center for Law and Social Policy
Richard B. Teitelman, Legal Services Corporation of
Eastern Missouri, Inc.

Diversified Reporting Services, Inc.

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P R O C E E D I N G S

(???? a.m.)

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3 CHAIR BATTLE: I would like to call the
4 meeting to order this, the 8th day of July 1996 and
5 welcome here today the members of this committee,
6 Ernestine Watlington and Bill McCalpin.

7 Joining us as well is Bucky Askew. We welcome
8 you being with us today. As I understand it, we will
9 later be joined by John Brooks and Tom Smeagle in time.

10
11 The first order of business is approval of the
12 agenda. I'd like to make one change in that. We don't
13 have the second page to our minutes for the February
14 23, 1996, meeting.

15 And until we receive that, we won't go into
16 approval of those minutes, but are there any other
17 changes suggested to the agenda?

18 MR. McCALPIN: I assume the agenda is as
19 published in the Federal Register on June 28th; is that
20 correct?

21 CHAIR BATTLE: Yes, it is. Yes, it is. But
22 there are no changes?

M O T I O N

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MR. McCALPIN: I move we approve the agenda.

CHAIR BATTLE: Okay.

MR. McCALPIN: As modified.

MR. McCALPIN: Okay.

MS. WATLINGTON: Second.

CHAIR BATTLE: It has been properly moved and seconded that we approve the agenda. All in favor?

(A chorus of ayes.)

CHAIR BATTLE: Motion carries. We can, now, approve the minutes of the May 19th meeting of the Operations and Regulations Committee. I will entertain a motion to that effect.

You should have received a copy of those minutes prior to this meeting and had an opportunity to review them, are there any corrections to those minutes?

MR. McCALPIN: Pretty --

CHAIR BATTLE: Pretty sparse, bare bones minutes.

M O T I O N

MS. WATLINGTON: I will make a motion for

1 approval of the minutes of May 19th.

2 MR. McCALPIN: Second.

3 CHAIR BATTLE: Okay. It has been properly
4 moved and seconded that we approve the minute as
5 drafted. All in favor?

6 (A chorus of ayes.)

7 CHAIR BATTLE: All opposed.

8 (No response.)

9 CHAIR BATTLE: Motion carries. Before we
10 start with the daunting task that we have before us
11 today of considering interim regs or virtually 15
12 different regulations in a continued meeting that will
13 span today, tomorrow and Wednesday, I'd like to first
14 just express my personal appreciation for the work that
15 our staff has done in pulling this together.

16 We have had a brief period of time between our
17 May 19th meeting and this meeting to pull together
18 specific regulations, in some instances, draft new
19 regulations, and in other instances, amend existing
20 regulations in various areas in order to implement the
21 new law in the appropriations bill for 1996.

22 And I think that our staff has done just an

1 outstanding job of pulling this together. We were
2 receiving Federal Express packages up through Saturday
3 with information in it to meet the deadline of having
4 this meeting today.

5 And so all of you should have received
6 virtually all of the proposed interim regs in the mail
7 at some point in time, and that's, in large measure,
8 due to our staff, to Suzanne and others in the OGC and
9 to others who have helped to get this whole process
10 together.

11 So I wanted to just express my thanks to you
12 before we get started this morning.

13 Because we have quite a bit to cover today, we
14 have, in the past, had a particular approach that we
15 took that was very detailed and specific. We covered
16 each draft comment and rule line by line.

17 Given the task that we have before us today of
18 beginning the review of 15 regulations, we're to depart
19 from that somewhat.

20 And my suggestion today is that we cover the
21 issues in each of the regs; that we cover, to the
22 extent that we must, line by line those issues where

1 there are concerns in the regulations; that we refer as
2 we go through the rule itself, to the commentary and
3 take up any issues initially that people may have on
4 the commentary as we go through this process.

5 I'd like for the staff responsible for
6 drafting the rule or working on the rule to first give
7 us the background of what the changes are before we
8 begin our process of review, why the particular changes
9 being proposed have been set out and some background as
10 to what the appropriation bill specifically requires so
11 that, as we go through, we have a sense for what it is
12 that we're covering in a particular draft rule, interim
13 rule.

14 Will that work for you, for the staff? All
15 right. Are there any questions about that process or
16 that procedure? I'm hoping that that will work, if we
17 need to depart at any point, and if there are any
18 comments from the public as we go through, I think we
19 need to entertain them as we go through rather than
20 waiting until the end of the day, because we simply
21 won't have time to go back and revisit them at the end
22 of the day.

1 The first interim reg that we have before us
2 today is 1620, which has to do with priorities and
3 allocation of resources. Suzanne, do you want to give
4 us the background on this?

5 MS. GLASOW: Okay. As a threshold matter, I
6 would like to mention that on almost all of these
7 regulations there are parts of the preamble
8 supplementary information that we're still working on
9 to make it consistent throughout where it's talking
10 about pretty much the same thing.

11 But because we have several drafters of these
12 rules, we have not still had the time to make it
13 consistent. So we recognize the preambles still need a
14 lot of polishing work done to them.

15 CHAIR BATTLE: In that regard, I had one
16 proposal to make, and that is any place that we speak
17 of appropriations act, let's say 1996 Appropriations
18 Act so that we're specific to where this particular
19 draft comes from.

20 MS. GLASOW: Okay.

21 CHAIR BATTLE: Okay.

22 MS. GLASOW: Generally, the revisions to this

1 rule are revisions to a rule that the Corporation
2 currently has on priorities. The main revisions are
3 that recipients are now required not only to establish
4 priorities, but they are also required to take cases or
5 matters that are within those priorities.

6 They are no longer allowed to take any cases
7 outside of those except for emergency situations as
8 defined by the rule.

9 And it also requires its staff be informed of
10 that and sign a written agreement that they will comply
11 with that requirement. So those are the major changes
12 to this rule.

13 CHAIR BATTLE: Okay. I have one thing. In
14 the commentary, I think it's on page 3, under the
15 section 1620.3, "Establishing Priorities," the fourth
16 line from the bottom.

17 It indicates that the Corporation's suggested
18 priorities were adopted by the Board on may 20, 1990.
19 I think that's a typo. It should be 1995 --

20 MR. McCALPIN: 6.

21 CHAIR BATTLE: I'm sorry, 1996.

22 MR. McCALPIN: LaVeeda, let me make a general

1 comment first. I think it would be helpful where what
2 we are due now replaces an existing regulation in toto
3 we say that.

4 In some instances, we are just demanding parts
5 and leaving other parts. In other instances, as in
6 this case, we are replacing the present 1620 with an
7 entirely new regulation.

8 And I think it would be helpful to all
9 concerned that we state that. When, in fact, we are
10 replacing a regulation in toto, we say right up front
11 don't bother looking at this one anymore. This is the
12 whole regulation.

13 Now, there are some others we're going to come
14 to where we don't replace in toto, and we'll have some
15 comments about that.

16 CHAIR BATTLE: Okay.

17 MR. TULL: On this particular one, it
18 certainly makes sense to do what Mr. McCalpin
19 suggested. In this particular one, there are two
20 provisions of this which are lifted completely out of
21 the old reg and were not changed. 1620.3 was not
22 changed, but there --

1 MR. McCALPIN: But even so --

2 MR. TULL: Right. But to say that --

3 MR. McCALPIN: We ought to republish it as an
4 integral unit.

5 MS. GLASOW: Actually, as we went through the
6 process, even in some of the smaller rules where we
7 thought there were going to be one or two changes, just
8 to change it to apply to all funds we found that there
9 were a lot more provisions affected than we had
10 anticipated.

11 So we will be more careful in that
12 terminology, and as we prepare these for final
13 publication as interim rules in the Federal Register,
14 they have very distinct terminology.

15 There is a difference, for instance, between
16 "revised" and "amended," which I don't necessarily
17 remember right at this moment, but they will help us go
18 through that process.

19 And there will be a sentence before every
20 section of the rule that very clearly designates
21 whether it's being revised, amended, amended in part or
22 whatever.

1 So all of that will be worked out, too, but
2 especially in the preamble I think it's very helpful
3 for the public to know just how substantively we are
4 changing the rule.

5 CHAIR BATTLE: Okay.

6 MR. McCALPIN: I'm not quite sure how you
7 propose to address this. Did I understand that you're
8 going to look at the text of the reg --

9 CHAIR BATTLE: Yes.

10 MR. McCALPIN: -- and then refer back to
11 commentary as required?

12 CHAIR BATTLE: Yes. Yes. That's the way
13 we're going to do it.

14 MR. McCALPIN: Okay.

15 CHAIR BATTLE: So really, before we begin our
16 process, we're going to get background from the staff
17 preparing it so that we'll know where the issues lie in
18 the actual rule.

19 MR. McCALPIN: I thought we had already
20 received that from Suzanne.

21 CHAIR BATTLE: Yeah. We did, but I'm just
22 telling you that's part of the process.

1 MR. McCALPIN: Fine.

2 CHAIR BATTLE: Okay. All right. Okay.

3 Suzanne?

4 MS. GLASOW: Do you want to start with Section
5 1?

6 CHAIR BATTLE: Yes.

7 MS. GLASOW: We, basically, revised the
8 "Purpose" section to indicate that there are new
9 requirements under this rule and that emergencies is an
10 exception to the prohibition.

11 CHAIR BATTLE: We are using terminology
12 "cases" and "matters" consistent with the language that
13 we adopted, I guess it was, in timekeeping --

14 MS. GLASOW: That is correct.

15 CHAIR BATTLE: -- here that was not in the
16 original Purpose. And that is so that we're being
17 specific as to how -- what types of activities are
18 covered in this allocation of resources section.

19 MS. GLASOW: Right. And the definitions
20 pretty much cover the activities of a recipient in
21 legal services situations.

22 Because the Board had spent so much time on

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1 those definitions and the timekeeping rule and because
2 they have to keep track now of the cases and matters
3 they're involved in, we felt that it was a good idea to
4 use the same definitions.

5 CHAIR BATTLE: Okay. Bill.

6 MR. McCALPIN: Let me go back to 1620.1. I
7 would like to expand slightly upon the stated purpose,
8 and that's because of the provisions now in 1620.3
9 which were picked out of 1620.2.

10 I think that the Purpose is designed to ensure
11 that they adopt the priorities and to provide guidance
12 for setting priorities, and that is what we do -- what
13 we used to do in .2 and now we do now in .3.

14 We provide guidance in how they do it, that
15 they have to -- well, in .3. The procedures adopted
16 shall, appraisal of the needs, included input from the
17 employees, governing body, members of private bar and
18 other registered persons and so on.

19 So I think that not only are we saying you
20 must do this, but we are providing some guidance as to
21 how you do it.

22 CHAIR BATTLE: I think the
guidance issue goes almost first. "This part is

1 designed to provide guidance in setting priorities and
2 to ensure that a recipient's governing body adopts
3 written priorities for the --" does that make sense?

4 MR. McCALPIN: It doesn't make any difference
5 to me.

6 CHAIR BATTLE: Okay.

7 MR. McCALPIN: But I think that's a more
8 complete statement of what this rule is about.

9 CHAIR BATTLE: Okay. Anything else on
10 "Purpose"? Suzanne.

11 MS. GLASOW: And Section 2 is the definitions,
12 "cases" and "matters" defined as in 1635.2.

13 MR. McCALPIN: Let me say on that one I
14 thought that a long time ago we adopted the principle
15 that we would not refer from one to another, that where
16 it was necessary to pick something up we would pick it
17 up in toto so that somebody dealing with this would not
18 have to go look at this and then have to thumb through
19 to find another regulation and come back.

20 I thought that we decided a long time ago that
21 we weren't going to incorporate by reference.

22 MS. GLASOW: If we did, I simply don't

1 remember doing that, but that's fine. I mean, we can
2 do it either way.

3 MR. McCALPIN: Well, and particularly since
4 now 1635 -- well, until today we didn't get something
5 like this that had 1635 in it. I'm not sure the extent
6 to which people in the field have 1635. Of course,
7 they could get it out of the Federal Register, if they
8 wanted to.

9 So I just thought that we had decided not to
10 incorporate by reference.

11 MS. GLASOW: That's your pleasure.

12 CHAIR BATTLE: There is one issue that Suzanne
13 and I discussed about, and it's probably a minor issue
14 but for Legal Services a major issue, and that is the
15 cost associated with how much we print in the Federal
16 Register as we go through this process.

17 I think, Bill, your comment is well taken.
18 Until you have one set of comprehensive rules, the
19 flipping becomes a problem, but I think, in part, what
20 we were attempting to do is to limit what we do to what
21 was necessary.

22 MR. McCALPIN: So far as I know, this is the

1 only place in the 13 regulations I've examined so far
2 where we've done that.

3 And it seems to me what we're talking about
4 is --

5 CHAIR BATTLE: It's two paragraphs. It is,
6 and it's -- the thing that Bill keeps referring to is
7 what I passed out to the Board this morning, and that
8 is a copy of the regulations of the Legal Services
9 Corporation effective June 21, 1996, which includes the
10 regs that we most recently have adopted as a Board,
11 final regs on timekeeping, competitive bidding and drug
12 addictions are all in place.

13 What's the pleasure of the committee? Bill, I
14 just -- I don't remember. We may have said that we're
15 going to just go ahead and restate definitions.
16 Somewhere in the back of my mind I remember a
17 discussion about that.

18 MR. McCALPIN: I don't know if it was
19 necessarily limited to definitions. I think that two
20 years ago, whenever it was we were doing this, there
21 were questions of whether we use just simply refer to
22 another regulation for a provision and one that we were

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1 discussing.

2 And I thought that we had said that in order
3 to avoid having people to move back and forth -- at
4 that point all we had was this. Now we have a couple
5 of different sources for them to move back and forth
6 to.

7 I think that given these two paragraphs -- as
8 I say, so far as I know, of the 13 regs I've read, this
9 is the only place where we've done that, and I would
10 think that --

11 MR. TULL: There are other of the new regs
12 where there are references to other cross-references.
13 I believe in 1610 it refers to 1627 where it relates to
14 subgrants.

15 I would suggest for this one I think that
16 Mr. McCalpin is certainly correct that this is a matter
17 of ease of reading the regulation and understanding --
18 being able to sit down with it and understanding
19 everything it encompasses, that simply transferring the
20 definition of "cases" and "matters" and repeating here
21 would be helpful.

22 Some of the other places, when we get to them,

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1 we might want to look at whether -- we chose the cross-
2 reference because it solved a serious drafting problem
3 that we'll talk about when we get to those particular
4 regs, and maybe the principle won't work for those
5 particular ones.

6 MR. McCALPIN: There may be a difference
7 between a reference and an incorporation by reference.

8 MR. TULL: Right. I think that's probably a
9 distinction.

10 CHAIR BATTLE: Why don't we do this, then:
11 "Case" and "matter" is defined in the timekeeping reg.
12 We can set out that same information here, it seems to
13 me.

14 MS. GLASOW: Okay.

15 CHAIR BATTLE: And that solves the problem.
16 1620.3, "Establishing Priorities."

17 MS. GLASOW: This section sets out the
18 requirements for recipients establishes priorities.
19 Paragraph (a) says the governing body must adopt
20 procedures for establishing priorities. It applies to
21 both Corporation and nonCorporation resources of the
22 recipient.

1 And it also has the requirement that the
2 procedures assure that cases and matters undertaken by
3 the recipient are within the priorities adopted.

4 CHAIR BATTLE: Okay. I had one just comment
5 under (a)(1) about five lines down. When you talk
6 about what the appraisal should include, there is a
7 statement "and to the extent feasible include outreach
8 to potential and current eligible clients."

9 And then, when we get into No. 2, we talk
10 about the fact that the procedures shall ensure the
11 opportunity for participation by all significant
12 segments of the client community.

13 And I wasn't really sure about that
14 distinction and why you have permissive language, on
15 the one hand, and then mandatory language in the other
16 instance.

17 MS. WATLINGTON: And I had questioned that
18 also.

19 MS. GLASOW: Well, I understand -- I raised a
20 similar issue.

21 CHAIR BATTLE: Okay.

22 MS. GLASOW: And I understand that this is,

1 basically, language that's in the current regulation.
2 I should let John speak for himself, but I raised the
3 issue.

4 I felt that both 1 and 2 were repetitious, and
5 it was unclear where the distinctions -- and I felt
6 that we could easily take this and parse out what were
7 really the essentials and write both 1 and 2 together
8 in two or three sentences and simplify it.

9 But I think the reason was because they
10 weren't -- they wanted to change as little as possible.
11 That's my understanding.

12 CHAIR BATTLE: And you're right. As I look at
13 the 1620.2 procedure in the old reg, it has precisely
14 the same language.

15 So you didn't really make a change, but as you
16 read it today, it just is inconsistent.

17 MR. TULL: In drafting this, we made a
18 judgment call based on -- partially on the standard for
19 adoption of an interim reg, which is it has to have
20 some emergency need to be adopted on an need basis.

21 And this section we chose not to change,
22 although it clearly cries out for significant change,

1 because it's not particularly well drafted.

2 We chose not to principally because the
3 changes we would make didn't seem to be driven or
4 required by the legislative changes in the
5 appropriations act.

6 I think the assumption that we have been
7 operating with is that since this is a regulation which
8 is both an interim reg of immediate effect and also of
9 a regulation published for comment that the matters and
10 the issues that are addressed in 1620.3 can be fixed
11 when the final reg is adopted.

12 But we chose not to do it on an -- and I guess
13 it probably is also because of a matter of efficiency,
14 that there is a lot of concepts in here that do need
15 revisiting, because this is a very troubled area with
16 programs and for programs.

17 It does need to be rethought, I think, but to
18 take that on in the midst of trying to get the other
19 regs out we just made a judgment that --

20 CHAIR BATTLE: And I think, John, I tend to
21 agree that for this purpose -- and it will require us
22 to be judicious in terms of how we approach our review

1 that, for the interim regs' sake, probably we do need
2 to focus on what comes under the rubric of what an
3 interim reg is all about.

4 However, as we put this out to comment and
5 think of the proposed rule aspect of it, I think we do
6 need to clear up and start thinking about editing
7 changes that we need to make to this rule to clear up
8 the inconsistencies that are contained therein.

9 Ernestine?

10 MS. WATLINGTON: I was checking both. The
11 client community worked very hard through the years to
12 do -- and then, when you get a word where it says --

13 MR. McCALPIN: Where are you reading,
14 Ernestine?

15 MS. WATLINGTON: I'm in both of them, 1622
16 "Procedure" and it's also up here in 4, when it says,
17 "To the extent feasible should include outreach to
18 eligible clients." That's excluding us again because,
19 you know, they could always use that that "We didn't
20 have the monies to do a thorough outreach."

21 It's just a simple word, but it goes back to
22 what we worked so hard for back in the days to make it

1 mandatory and not -- if you leave at outing, that's
2 there, "to the extent feasible," who is going to spend
3 any money to do that? MS. GLASOW: In the commentary
4 to the interim rule, I could add language stating that
5 we recognize that there are issues in this section that
6 although we have not changed it for the interim rule
7 process, we can ask comments on particulars in that for
8 a final rule in terms of where recipients either find
9 it unclear or feel there needs to be other revisions
10 for more substantive reasons.

11 So if we talk about that in the commentary at
12 this point, then we can get the comments and change
13 it --

14 CHAIR BATTLE: That's fine. I think that
15 makes good sense. Linda?

16 MS. PERLE: Programs are now required -- are
17 in the process of being required to do new priorities;
18 is that right? Are they going to be done under this or
19 under the old rules?

20 Wasn't there a memorandum sent out or a
21 program letter on --

22 MR. TULL: We sent a program letter in

1 anticipation of this regulation being adopted. When
2 this becomes -- assuming that the Board determines to
3 go forward in making this an interim reg of immediate
4 effect, then they would adopt under this --

5 MS. PERLE: Pursuant to this. Well, I guess
6 my concern, then, is that this language in (a)(1) and
7 (2) -- you really change the way that -- not just the
8 way the priorities are being done but the reason
9 they're being done by this rule.

10 And so it strikes me that we should try to
11 make as clear as possible what programs are supposed to
12 do, what they're required to do.

13 I think what this does by talking about
14 assessing the needs through discussions with the client
15 population in three different places and three
16 different ways I think it muddies it, in terms of what
17 Ernestine was talking about.

18 And I think it makes it difficult for programs
19 to come figure out what they're supposed to do. It
20 also suggests that there is -- you know, with this long
21 list of things in (1) that there is a huge burden on
22 programs between when this rule becomes effective and

1 when they're supposed to get their next set of
2 priorities done, which also happens to be at the same
3 time that they're doing their response to the RFP.

4 So it's a big burden on the programs to, kind
5 of, get all this done, and if you can simplify it a
6 little bit so that they understand better how it fits
7 together, I think --

8 MR. TULL: Well, I would assume that -- my
9 answer to Linda's question, when she said what do we
10 think programs will do or the impact of this will be,
11 my response was that they would be under this reg.

12 But that doesn't mean that programs would be
13 required to go through the full appraisal process in
14 order to change their priorities.

15 What we advised programs of in the program
16 letter and what this reg, if adopted, would make clear
17 is that the degree to which a program now has
18 priorities which don't cover all of the work that they
19 do -- and the programs typically haven't written
20 priorities that way because it wasn't a statutory
21 requirement before -- the degree to which they're
22 framed in a way which doesn't cover all of the work

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1 that they do or that they don't have an emergency
2 procedure, which most do not have, that they would need
3 to adopt new priorities to accomplish that.

4 But what we said in the program letter, which
5 I don't believe would be changed by the adoption of an
6 interim reg, is that doesn't mean you've got to start
7 over from scratch and go through a whole needs
8 assessment because, for the reasons that Linda stated,
9 it's clearly going to be impractical and a huge burden
10 on programs to mandate and would really not be
11 appropriate use of their time unless they were already
12 engaged in that, as some programs may well be.

13 CHAIR BATTLE: I guess the question I have is
14 was there a need from the program's perspective prior
15 to now to adjust this reg to make the priority-setting
16 process clearer? And if there was, then it
17 seems to me, since we are now placing the critical
18 importance of priority assessing that the statute does
19 on programs we may need to, because of that -- that, in
20 my view, then pulls this language into the interim --

21 MS. PERLE: That's my point.

22 CHAIR BATTLE: -- responsibility for us to

1 make sure that it's clear and what it is that programs
2 must do in order to set priorities in a way that it
3 covers everything that they do so that we can track it
4 in timekeeping and so that we can report to Congress on
5 a regular basis that this is what this program says
6 it's doing; this is what it is doing.

7 MR. McCALPIN: Let me make a general comment
8 that responds to something that John said a bit ago.
9 That is I can understand the time pressures that people
10 were under to do this in response to the legislation
11 that was adopted the 26th of April.

12 I think that we would kid ourselves by saying
13 that, well, since we're going to put this out for
14 comment, we'll have time to correct anything in the
15 final reg.

16 I will point out to you that it's two years
17 ago we were dealing with 1609, which still hasn't been
18 done. I think that if we see a problem in a reg, even
19 if it doesn't quite meet the requirements of the
20 Administrative Procedure Act, we ought to correct it
21 and not rely on the hope that in the next 3 months, 6
22 months, 12 months, 18 months we'll correct it.

1 I think -- I agree that there is a lot of
2 little stuff we don't need to mess with, but if we see
3 a real problem with a reg, I think that we shouldn't
4 rely on the comment period and later address to it.

5 CHAIR BATTLE: Yeah. This particular one I
6 could see a need, because of what Linda has said, to
7 correct it because what we're really telling programs
8 now is you're going to have to establish -- and I
9 understand what John is saying.

10 There probably are priorities that are already
11 set, but they're really going to have to do a
12 comprehensive view of what their program is actually
13 doing in a way that may not have been envisioned in how
14 they did their previous priority-setting. And we
15 probably need to give clarity to how that process will
16 need to take place.

17 Now, the one issue that I raised was the
18 distinction between how the client community would
19 interface in that process based on what's set out in
20 paragraphs 1 and 2.

21 There may be other inconsistencies. I'm not
22 sure. Ernestine?

1 MS. WATLINGTON: Well, that one is I'm very
2 concerned with because, you know, the client community,
3 if you don't really get that input and make it so
4 that -- and there is any way out, then that's going to
5 be -- the first part of that is not going to be there.

6 If they don't have that input, they're really
7 not addressing the needs of their community because
8 they no idea -- what they think is and what is is two
9 different things, because the people that comes to your
10 door is not usually what the problems in their
11 community is.

12 And then I have a problem with that emergency
13 one when they were determining who will determine what
14 is an emergency, because back in the days when they
15 wanted to cut -- first started being cut in the
16 community, the Legal Services programs could only
17 service emergencies, and most clients don't go to their
18 program until there is an emergency.

19 And if it isn't addressed then, then that will
20 no longer address their problem. So that has caused
21 problems within the client community for many, many
22 years, because when you're trying to get clients

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1 involved, it was very difficult because they weren't
2 being serviced.

3 So they had a negative attitude toward the
4 program because, as I say, most of them, without
5 community outreach, they don't come to the program.

6 CHAIR BATTLE: Let me suggest something. Why
7 don't we talk through -- this one has -- at least we've
8 got some critical concerns about what procedures should
9 be.

10 Let's walk through it so that we can, kind of,
11 move our discussion along through this reg and make the
12 changes as we walk through it. Bill, did you have
13 something else?

14 MR. McCALPIN: Yeah. Let me ask general
15 counsel or somebody a question. As I see it, there are
16 two elements of the statute in this respect which will
17 require programs to do something quite different.

18 One is the execution of the agreement to abide
19 by priorities, and the other, perhaps, is the inclusion
20 of an emergency provision.

21 Is there some way that we can lay that
22 requirement on programs independently of a regulation

1 and take our time about reviewing this regulation and
2 the things that we're talking about?

3 In other words, can we put out some kind of a
4 requirement with respect to that agreement and the
5 emergency procedure and then take more time with the
6 drafting of the regulation?

7 MS. GLASOW: I doubt it. Whenever you
8 implement a new substantive requirement on our
9 recipients, it should be done according to 10.080 of
10 our LSC Act, which is, basically, rule-making.

11 The only rationale you have for doing an
12 interim rule-making which is effective immediately upon
13 publication is when you have an emergency situation,
14 which brings up the point of even though we would like
15 to, perhaps, make certain other changes, it does raise
16 the possibility of the Corporation's rule-making being
17 liable to suit because we have not followed
18 requirements of the LSC Act, which is, you know,
19 following the basic -- which is very analogous to the
20 APA rule-making.

21 So I think we need to say as much as possible
22 in making those changes that are required under the

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1 interim rule rationale.

2 Anything that's a substantive change that
3 would, basically, affect the recipients' funding, that
4 if they didn't follow it, we're going to terminate or
5 cut back their funding in some way.

6 So I think we should. And the thing is, even
7 if we did something else, I mean, we are in the process
8 of a rule making, and there will be comments. We will
9 have more time.

10 The committee always has the option of putting
11 off to one more meeting or, you know, having more
12 meeting dates or whatever to work on a particular rule
13 where they're really having trouble getting it right.

14 CHAIR BATTLE: I think, being realistic about
15 it, too, I'm just going to say that I don't think we're
16 going to make it through the 15 regs that we have
17 before us in three days if we aren't mindful of what
18 Suzanne has just put before us in terms of what our
19 tasking is at this point.

20 And that is based on the interim rule
21 procedure get these rules out for publication
22 addressing the emergency aspect of why we have to get

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1 them out now and allowing those issues that fall
2 outside of that to come through the regular proposed
3 rule-making process.

4 This particular issue, though, I think, based
5 on what I've heard both from John and Linda is one that
6 we can take up. So let's just do that right now.

7 Let's just look at 1620.3, "Establishing
8 Priorities," and the procedures and go through line by
9 line and see if there are any other changes other than
10 the ones I've pointed out that we need to make.

11 "The procedures adopted shall, number one,
12 include an effective appraisal of the needs of eligible
13 clients in the geographic areas served by the recipient
14 and their relative importance based on information
15 received from potential or current eligible clients
16 solicited in a manner reasonably calculated to obtain
17 the attitude of all significant segments of the client
18 population."

19 Let me stop there. Now, is there any
20 difference between that and the second sentence, which
21 also talks about outreach to clients? And let me read
22 it.

1 "The appraisal shall also include input from
2 the recipient's employees --" That's different from
3 the first sentence because you're talking about
4 employees -- "governing body members, the private bar
5 and other interested persons and to the extent feasible
6 should include outreach to potential and current
7 eligible clients, which may include the use of such
8 techniques as questionnaires and surveys."

9 MS. WATLINGTON: That's where I have a
10 problem.

11 CHAIR BATTLE: Okay.

12 MS. WATLINGTON: The others is inclusive, but
13 there you go "to the extent feasible should."

14 CHAIR BATTLE: Well, and the thing about it,
15 No. 1 already includes "an appraisal of the needs of
16 eligible clients." So paragraph 2 doesn't even need to
17 have it in there at all, I think.

18 I think you could strike "to the extent
19 feasible" completely because you've covered "outreach
20 to clients shall" in paragraph 1.

21 MS. WATLINGTON: Or maybe "the private bar,
22 eligible clients and other interested persons."

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1 CHAIR BATTLE: Period. And take out "the
2 eligible client" language.

3 MR. McCALPIN: Just put a period after
4 "persons."

5 CHAIR BATTLE: Yeah.

6 MS. WATLINGTON: "The private bar, eligible
7 clients and other interested persons."

8 CHAIR BATTLE: "Which may include the use of
9 such techniques as questionnaires and surveys," do we
10 need that?

11 MR. McCALPIN: No. You don't need that.

12 MS. WATLINGTON: No. You don't need that.
13 That's just a process.

14 MR. McCALPIN: Because it says up there, "in a
15 manner reasonably calculated to obtain" in the sentence
16 preceding.

17 CHAIR BATTLE: Yeah.

18 MR. FORGER: The beginning of that sentence,
19 "The appraisal shall also include" --

20 MS. WATLINGTON: "Input."

21 CHAIR BATTLE: "The appraisal." It relates
22 back to the --

1 MR. FORGER: Yeah.

2 CHAIR BATTLE: Okay.

3 MR. FORGER: You've used the word
4 "information" up above. I don't know what "input"
5 means, but you might use "information" instead of
6 "input" there.

7 CHAIR BATTLE: Yeah.

8 MS. GLASOW: I don't know why we're adding
9 "eligible clients" to the second sentence when they're
10 already in the first.

11 CHAIR BATTLE: That's right.

12 MS. GLASOW: Especially since we took off all
13 the other language.

14 CHAIR BATTLE: Yeah. That's my point. So
15 can't we just strike all of that?

16 MR. McCALPIN: Yes.

17 CHAIR BATTLE: Okay. All right. We'll strike
18 that. "In addition to substantive legal problems, the
19 appraisal shall address the need for outreach, training
20 of the recipient's employees and support services."

21 I ask the question why? Because is training
22 of the recipient's employees and support services

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1 anything that relate back to "cases" and "matters"?

2 MR. TULL: I believe that's there because it's
3 in the Act, 1007(a)(c) 21 or whatever it is, which is
4 the second that requires this "specifically refers
5 to" --

6 CHAIR BATTLE: "Outreach training and" --

7 MR. TULL: "Outreach training and support
8 services that are necessary."

9 CHAIR BATTLE: Okay.

10 MS. PERLE: But John, aren't those also things
11 that are included within the definition of "matters"?

12 MR. TULL: Yes. I think that's correct.

13 MS. PERLE: I think that that should probably
14 be a separate number.

15 CHAIR BATTLE: So you're saying that No. 2
16 should be, "In addition, the substantive -- the
17 appraisal shall also address the need for outreach,
18 training of recipient's employees and support services"
19 as No. 2?

20 MS. PERLE: Yes.

21 CHAIR BATTLE: Okay. And take out that "in
22 addition to substantive legal problems"? Because

1 that's now what we call "matters." Okay.

2 Then, the next sentence begins -- and it's
3 really following, "The procedure adopted shall insure
4 an opportunity for participation by all significant
5 segments of the client community and the recipient's
6 employees and the setting of priorities and in the
7 annual review required by 1620.6 and provide an
8 opportunity for comment by interested members of the
9 public." Is that redundant?

10 MS. PERLE: Yes.

11 CHAIR BATTLE: In my view, I think that once
12 you do your survey you've already covered everyone in
13 the community of interest in paragraph 1. Can we just
14 strike that one?

15 MS. WATLINGTON: Just in the one on top --

16 CHAIR BATTLE: Yeah. So why don't we just
17 strike 2. Bill?

18 MR. McCALPIN: The first word in the third
19 line on that page, "attitude," I recognize it's in the
20 current regulation, but I have a notion we could find a
21 better word.

22 MS. WATLINGTON: Other than "attitude."

1 MR. McCALPIN: Yeah. We're not looking for an
2 attitude. We're looking for views, requirements,
3 needs.

4 CHAIR BATTLE: Views.

5 MS. WATLINGTON: Not attitude. I hope not.

6 MR. McCALPIN: I think "attitude" is a --

7 MR. TULL: So we don't consult with people who
8 have an attitude?

9 MR. McCALPIN: Yeah. That's right.

10 CHAIR BATTLE: We're going to strike No. 2
11 completely; is that right? Any objections to that? We
12 really are already covering it. Okay.

13 We're down to (b). "The following factors
14 shall be among those considered by the recipient in
15 establishing priorities:

16 "The suggested priorities promulgated by the
17 Legal Services Corporation," which we know. I had a
18 question just about "promulgated by."

19 When we sent out that suggested list of
20 priorities, when you use the word "promulgated," is
21 that only in the rule-making sense, or can Legal
22 Services promulgate rules separate from those that are

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1 contained in the Code of Federal Regulations?

2 MS. GLASOW: It's a term used in rule-making
3 for something that is published publicly, and normally
4 it's in the Federal Register.

5 MR. McCALPIN: Did we publish those priorities
6 in the Federal Register?

7 MS. GLASOW: Yes, we did.

8 CHAIR BATTLE: Okay. All right. So that's
9 promulgated. Okay.

10 MS. PERLE: You could use the word "adopted"
11 instead of "promulgated," because we clearly adopted
12 them.

13 CHAIR BATTLE: Yeah.

14 MS. PERLE: If you think that that --

15 CHAIR BATTLE: Okay. "The appraisal described
16 in paragraph (a)(1) of this section," which we just
17 talked about, "the population of eligible clients in
18 the geographic areas served by the recipient, including
19 all significant segments of that population with
20 special legal problems or special difficulties of
21 access to legal services.

22 "The resources of the recipient, the

1 availability of another source of free or low-cost
2 legal assistance in a particular category of cases or
3 matters.

4 "(6), the availability of other sources of
5 training, sort and outreach services;

6 "(7), the relative importance of particular
7 legal problems of the individual clients of the recipient;

8 "(8), the susceptibility of particular
9 problems to solutions through the legal processes;

10 "(9) where the legal efforts by the recipient
11 will complement other efforts to solve particular
12 problems in the area served;

13 "(10) whether legal efforts will result in
14 efficient and economic delivery of legal services;

15 "(11) whether there is a need to establish
16 different priorities in different parts of the
17 recipient's service area."

18 Now, this list is a little bit longer than the
19 list that we had in our procedure before because we've
20 added the suggested priorities. And what else have we
21 added? We had nine before. We've got 11 now.

22 MS. WATLINGTON: I like the whole area --

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1 CHAIR BATTLE: Yeah, it does.

2 MS. WATLINGTON: I like that.

3 CHAIR BATTLE: There is at least one more.

4 MS. PERLE: 11 is new.

5 CHAIR BATTLE: 11 is new. Okay. All right.

6 Okay. Are there any other questions about 1620.3,

7 "Establishing Priorities"? Okay.

8 Suzanne, do you want to tell us about 1620.4,

9 "Establishing a procedure for emergencies"?

10 MS. GLASOW: This, basically, sets out the
11 requirements of allowing recipients to have emergency
12 cases or matters, but we're saying they have to be very
13 specific about defining that.

14 And they have procedures that they have to
15 follow to take up a cases or matter that is an
16 emergency. Paragraph (a) requires the governing body
17 to adopt procedures for undertaking emergency cases or
18 matters, give guidance to a recipient of how to define
19 an emergency and also how to set up the procedures for
20 that.

21 CHAIR BATTLE: Okay. Are there any questions
22 about 1620.4,, "Establishing a procedure for

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1 emergencies"? Alex?

2 MR. FORGER: Could I suggest the addition of
3 another factor?

4 CHAIR BATTLE: Okay.

5 MR. FORGER: Which would be 7, the consequence
6 of diverting resources from existing priority cases or
7 matters.

8 CHAIR BATTLE: Okay.

9 MR. McCALPIN: Are you on 4 or back on 3?

10 CHAIR BATTLE: 4.

11 MR. FORGER: Adding 7. I'm just suggesting
12 that a factor ought to be what is the consequence of
13 taking on this emergency in respect of your existing
14 priorities.

15 If you have to give up priority No. 1 in order
16 to do this emergency, that should be the factor, the
17 consequence of diverting resources from existing
18 priority cases or matters.

19 I mean, it may have no consequence, but it may
20 prevent you from doing your number one priority.

21 MS. WATLINGTON: LaVeeda?

22 CHAIR BATTLE: Okay. Ernestine?

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1 MS. WATLINGTON: In the reg, the comments
2 defining who are the different designees to determine
3 this emergency.

4 CHAIR BATTLE: The comments?

5 MR. McCALPIN: That's under (b).

6 CHAIR BATTLE: Now, what is your concern? The
7 director, of course, has the authority based on the reg
8 to make a determination as to whether there is an
9 emergency, or the director can designate someone to do
10 that but remains ultimately responsible for how that
11 occurs.

12 MS. WATLINGTON: But if that board doesn't
13 set -- you know, you're putting too much on -- you
14 know, I -- I'm just having some problem with that, you
15 know, because that's always -- sometimes you have a
16 clerk or someone, you know, in the office making a
17 determination, as I say, that's a crucial point.

18 Because when you get down and you start --
19 your resources keep getting less there -- most of your
20 cases are emergencies. As I said, the majority of
21 clients don't come in until they are emergencies, and
22 that's very important.

1 I think I -- I don't know how to explain how
2 it's going to be clear, but that is a serious point
3 there.

4 CHAIR BATTLE: I think that in part -- now,
5 let me see if I understand the concern. From the
6 program's standpoint of view, a lot of the issues that
7 are emergencies to clients probably are part of the
8 general work that the program does anyway.

9 Even though the doesn't get there until it's
10 an emergency to the client, the program could have
11 identified a lot of those issues already in there in
12 the way that they set their priorities.

13 MS. WATLINGTON: Right. Yes.

14 CHAIR BATTLE: However, there may be an issue
15 because of a natural disaster or something that comes
16 up that at the time the priorities were put together
17 there was no way for the board to know that this was
18 going to be an issue for their client community.

19 So they end up having to extend some resources
20 to address that emergency that wasn't envisioned at the
21 time that they initially set priority.

22 So "emergency" is really used from the

1 perspective of something that wasn't envisioned at the
2 time we set our priorities rather than whether it's an
3 emergency to the client. Is that --

4 MS. GLASOW: And Linda has some language that
5 will address that, I think.

6 MS. PERLE: I think that this will address it.
7 In 1620.4(a), it starts, "The governing body of a
8 recipient shall adopt procedures for undertaking
9 emergency cases or matters." I think you ought to add
10 "that are not within the recipient's established
11 priorities."

12 MR. McCALPIN: Exactly. Exactly.

13 MS. WATLINGTON: Okay. That's clear.

14 MR. McCALPIN: I wrote "outside of
15 priorities."

16 MS. WATLINGTON: And that's takes away from
17 people having to make those decisions. It's already
18 there.

19 MR. McCALPIN: Let me say also that I have a
20 feeling that the language of (a) creates a very wide
21 open potential for declaring emergencies.

22 I would think that emergencies ought to be

1 fairly rare. The way that (a) is worded, there are an
2 awful lot of things that could come on and be declared
3 an emergency.

4 And it seems to me that it suggests to boards
5 of recipients that they could create wide open areas to
6 depart from their set priorities.

7 CHAIR BATTLE: I don't agree. I don't agree.

8 MS. WATLINGTON: No, I don't agree. I agree
9 with what she was saying.

10 CHAIR BATTLE: Yeah.

11 MS. WATLINGTON: When I said that most of your
12 cases are an emergency, I'm saying it, but they're in
13 your priorities.

14 MS. BERGMARK: We tried to address that a bit
15 in the annual review. We tried to look at on our No.
16 4, consideration under 1620.5(b) is that the Board
17 should look at the volume of emergency cases or matters
18 in a particular legal area so that you are -- the board
19 is going to, then, take a look at whether something
20 that came up as an emergency in a particular year
21 merits ongoing attention and can consider that.

22 So realize it's not shrinking the discretion

1 of the program to deal with emergencies as they come
2 up, but it's taking a look at that along the way to see
3 whether that's not a legal area that needs attention.

4 MR. McCALPIN: It seems to me that one of the
5 problems that we've heard over the years is that -- the
6 section of the Act on priorities has not really been
7 very well observed in programs.

8 And I just have the feeling that the way (a)
9 is worded it takes us back to that area where
10 priorities will not be honored very greatly and will
11 not be considered as strict, serious limitations to be
12 departed from only in a real, honest-to-God emergency.
13 A natural disaster is one you conditioning of.

14 CHAIR BATTLE: Yeah. Well, but the other
15 thing is my reading of it is I guess I read it and got
16 the exact opposite view from reading it, because it
17 talks about issues that arise that are new and
18 unforeseen circumstances, which really takes you back
19 to the priority setting.

20 And if, during the time that you did your
21 priority setting, you had an opportunity to look at
22 this issue, you considered it and didn't include it in

1 your priorities, then it's not new or unforeseen.

2 And so it seems to me that you really do have
3 parameters placed on what can be an emergency based on
4 the language that you have here. Go ahead, John.

5 MR. TULL: Obviously, this is a difficult
6 problem that this reg is trying to address, which is a
7 legitimate need for flexibility, that if a board does
8 adopt a set of priorities which, because of some change
9 in the law they just didn't know about so they couldn't
10 have adopted a priority to encompass that or because
11 some plant shuts down and it creates a whole new set of
12 employment problems, unemployment problems or because
13 of a natural disaster that we wanted to make certain
14 that a program would not be completely hamstrung from
15 responding.

16 But we're also attempting to respond to the
17 concern that you've expressed, Bill, which is that that
18 not become a door through which programs could drive
19 large trucks and taking cases that the board had not
20 looked at and made a determination that they were
21 important.

22 That's the reason -- I think there is two

1 protections against that. One is what is mandated by
2 the appropriations bill itself as reflected in the
3 regulation, and that is reporting both to the
4 Corporation and to the board as to any emergency cases
5 that are taken.

6 So they will get -- the board will get on a
7 semi-annual basis or a quarterly basis will get a
8 report of any emergencies, and the Corporation will get
9 a report on an annual basis.

10 The second is what Martha referred to, which
11 is we changed the language regarding the annual review
12 to say that the annual review should take place more
13 reflectively if there is a high volume of emergency
14 cases; that is, that the board -- it's a invocation to
15 the board, if there are a number of cases outside of
16 the priorities in the emergency area, to look at that
17 and to say, "We believe that these are cases we should
18 be taking, and we're going to change the priorities to
19 make them not emergencies anymore but to make them one
20 of the priorities that we now in adopt."

21 Or to say, "We've looked at this, and the
22 director made a judgment when these came in that these

1 were important, but the board has made a judgment that
2 that's not correct.

3 "We think we should still continue to do
4 housing and not do unemployment because the plant shut
5 down."

6 CHAIR BATTLE: And the other piece is the fact
7 that the staff has to sign off on this agreement that
8 they understand what the priorities are and will
9 implement them and are familiar with them places an
10 additional kind of responsibility.

11 It seems to me if you've signed an agreement
12 to take cases within a priority to examine carefully
13 when you have to depart from that exactly what you must
14 do in order to appropriately depart therefrom.

15 So I can see your concern, Bill, because
16 emergency -- especially given Ernestine's first
17 statement. Emergency, generally, by the time any
18 client makes it to a Legal Services office, in their
19 view, they're coming because it has gotten -- they're
20 in dire straights, and they need desperate help.

21 And it's real hard for a program in that
22 instance to say yea or nay to a particular case, but

1 given all of the strictures that we have now in how
2 this is going to be constructed and the specific
3 monitoring setup and the agreements required, it seems
4 to me that any time there is a departure from an
5 established priority that there is going to have to be
6 a procedure in place for some executive director to
7 make a judgment as to whether or not it's appropriate
8 or not.

9 MS. GLASOW: And just the requirement that the
10 executive director is ultimately responsible for that
11 decision I think is a lot chilling factor in terms of
12 he or she is going to be very careful about making
13 those decisions. CHAIR BATTLE: That's right.
14 Alex, I didn't mean to --

15 MR. FORGER: Following up on Bill's point, the
16 last clause in (a) may cause some concern of
17 "unanticipated change in the law affecting large
18 numbers of clients."

19 I mean, that is quite different than a
20 hurricane, I suppose, or an earthquake, although
21 legislatures may act that precipitously, but I assume
22 that a board can always modify its priorities at any

1 meeting at any time.

2 And a change in law that affects 1,000 people
3 or something or other is something that I think the
4 board should function on unless there is some
5 circumstance where a change in law can occur overnight
6 affecting the health and safety of people and the board
7 has not an opportunity to function on that.

8 I mean, this is just a very broad -- the
9 legislature may be considering something for a long
10 period of time and enact it, and it has affect on
11 housing that is something that concerns large numbers
12 of clients.

13 Should an executive director take that as the
14 opportunity of moving that to a high priority if a
15 board should act on that and decide whether or not it
16 rises to that level? That just doesn't seem as big an
17 emergency as a flood.

18 MR. TULL: I think that's probably more
19 likely -- that's often likely to be the case, but the
20 reality of programs often is not every conceivable
21 change that a regulatory body or a housing agency or a
22 legislature or a city council or even like a zoning

1 board putting a highway into a neighborhood, for
2 instance, not all of those are typically monitored or
3 should they be monitored because it takes a lot of
4 resources to do that.

5 So some matters come to the attention of a
6 program only through clients coming in the door and
7 saying, "They've changed XY procedure down at the
8 housing authority, and as a result this has been
9 happening to me."

10 This is designed to provide the opportunity,
11 in the event that such cases come in, that the director
12 can say this is something that is new, unexpected.

13 The section in 1620 --

14 MR. McCALPIN: I guess my point, John, is
15 unless -- if it is impractical or impossible for the
16 board to function because of the time constraints.

17 Simply because this is new in '96 shouldn't be
18 the exception if the board has ample time to consider it
19 and either adopt it or reject it, I mean, if it's the
20 nature of the time, emergency, that the board can't
21 even be convened or at its next regular meeting.

22 CHAIR BATTLE: It seems to me that this issue

1 can be covered in the commentary. A board has the
2 authority to adopt priorities and to make changes to
3 those priorities as need be.

4 But we've got a specific producer for how
5 adoption of priorities are suppose to take place, and
6 it really becomes a judgment call and a resource call
7 on whether it's worthwhile for the board to undergo
8 that kind of process in order to adopt new priorities
9 in an interim if the actual expenditure of resources to
10 address this particular emergency situation is not
11 going to be that great.

12 So it seems to me that if we address in the
13 comments the fact that -- some examples of when it may
14 be useful, particularly when the annual reviews show
15 that a particular area shows up pretty frequently with
16 a program as an emergency to the point that it ought to
17 be a priority because it means that resources are being
18 taken from some other priorities that are already
19 established, then, at that point probably, rather than
20 the executive director making a determination, it needs
21 to be a board determination as to whether this area
22 needs to be a priority. That's a judgment call with

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1 shades of gray in it.

2 MR. FORGER: I just think, indefensively, it
3 would look, I think, better if it said, "and the board
4 has not had an opportunity to" or the timing of it.
5 But if it's in the commentary, that's okay.

6 MR. McCALPIN: I have a slight language
7 problem on the fifth line on page 5. I don't think the
8 executive director authorizes "taking the emergency."

9 It's the emergency that gives rise to the
10 case. It authorizes the taking of the case outside of
11 normal priorities. They're not going to take the
12 flood.

13 CHAIR BATTLE: Take the emergency case
14 outside.

15 MR. TULL: We're mad, and we won't take it
16 anymore.

17 CHAIR BATTLE: Outside the
18 established priorities.

19 MS. GLASOW: I'd like to point out that on
20 page -- well, 10. I hate to say pages. I'm not sure
21 everybody has the exact same copy.

22 Section 1620.4(b)(4) appears to be redundant
of (b)(1). So we are suggesting deleting (4). Section

1 20.4(b)(4) appears to be redundant of 4(b)(1).

2 MR. McCALPIN: (1) probably includes (4).

3 MR. TULL: (1) includes (4).

4 CHAIR BATTLE: (1) includes (4). Okay.

5 MS. GLASOW: So we'll delete (4) and add the
6 one that Alex suggested on the consequences to the
7 other --

8 CHAIR BATTLE: And that will become No. 6.

9 MS. GLASOW: Yeah.

10 CHAIR BATTLE: Okay. Anything on annual
11 review? Linda?

12 MS. PERLE: Let the Board members --

13 CHAIR BATTLE: Okay. I hear Bill clearing his
14 throat.

15 MR. McCALPIN: Well, I just raise the question
16 whether the combination of 1620.5 and 1620.7 requires
17 two reports, two separate reports.

18 One, it says, "shall submit an annual report
19 summarizing the review of priorities the day of the
20 most recent appraisal," and so on.

21 Then, 7(b), "report annually to the
22 Corporation on a form provided -- information on all

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1 cases or matters, including emergencies. " Are those
2 two separate reports we're requiring, or is it one
3 report with two -- with separate subject matters?

4 MR. TULL: It's the same report that needs to
5 be made annually to the -- under the appropriations
6 act, it needs to be made quarterly to the recipient
7 board and annually --

8 MR. McCALPIN: I understand that. I'm just
9 asking whether .5 .7 lay upon the programs the
10 obligation to prepare two separate reports or whether
11 it can be done in one.

12 MS. PERLE: The issue you've raised is part
13 and parcel of the issue I was going to raise. 1620.5
14 is another one of those sections that's lifted, I
15 think, directly from the current reg.

16 And I don't think there was an effort made to
17 really see how -- whether or not it was consistent with
18 the rest of the reg.

19 The point that I was raising -- I agree with
20 your point. The other point that I was raising was it
21 discusses -- it says, "the report will also include
22 copy of the case acceptance policies and procedures

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1 established under 1620.3 of these regulations as a
2 result of the priority review and assessment."

3 1620.3 doesn't require that as part of the
4 priority-setting process they do case acceptance
5 policies and procedures. It might be a good idea to
6 say that they do, but they don't.

7 So you're asking me to include something that
8 you're not requiring them to do.

9 CHAIR BATTLE: Okay. So we really need to
10 take a look at annual review. What I'm hearing in part
11 was that what we did was to add to 1620 a .7 which --
12 we added a .7 on report which really includes part of
13 reporting that was already in the reg under 1620.5.

14 And it probably makes more sense to just
15 include or overlay the reporting requirement in 1620.5
16 rather than have two separate reporting requirements.

17 MR. TULL: They are different reports.

18 CHAIR BATTLE: Are they?

19 MR. TULL: One is a report on what the board
20 has adopted as its priorities.

21 CHAIR BATTLE: Okay.

22 MR. TULL: And the other is a report of the

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1 cases or matters which were taken outside the
2 priorities or as emergency matters. There would be a
3 listing of cases and a statement as to why.

4 CHAIR BATTLE: But it says, "all cases,
5 matters, including emergencies."

6 MR. TULL: We could make a judgment to ask
7 programs to submit those together as a matter of just
8 the procedure that we use, but they are -- they do
9 serve different purposes.

10 CHAIR BATTLE: But you ask not only just for
11 reporting on those that fall outside. You ask for
12 those that fall within because you ask for all cases or
13 matters, including emergencies undertaken.

14 MR. TULL: Undertaken that were not within the
15 recipient's priorities.

16 CHAIR BATTLE: That were not within the
17 recipient's priorities. Okay.

18 MR. TULL: I mean, one is a document -- one is
19 a document that we typically use priorities for
20 purposes of evaluation and a whole variety of things to
21 make a judgment about what a program is doing.

22 The other is really a compliance report. We

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1 might -- as a general rule, we've, in approaching the
2 reporting question, have tried to shy away from
3 prescribing a kind of report or what the contents
4 should be because that may change over time in terms of
5 the way we would need the information and what it would
6 capture and display for purposes of Congress or
7 whatever.

8 I'm not sure what the impact would be of
9 joining the two together.

10 MR. McCALPIN: My interest is in cutting down
11 the paperwork and the bureaucratic requirement laid on
12 programs. They have fewer resources, more problems.
13 Let's not lay more paperwork on them.

14 MS. GLASOW: May I suggest we're in the
15 process of working with the Office of Inspector General
16 on the report requirements, which is why, in Section 7,
17 we say "in a form provided by the Corporation."

18 What we're trying to determine at this point
19 is what information they need we need to insure
20 compliance with the legislation.

21 So why don't I suggest that we'll take
22 whatever is in Section 5, incorporate it into Section 7

1 so at least all the reporting requirements are in the
2 same section and revise the language to reflect the
3 basic policy that we're undergoing right now that we
4 are working with OIG in trying to come up with language
5 that makes a reporting requirement but doesn't
6 necessarily tie us in by regulation to information that
7 we may not really need to insure compliance with the
8 legislation.

9 CHAIR BATTLE: That makes sense because that
10 addresses and satisfies a concern I think we've raised
11 about how it's set out at present. When do we expect
12 that we'll have that?

13 MS. GLASOW: We're going to make revisions to
14 all these rules that you work on now for the --

15 CHAIR BATTLE: For the next meeting next week?
16 Okay.

17 MS. GLASOW: -- 19th meeting so that the
18 committee has one chance to look at it quickly before
19 the Board looks at it on the 20th.

20 CHAIR BATTLE: Okay.

21 MS. PERLE: Do I understand, then, that what
22 would be left in the annual review provision would be

1 the first sentence, "Priorities shall be set
2 periodically," and then go all the way down to "The
3 following factors shall be among those considered in
4 determining whether the recipient's priorities should
5 be --"

6 MR. McCALPIN: I can't hear you, Linda.

7 MS. PERLE: "The following factors shall be
8 among those considered in determining whether
9 recipient's priorities should be changed," and then the
10 factors, and then everything in between those two
11 things will be reviewed and what was appropriate would
12 be incorporated into 1620.7, right?

13 CHAIR BATTLE: Yeah. Anything that has to do
14 with reporting will go in a section called "Reporting,"
15 and then, you know, just the annual review itself will
16 go in 1620.5. I think that makes sense. Alex.

17 MR. FORGER: Sort of a basic question. If a
18 matter does not fall within the adopted priorities and
19 it is not an emergency, can it be undertaken?

20 MR. McCALPIN: No.

21 CHAIR BATTLE: No.

22 MR. FORGER: Well, then, why does the language

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1 talk about emergencies, for example, in 620.4(b),
2 "Director or designee shall determine whether a
3 particular situation constitutes an emergency case or
4 matter that should be undertaken by the recipient"?

5 MS. GLASOW: Because it's an emergency case or
6 an emergency matter.

7 MR. FORGER: Okay. So it's --

8 CHAIR BATTLE: Emergency case or matter.

9 MR. McCALPIN: It's an emergency.

10 MR. FORGER: Okay. Then --

11 CHAIR BATTLE: Emergency case or emergency.

12 MR. FORGER: -- when we get to the reporting,
13 "The recipient shall report annually on a form
14 information on all cases or matters, including
15 emergencies undertaken that were not within the
16 recipient's priorities."

17 CHAIR BATTLE: Really, it should be "on all
18 emergency cases or matters undertaken that were not --"

19 MR. FORGER: Would you restate that?

20 MS. BERGMARK: I would take out the comma. In
21 other words, the phrases "undertaken that were not
22 within the recipient's priorities" modifies

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1 "emergencies."

2 MR. FORGER: Okay.

3 CHAIR BATTLE: I would put "emergencies" in
4 front of "cases or matters," just "emergency cases or
5 matters undertaken" --

6 MS. BERGMARK: They have to report on all
7 cases or matters, and then they also have to report on
8 emergencies.

9 CHAIR BATTLE: I raised that question with
10 John, and he said no. This is just on the emergencies
11 here.

12 MR. McCALPIN: That's right. This only
13 requires reports on cases or matters undertaken that
14 were not within the priorities.

15 CHAIR BATTLE: Which would only be
16 emergencies.

17 MR. McCALPIN: Which should only be
18 emergencies.

19 MR. FORGER: I thought it would only be
20 emergencies.

21 CHAIR BATTLE: Yeah. So I would put the word
22 "emergency" in front of "cases or matters."

1 MR. McCALPIN: Right.

2 CHAIR BATTLE: "Information on all emergency
3 cases or matters undertaken that were not within the
4 recipient's priorities."

5 MR. McCALPIN: Right. Exactly.

6 MR. FORGER: That's in (a) and (b), right.

7 MR. McCALPIN: Exactly.

8 MR. FORGER: And for the form that's going to
9 be developed, Suzanne, I guess maybe it's implicit in
10 this, but I would think "useful" would be the rationale
11 for doing so, why not only reporting cases and matters
12 undertaken that were not within the priorities, I
13 suppose where it should be, "Why were they undertaken?"
14 A flood. A fire. A change in law affecting whatever.

15 I mean, that's the purpose, I suppose, of
16 monitoring this to see was it truly an emergency. Give
17 us a clue as to why you undertook it.

18 MS. BERGMARK: And I guess that's Suzanne's
19 point about working with IG on what should be in the
20 report. In other words, what we want to say is -- want
21 to be broad enough here to incorporate a form that can
22 be used for purposes of monitoring compliance.

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1 CHAIR BATTLE: Okay.

2 MR. FORGER: So I would add, "and the
3 rationale for doing so" at the end of (b).

4 CHAIR BATTLE: Okay. Is there anything else
5 that we need to cover? Signed written agreement. We
6 really didn't talk about that. That's pretty
7 straightforward. Linda.

8 MS. PERLE: I have one point which I raised
9 with John on No. 3 in 1620.6. I think it should say,
10 "Will not undertake any case or matter for the
11 recipient that is not a priority or an emergency."

12 MR. McCALPIN: "Any case or matter" what?

13 MS. PERLE: "Case or matter for the recipient
14 that is not a priority or an emergency."

15 CHAIR BATTLE: Yeah. You're going to need
16 somebody to individually sign. I think you're right.
17 Okay. Anything else on 1620.6? Okay.

18 We've taken about an hour and a half on our
19 first reg. We're going to make it. What I'd like to
20 do is just take a short five-minute break. We'll come
21 right back.

22 MR. McCALPIN: Let me ask a question. Rick,

1 you have a bunch of intake centers which are handled by
2 the likes of Dick Straub and others who are not
3 employees. Do they make -- these are pro bono people.
4 Do they make decisions about intake out at the Rockhill
5 Center?

6 MR. TEITELMAN: They have the priorities, and
7 they would, basically, do intake there.

8 MR. McCALPIN: I'm talking about whether
9 they're going to have to sign this agreement.

10 CHAIR BATTLE: It says "staff." I mean, the
11 reg says "staff," and so a person who is not staff I
12 don't think has to sign this agreement.

13 MR. McCALPIN: But we got Dan Klagett and Dick
14 Straub and people like that out at the Rockhill Center,
15 Mark Keaney, and they are not staff.

16 They are pro bono, and there are a lot of
17 these situations around the country. Do they have to
18 sign these agreements?

19 MR. TULL: The regulation would not conflict,
20 if they do, and that's consistent with what the act
21 says, which requires that a staff of such person or
22 entity has signed the agreement not to undertake cases.

1

CHAIR BATTLE: Right. Yeah.

2

3

MR. McCALPIN: Yeah. But they may be taking matters on and handling them.

4

5

MR. FORGER: Nonlawyers handling matters?

6

MR. McCALPIN: No. No, they're lawyers but not staff.

7

8

MR. FORGER: But they're handling it themselves on a pro bono basis.

9

10

MR. McCALPIN: Right.

11

MR. FORGER: So they're outside our regs.

12

CHAIR BATTLE: They're outside the regs if they're pro bono.

13

14

MR. McCALPIN: Are they outside the statute?

15

CHAIR BATTLE: Yes. I think, from what John is saying, the statute requires that we implement a section which requires staff to sign the agreement. It does not speak to pro bono work at all, does it?

16

17

18

19

MR. TULL: It doesn't, no.

20

CHAIR BATTLE: So I think there will, from time to time, be an interface of pro bono with a lot of the things that we're required to do.

21

22

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1 MR. FORGER: An LSC program can refer illegal
2 aliens, abortion litigation, I assume, to a pro bono
3 lawyer.

4 MS. PERLE: They wouldn't count it as PAI
5 cases.

6 CHAIR BATTLE: It would not count as a case
7 that would be undertaken by Legal Services.

8 MS. PERLE: You could make that referral.

9 CHAIR BATTLE: Yeah.

10 MR. McCALPIN: By "staff," we mean employed
11 staff?

12 CHAIR BATTLE: Right.

13 MR. TULL: And the judgment there was one we
14 made in other places as well, which is understanding
15 the concern that Congress expressed seeking to propose
16 a regulation which would implement that but would not
17 do it in a way which would add another impediment to
18 affect the pro bono work, asking pro bono lawyers to
19 sign a statement pledging not to take cases outside the
20 priorities when it's not mandated by the statute.

21 In our judgment, it would be yet another
22 factor that would make recruitment difficult with --

1 CHAIR BATTLE: Entirely consistent with what
2 Congress is really saying here. They're saying we're
3 going to allow federal funds to be used for certain
4 specific purposes that are tied to priorities.

5 The private bar is free to do all other cases,
6 and when you do pro bono --

7 MR. FORGER: We're we're relying on them to
8 do that.

9 CHAIR BATTLE: That's right. And pro bono
10 work is outside of the rubric of this work that is
11 being done with federal funds, it seems to me.

12 MR. TULL: I think the one limitation we
13 would -- this is not something that's necessary to
14 reflect on the regulation, but certainly our policy
15 would be that a case cannot be counted as a PAI case as
16 a part of the program if it is outside the priorities,
17 but that's really a different matter. That's a matter
18 of a program's compliance with 1614, whether it's a
19 case within the program's PAI effort or not.

20 CHAIR BATTLE: Okay. Is there anything else
21 on 1620? If not, we'll take a five-minute break.

22 (A brief recess was taken.)

1 CHAIR BATTLE: We are now back on the record
2 after a brief five-minute break. And as I said, I hate
3 to be such a tough taskmaster, but we've got a lot of
4 work before us today.

5 I do want to allow for breaks so that our
6 level of energy stays up, but at the same time I want
7 us to come back quickly, if we can, to continue this
8 process. Alex, do we have lunch here?

9 MR. FORGER: I do not know.

10 CHAIR BATTLE: Okay.

11 MR. FORGER: But I will assume it is.

12 CHAIR BATTLE: Okay. That was my assumption.
13 I hope we're all assuming --

14 MR. FORGER: And we'll assume lunch, if it
15 isn't.

16 CHAIR BATTLE: So that we can plan to take a
17 lunch break, depending on where we are, in about
18 another hour and a half, if we can complete another
19 reg.

20 Let us move on to the second reg that we have
21 on our agenda, which is 1636, "Client Identity and
22 Statement of Facts."

1 This is a new reg which falls from the 1996
2 Appropriations Act. Suzanne, can you give us the
3 background on this one?

4 MS. GLASOW: As you stated, this is a brand
5 new regulation. We are attempting to implement a
6 provision in the '96 Appropriations Act that requires
7 that programs prior to filing a complaint or engaging
8 in precomplaint settlement negotiations identify to a
9 defendant the name of each plaintiff and that the
10 plaintiff sign a Statement of Facts that are the basis
11 of the complaint unless a court finds that it would be
12 to the detriment or harm of the plaintiff to do so.

13 And in essence, this rule sets out that
14 requirement and the policies and procedures and
15 applicability of that requirement.

16 CHAIR BATTLE: Okay. And the rule,
17 essentially, follows the appropriations requirement
18 specifically.

19 MS. GLASOW: Yes. It's a relatively short
20 rule.

21 CHAIR BATTLE: Okay. It's in Subsection
22 504.9(a) and (b).

1 MR. McCALPIN: 8.

2 MS. GLASOW: 504(a)(8). 8 has (a) and (b) to
3 it.

4 CHAIR BATTLE: Okay. You're right.

5 MR. McCALPIN: Let me raise a threshold
6 question which relates not only to this regulation but
7 to several others, and that is the definition of
8 "litigation."

9 We have a tendency here to think of it as
10 something in a judicial grantee entity. There is at
11 least one regulation, and unfortunately I'm swimming in
12 them, and I can't put my finger on it, where we require
13 a certain -- some action with respect to an
14 administrative proceeding.

15 And while, of course, they use "litigation" in
16 (a)(8) and others places, I think we need to have a
17 clearer understanding of how broad or how narrow the
18 word "litigation" -- does it involve any contested
19 proceeding? Is that litigation? Or does it only
20 involve a contested proceeding in a court of law?

21 CHAIR BATTLE: That's a good question. I'll
22 give my own thoughts after we get a response.

1 MS. GLASOW: I believe that we mean
2 litigation, though we have not defined it, that is
3 true, to any -- something brought within a court of law
4 because we so often otherwise talk about administrative
5 proceeding, which would be something outside of a court
6 of law, just a whole separate area of avenue of
7 hearings for a --

8 CHAIR BATTLE: My reading of just the language
9 in 504(a)(8)(a), "files a complaint or otherwise
10 initiates or participate in litigation" led me to
11 believe, particularly with the language "plaintiff and
12 defendant" that we're really talking about in-court
13 litigation.

14 There are so many instances in which, as a
15 lawyer, you might send a letter lodging a complaint on
16 behalf of a client against someone and get it resolved
17 way before it ever goes to court.

18 And I think that Congress's intent here is
19 when someone is named as a defendant in litigation that
20 there be a procedure, at least for checks and balances
21 from a Legal Services side, to know who the plaintiff
22 is.

1 And I don't think that procedures outside of
2 court proceedings were envisioned by this rule, in my
3 view. Just reading 504(a)(8)(a) and the language
4 "plaintiff and defendant" leads me to that conclusion.
5 Is that the conclusion that the staff reached as well?

6 MR. TULL: That's the conclusion that we
7 reached. This language in -- are we speaking of
8 1636.2, on that page?

9 MS. GLASOW: No. It's a threshold issue.

10 MR. TULL: Oh, it's just what litigation is.

11 CHAIR BATTLE: Yeah.

12 MR. TULL: Because that next section will be
13 debated by the answer to this question. But we have
14 read and understood "litigation" to be a term of art,
15 which means a matter in a court of law, as opposed to
16 including administrative matters. And it has
17 significance throughout the regulations in a variety of
18 places.

19 MS. PERLE: I'd like for to you remember what
20 John said when we go to some of the other regulations,
21 because I don't think that is --

22 MR. McCALPIN: I wish I could find the one I

1 have in mine where it talks about something that had to
2 be done in an administrative proceeding.

3 MS. PERLE: In prisoners, the one on
4 prisoners.

5 MS. GLASOW: I would like to -- that's a good
6 question because where we are going to suggest in
7 Section 2 --

8 MR. McCALPIN: What is prisoners, 27? No.

9 MR. TULL: 37.

10 MR. McCALPIN: 37.

11 CHAIR BATTLE: No. 2, it sets out the
12 requirements. Is that what you're saying?

13 MS. PERLE: Maybe I'd better let them finish
14 this issue.

15 CHAIR BATTLE: Okay. All right.

16 MS. GLASOW: No. I'm finished.

17 MR. TULL: We have, in this regulation and in
18 1637, which Bill is looking for now regarding
19 prisoners, interpreted the restriction or made a
20 recommendation to the Board that the restrictions be
21 interpreted to include certain kinds of administrative
22 matters.

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1 But the commentary specifically notes that
2 what Congress limited was litigation, and we understand
3 "litigation" to be a term of art which means a matter
4 in a court of law.

5 But we believe that the intent of Congress was
6 to include certain kinds of matters that were not
7 encompassed within that particular word and therefore
8 recommend to the Board that it use its power to adopt a
9 regulation which is somewhat more expansive than --

10 With regard to this particularly -- statement
11 of facts, when we get to Section 2, .2, we have a
12 recommendation that that actually be restricted back
13 down just to "litigation" in light of some research
14 which was done over the weekend.

15 CHAIR BATTLE: Okay.

16 MR. TULL: But it is a -- where it does appear
17 and includes "administration" is a conscious choice and
18 is described as expanding the definition -- or not
19 expanding, keeping the definition of "litigation"
20 intact but expanding the restriction beyond that.

21 CHAIR BATTLE: Okay. All right. Bill, are
22 you still looking for where it is? I think that John

1 has explained the distinction, because I think it is an
2 inconsistency, as he has noted, that when we start to
3 talking about proceedings involving prisoners that
4 we're actually using the term "litigation" more
5 expansively to include administrative.

6 MS. BERGMARK: Or more accurately, we are
7 keeping the definition of "litigation" but creating a
8 restriction which is slightly --

9 CHAIR BATTLE: Broader than that. Okay.
10 That's probably right. Okay. So let's look at -- in
11 light of that and how we have used the word
12 "litigation," do we define it anywhere, or do we simply
13 use it.

14 MR. McCALPIN: No.

15 CHAIR BATTLE: Okay. Do we need to define it?
16

17 MR. TULL: Well, we certainly could.

18 MS. PERLE: We could, if you'd like. You
19 don't actually use "litigation" in this form. You use
20 prelitigation negotiations.

21 MS. GLASOW: We do in the Purpose section, but
22 that's not --

1 CHAIR BATTLE: Initiate litigation or engage
2 in precomplaint --

3 MR. FORGER: You don't prepare a statement of
4 a case when your adversary knows that you don't intend
5 to litigate it.

6 MR. TULL: Well, the adversary wouldn't
7 necessarily know that the statement has been prepared,
8 but if they did, they would know that.

9 MR. FORGER: But if you're telling your client
10 you don't have to prepare a statement, you're saying
11 we're not going to litigate.

12 MR. TULL: Which is common. Many programs do
13 take on matters for clients that specifically say we
14 will --

15 CHAIR BATTLE: Handle it administratively but
16 not --

17 MR. TULL: -- handle this or negotiating with
18 your landlord or try to work something out, but we will
19 not go to court for you. And it's consistent with the
20 Rules of Professional Ethics. It's a limitation on the
21 scope of representation, which is understood by both.

22 MR. FORGER: But in some cases where you

1 contemplate you may not, you would still want to retain
2 that as a tool. Now, I don't know how this gets into
3 the negotiating strategy.

4 As you say, you can say, I guess, "Sorry,
5 we're not going to litigate," and then say to your
6 adversary, "Well take you to the U.S. Supreme Court, if
7 need be, to get justice in this case," although you've
8 already committed yourself not to do it.

9 So I don't know whether "prelitigation" means
10 that you have not ruled out the possibility of
11 litigating.

12 MR. TULL: Obviously, the issue you raise is a
13 very difficult problem in terms of how to craft a
14 regulation which doesn't expand what would be an
15 enormous administrative burden on programs and on
16 lawyers and paralegals representing their clients and
17 the creation of a lot of paper that will not be a part
18 of the actual representation of the client.

19 It implicates a lot of thing. Obviously, one
20 is we encourage programs to set up hotlines and to
21 create efficient ways of providing advice and free
22 service to large numbers of clients, and we have

1 sought, in drafting the regulation, to strike a balance
2 which is not overzealous in requiring the creation of a
3 lot of paper and a lot of procedures that a program has
4 to go through and a client has to go through before
5 they become -- before they get the service that they
6 need.

7 We felt -- with all these, we've been mindful
8 of what we understand to be the concerns expressed by
9 Congress both on the record and in conversations with
10 staff that these restrictions were designed to address.

11
12 And this particular set of restrictions
13 comes -- the history of it, as it comes out of migrant
14 representation and concerns on the part of small
15 farmers and large farmers that they were being pushed
16 into spending a large number of expenses regarding
17 representation of issues regarding migrants.

18 This particular provision comes out of an
19 effort to reform what was deemed to be abuses in that
20 area by some members of Congress.

21 It happens that they've expanded it to cover
22 all litigation. So we felt in this particular one that

1 it is one where because it does involve such a huge,
2 potentially huge expenditure of resources, creating
3 records and maintain records that are not
4 particularly -- which are not directly responsive to a
5 concern that Congress had, because their concern was
6 not all litigation. It was in a very narrow part of
7 the work that is done by programs that, in this area,
8 we felt it was appropriate to make choices which did
9 not expand --

10 CHAIR BATTLE: The administrative burden.

11 MR. TULL: -- the administrative burden and to
12 interpret it as strictly as possible because it will
13 involve a significant amount of just cost that will be
14 of little immediate benefit even to the compliance
15 issues that Congress was concerned about.

16 CHAIR BATTLE: Yeah. Well, then, in light of
17 that background and history that John has given us, do
18 we have any suggestions with regard to the requirements
19 in 1636.2?

20 MS. GLASOW: Yes. We are suggesting striking
21 the language "when a recipient files a complaint in a
22 court of law," striking the language starting with the

1 word "or" --

2 MR. FORGER: Where is this?

3 MS. GLASOW: It's in 1636.2(a). So on the
4 first line, starting with the word "or," striking "or
5 otherwise initiates or participates in an adversarial
6 proceeding against a nongovernmental defendant or."

7 MR. McCALPIN: You're taking that out?

8 MR. TULL: And that's based on -- this was one
9 of the sections where we were recommending to the Board
10 that it expand the restriction beyond what Congress
11 explicitly stated, which is a requirement of the
12 procedures in litigation.

13 That was based on an erroneous understanding
14 of the law on our part, which was that for migrant work
15 that the Agriculture Protection Act, which is an area
16 of some concern, that it involved administrative
17 proceedings.

18 And we assumed that Congress intended for each
19 of the restrictions, since our concern was in the
20 migrant area, to encompass that. It turns out that
21 AWPA does not involve any administrative proceedings,
22 and that was the sole basis for our recommendation to

1 the Board that they expand this beyond what Congress
2 had asked the Corporation to do.

3 MR. McCALPIN: Let's back up one minute to
4 1636.1. I don't think you have accurately reflected
5 the statute, which says that, "Files a complaint or
6 otherwise initiates or participates in litigation."

7 And what you say is that in 1 is "to ensure
8 that when recipients initiate litigation or engage in
9 precomplaint settlement," and there is a whole middle
10 area of participating in litigation without having
11 initiated it.

12 CHAIR BATTLE: You mean files a complaint?

13 MR. McCALPIN: No. What the statute says,
14 "files a complaint, otherwise initiates or
15 participants." So you can engage in litigation other
16 than simply by filing a complaint. You can otherwise
17 initiate, or you can otherwise participate. Somebody
18 else may file the complaint, and you come along and
19 participate in the litigation.

20 CHAIR BATTLE: So would you amend this to say,
21 "The purpose of this rule is to insure that when LSC
22 recipients file a complaint or otherwise initiate or

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1 participate in litigation or engage" --

2 MR. McCALPIN: Exactly. I would reflect the
3 first line in subsection 8 of the statute.

4 CHAIR BATTLE: Okay. All right. I think
5 that's consistent with what the actual language says.

6 MR. TULL: And would you include in that the
7 rest of the subsection where it says, "against a
8 defendant," which does --

9 MR. McCALPIN: Yeah. Yeah. Sure.

10 MS. BERGMARK: 1636.2 would read, "When a
11 recipient files a complaint in a court of law or
12 otherwise initiates or participates in litigation
13 against a defendant" --

14 MR. McCALPIN: Against a defendant. "Or
15 engage in precomplaint settlement negotiations they
16 identify."

17 CHAIR BATTLE: Okay.

18 MR. McCALPIN: Now, then, now you get down to
19 where we were on 2(a). "When a recipient files a
20 complaint or otherwise initiates or participates"
21 that's reflective of the statute.

22 MS. PERLE: Well, no, because it says

1 "adversarial proceeding." It doesn't say "litigation."

2

3 MR. McCALPIN: Well, I haven't gotten that far
4 yet.

5 MS. BERGMARK: We just changed
6 it. We just changed it to "litigation," right?

7 MR. TULL: I don't know.

8 MR. McCALPIN: And litigation.

9 MR. FORGER: Have we stricken "adversarial
10 proceeding"?

11 CHAIR BATTLE: Well, I think what I hear Bill
12 doing is saying this, that this language now needs to
13 reflect what the Purpose says and what the statute
14 requires, which is it's not simply just a recipient
15 filing a complaint in a course of law.

16 It can be "or otherwise initiates or
17 participates in litigation."

18 MR. McCALPIN: Right.

19 MS. BERGMARK: And are we talking about 1636.1
20 or .2 right now?

21 MR. McCALPIN: .2.

22 CHAIR BATTLE: .2.

MS. BERGMARK: .2. Okay. That's what I

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1 thought. Okay.

2 MS. GLASOW: They both need to be fixed. I
3 think there has been a tendency in the Purpose section,
4 and we'll probably see it in other rules, to summarize
5 a requirement, and sometimes important words are left
6 out in the Purpose section. But it's especially
7 important in the Requirements section to get it right.

8 CHAIR BATTLE: Okay. So can we have that
9 language reflect precisely what the statute sets out as
10 a preliminary matter?

11 MS. GLASOW: Yes.

12 CHAIR BATTLE: Okay. That's in (a).

13 MR. McCALPIN: And we have taken out the words
14 "and adversarial proceeding against a nongovernmental
15 defendant"; is that right?

16 CHAIR BATTLE: Well, you leave in "against a
17 defendant," but you take out "a nongovernmental." And
18 so what you have is "against a defendant."

19 MR. TULL: So "adversarial proceeding" is
20 changed to "litigation"?

21 CHAIR BATTLE: Yeah. Okay. Anything else in
22 (a)? Let's go on to (i). "It shall identify each

1 plaintiff by name." Is there any prob with (i)?

2 MS. PERLE: I just want to point out
3 something.

4 CHAIR BATTLE: Okay.

5 MS. PERLE: And it's a little bit of a
6 conundrum. I don't think that -- I'm not sure there is
7 anything we can do about it.

8 This talks about prelitigation negotiations,
9 and the only way you can protect the identity of the
10 client in that is to get a court to issue an
11 injunction.

12 No court is going to issue an injunction if
13 you haven't already filed suit. So what this, in
14 essence, says if you want to protect your client's
15 identity, the only way to do it is to file suit first
16 before you negotiate.

17 I don't know that there is anything we can do
18 about that because I think the statute is clear that
19 you have to get an injunction. But I just wanted to
20 make sure that everybody understood what it did.

21 MR. TULL: The statute also raises the curious
22 problem of a lawyer having to get an injunction against

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1 him or herself.

2 CHAIR BATTLE: Not to have -- yeah.

3 MR. TULL: They used the word an "injunction,"
4 which really creates, sort of, a procedural oddity
5 which certainly would be noted by a --

6 MR. FORGER: Stop me before I do it again.

7 MR. TULL: Stop me.

8 CHAIR BATTLE: There is nothing we can do
9 about it, but that's the reality of it, it seems to me.

10

11 MS. PERLE: I don't know what -- do you want
12 to explain that in the preamble or just let people
13 figure it out on their own?

14 MS. GLASOW: I don't know how to get around
15 the regulatory language --

16 MS. PERLE: No, no. Just --

17 MS. GLASOW: Oh, just --

18 MS. PERLE: Just say in the preamble that
19 this -- it raises this kind of "not" that can't be
20 unraveled. I don't know. Maybe someone can think of a
21 way to deal with it in the final reg.

22 You might be able to get somebody who has a

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1 suggestion on how we might deal --

2 CHAIR BATTLE: Well, the only way around it is
3 it says, "precomplaint settlement negotiations. " A
4 decision, it seems to me, before 1636 becomes operative
5 has to be made that one is going to litigate an issue
6 if it is not resolved. And I think John brought up
7 earlier there are instances in which part of your
8 agreement is not to engage in litigation but to attempt
9 to resolve something administratively by negotiations.

10 If you do not intend to be involved in
11 litigation and that's part of your agreement, then I
12 don't think that 1636 becomes operative, and that's
13 your only way out.

14 But if at any point in time you, from the
15 onset, believe that you're going to engage in
16 litigation if you're not able to settle it otherwise,
17 then I think 1636 takes effect.

18 MR. McCALPIN: Let's role play this a little.
19 You've got clients in a situation with a complaint
20 against a defendant. So you go to the defendant's
21 lawyer and say, "Look, I want to resolve this problem
22 with you. You got this problem."

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1 And the guy says immediately, "Who are your
2 clients?" What are you going to say? Are you going to
3 say, "I ain't going to sue you. Therefore, I don't
4 have to tell you"? That puts you in a hell of a
5 bargaining position right at the start.

6 Are you going to say, "I'll tell you who my
7 clients are," and so you disclose the clients even
8 though you have already decided you won't file suit?

9 MS. PERLE: And another little scenario. You
10 haven't been authorized to file suit. You don't intend
11 to file suit. Your agreement says you won't file suit,
12 but you go to somebody and you say, "If you ever do
13 this, I'm going to sue you."

14 I mean, I'm very uncomfortable with that, the
15 notion that you say, "I don't have the client. I'm not
16 going to identify my clients, and I don't have a
17 client's statement because I don't have permission from
18 my client to sue you, even though I'm threatening to
19 sue you."

20 CHAIR BATTLE: I don't think -- yeah. Yeah,
21 you can't threaten them unless you're going to carry it
22 out.

1 MR. McCALPIN: I think as a practical matter,
2 you're going to have to disclose clients' names period,
3 if you want to get anywhere.

4 CHAIR BATTLE: Well, but I think I pointed out
5 a distinction that is a real distinction. I think it
6 depends on the circumstance.

7 I can envision a situation where you say,
8 "You've got a problem with somebody. I'd like to see
9 if we can work it out with this."

10 And if there is a demand made for the names of
11 the clients, if you're engaged in negotiations to
12 resolve it but you don't have the authority to sue,
13 yeah, that does limit your strength in negotiations
14 from the onset, but at least if there is a problem out
15 there and you bring it to that person's attention, they
16 may be willing to resolve it not because of the threat
17 of litigation from you but because of the exposure that
18 they may have because now they know that there are
19 people out there that know that they have this exposure
20 to possible litigation around that issue.

21 MS. PERLE: And we're not only dealing with
22 that issue, we're also dealing with the statements of

1 facts issue. MR. McCALPIN: Well, you don't
2 have to disclose the statement of facts.

3 MS. PERLE: But you have to have it.

4 MR. McCALPIN: You have to have it, but you
5 don't have to disclose it.

6 CHAIR BATTLE: And again, the point I'm
7 raising gets to the administrative burden of it all.
8 You've got a lot of work to do prior to filing any kind
9 of litigation.

10 And I think that what this is going to do is
11 to make clear to programs and to lawyers, staff
12 attorneys before you start down the road toward
13 litigation there are certain specific things that you
14 have to do.

15 If you're involved solely in negotiations to
16 try to resolve a matter where you're not going to take
17 the litigation, then you're going down a different road
18 in the process of doing that.

19 But I think, Bill, you're right. By and
20 large, when you're in the kinds of situations that were
21 envisioned by this particular congressional requirement
22 and restriction N those instances, really, absent

1 litigation, you don't get much results.

2 So in those situations, I think you're
3 covered. In a lot of other situations, you may not be.

4
5 MR. FORGER: Is this intended to permit
6 retaliation? Is that its purpose? I mean, otherwise,
7 I cannot see in any kind of a overture to a prospective
8 defendant reciting a grievance for which you want some
9 recognition that you must disclose who it is you're
10 talking about.

11 Otherwise, there really can't be any serious
12 discussion, and if someone says, "You have done this
13 following, and I want \$100,000," and said, "Well, you
14 know, who did I do this to?" Or "Who purchased it from
15 me?" Or, you know, "Who is alleging these things?" Or
16 "Which tenant in the building is it now that you're
17 complaining about?"

18 I don't see how that you can engage in that
19 sort of a thing without identifying not generically but
20 by, you know, closer identification who you're talking
21 about.

22 MS. PERLE: But what if you're representing a

1 tenant association and you go to the manager of the
2 building and you say, "Members of the association have
3 complained about lack of security or something, and we
4 need to fix these things"? Do you have to identify
5 each individual?

6 MR. FORGER: You're asking me?

7 MS. PERLE: No, no, no. I think there are
8 situations where you might want to engage in this kind
9 after negotiation without identifying particular
10 individuals.

11 MR. FORGER: Well, if you've got an entity,
12 sure, without naming the shareholders and the members
13 or whatever. But I think if you just went to the
14 landlord and said, "You have to fix up some conditions,
15 and I can't tell you whether anybody in the housing
16 project has complained or not, but I just think -- I
17 passed by. I think you ought to fix this place up,"
18 he's not likely to respond.

19 CHAIR BATTLE: Well, our requirement is --

20 MR. FORGER: Yes. I mean, I would disclose
21 simply on behalf of somebody who has an interest.

22 CHAIR BATTLE: Whoever the plaintiff is must

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1 be identified. When you get ready to file a lawsuit,
2 you're going to have to name whatever it is that the
3 plaintiff is, and that is --

4 MR. FORGER: But in advance of that, you're
5 going to have to do that before real negotiations
6 unless -- that's why I say not really facetiously, but
7 there are some folks who would be intimidated by the
8 fact that they are now going to be identified, and
9 maybe that's the purpose of the identification,
10 although I suppose Congress is saying that there are
11 too many frivolous actions brought.

12 And if the people have to stand up and
13 identify themselves, they will be less inclined to make
14 this kind of a complaint, and we will then get some
15 balance, but I suppose that's only when you're talking
16 about a very vulnerable group, and maybe it's in the
17 migrant area.

18 MR. TULL: I think what might help would be in
19 the commentary we certainly can say more to cover the
20 kinds of circumstances that Linda addressed.

21 Certainly, if a client has authorized suit,
22 you have to disclose. I think even if a client hasn't

1 authorized suit, if you threaten a suit and that's
2 explicit and you say, "You don't fix this, and I'm
3 going to sue you," it seems to me that --

4 CHAIR BATTLE: You got to do it.

5 MR. TULL: -- whether you're authorized or not
6 or whether in your mind you really think you can do it,
7 you're under the rule in that circumstance.

8 We can certainly address that in the
9 commentary. Linda does point out a problem which has
10 been created which I don't think we can get around
11 which is in the housing situation, for instance, where
12 you very well may not want to, for the purposes of --
13 your client might be in jeopardy if you say, "I'm
14 representing Mrs. Jones in Apartment 6, and Mrs. so and
15 so in Apartment 8, and everyone in this amount is
16 complaining about the fact that you have rats running
17 throughout the building and there are people using
18 drugs in the front door, and it's a dangerous place.
19 Fix it," that those two persons might be singled out
20 for injury.

21 And you have no choice, I think, but to go
22 immediately and file suit if you have to disclose their

1 identity before you negotiate.

2 Now, it will change the way you represent the
3 clients because about it might well be better just to
4 call up and say, "Look, you've got to fix this, or
5 we're going to have to sue you."

6 You may very well get a response from a
7 landlord with the threat of -- but I think Linda is
8 correct, given the requirement of having to get a court
9 order in order not to -- that it does hamstring
10 programs to a degree, which is probably not intended
11 but is a result.

12 CHAIR BATTLE: Okay. Can we do that? Can we,
13 in the commentary, cover the circumstances identified
14 that Linda set out and as well just point out for
15 clarity's sake so that programs will understand that
16 where there is a need to protect identity that the
17 statutory provision requires that one must get an
18 injunction for that in order to come out from under
19 this identity requirement? Okay.

20 Now, that covers those two points. Let's go
21 back to 1636.2, the requirements. We've made changes
22 to (a), (i). (ii)?

1 MR. McCALPIN: Without getting into drafting
2 here, I'd like to sit down with somebody and suggest
3 some rearrangement of the phrases in this for clarity
4 purposes.

5 MS. GLASOW: Actually, I should have said up
6 front that we welcome any stylistic technical changes
7 that you can provide --

8 CHAIR BATTLE: Sure.

9 MR. McCALPIN: I don't see the point in taking
10 everybody's time to do that. I'd like to suggest some
11 rearrangement of phrases.

12 CHAIR BATTLE: Which ones?

13 MR. McCALPIN: 2(a)(ii).

14 CHAIR BATTLE: Okay.

15 MS. GLASOW: I'm sure that we can do that,
16 Bill.

17 CHAIR BATTLE: Okay. Anything in (2)(a)(ii)?
18 Prepare a date that written statements signed by each
19 plaintiff and (b), which has to do with the statement
20 of facts in English and, if necessary, in another
21 language and (c), which has to do with the emergency
22 circumstance?

1 MR. McCALPIN: You think that the statute
2 really gives us that opening?

3 MR. TULL: The statute is silent on that
4 issue. There is a precedent in the regulations for --
5 where a retainer agreement is required by the statute
6 where an emergency program can go --

7 MR. McCALPIN: We're dealing with a brand new
8 statute now, 3019, and the question is whether 3019
9 gives us an opening not to follow 504(a)(8) in an
10 emergency.

11 MS. GLASOW: I think it's implicit or within
12 the spirit of the exception for going to a court and
13 getting a court to grant protection for your client's
14 identity.

15 I mean, you still have to follow -- you still
16 have to do it. It's just a matter of timing. If it's
17 a real emergency, you can't get to the court in time,
18 you can't get that protection, but you still have to
19 follow up and do the same thing.

20 So I think it's within the spirit of the
21 statutory exception allowing for an emergency
22 situation. And again, I think in monitoring, in

1 looking over it, if we find this happens too often,
2 then we would question it and make whatever revisions
3 that are necessary.

4 MS. PERLE: John, I wonder, is it reasonable
5 to say that if a person is -- if there is an emergency,
6 you have to file this immediately, this lawsuit
7 immediately, you're not in contact face to face with
8 the client to get him to sign it, that in order to
9 protect their interests -- there is a professional
10 obligation for you to go forward with this because, if
11 you delay in order to get the signature -- say you're
12 in Alaska, you know, and your office is in Anchorage,
13 and they've closed all offices, you know, thousands of
14 miles away and you really can't get back to the person
15 to sign, if you're jeopardizing by not filing it
16 quickly, that would violate -- for us to not provide
17 for emergency?

18 MR. TULL: Well, that certainly is the issue
19 it raises is that professional obligation may require
20 taking an action which can't be taken in a timely way.

21 And we are required under the Act to operate
22 in a way which insures that representation is

1 consistent with professional obligations. So I assume
2 that's probably correct.

3 MS. GLASOW: We can discuss it more fully in
4 the preamble.

5 MR. FORGER: Do you have a commentary from
6 those who will be monitoring this provision?

7 MS. GLASOW: We've had no comment from the
8 Inspector General's Office that this provides is a
9 problem, that it's outside the spirit of the statute.

10 MR. TULL: I met with Renee and Laurie over at
11 the IG's Office and specifically alerted them to the
12 fact that we were recommending this proceeding because
13 it was not in the original draft.

14 And as we worked through it, we realized that
15 we had a problem which was -- they can certainly speak
16 for themselves, but --

17 CHAIR BATTLE: Yeah. I'd just like to say
18 because we didn't, as we began, which is recognize that
19 the Inspector General is represented here today by
20 Laurie.

21 And at any point -- I know that the Inspector
22 General did submit copies of comments to the committee

1 and also to the staff on all of these regulations.

2 So if there are any concerns as we go through
3 our review that you, please, are welcome to come do the
4 table and express those concerns so that we may address
5 them prior to our implementation of the interim regs.

6 MS. TARANTOWICZ: Thank you. But as to this
7 particular provision, I don't think that we've
8 expressed any thought on the --

9 CHAIR BATTLE: Okay.

10 MS. TARANTOWICZ: I mean, the statement still
11 has to be done. It's just a question of timing in a
12 limited emergency situation.

13 MR. McCALPIN: Could I address a couple of
14 comments to the last paragraph on page 3?

15 CHAIR BATTLE: Okay.

16 MR. McCALPIN: In view of what we struck out
17 before, are we going to leave the "nongovernmental"
18 phrase in the last paragraph on page 3?

19 MR. TULL: No. That would be changed.

20 MR. McCALPIN: You would take out "believes it
21 appropriate to apply the restriction to cases filed in
22 adversarial" and take out "nongovernment"?

1 MS. GLASOW: Yes. We will be fixing a
2 preamble --

3 MR. TULL: We think that whole paragraph would
4 be --

5 MR. McCALPIN: What?

6 MR. TULL: That whole paragraph really would
7 no longer be appropriate. That explained why that
8 phrase was in there, which is now out.

9 MR. McCALPIN: So you're no longer going to
10 require this in an adversarial administrative
11 proceeding?

12 MR. TULL: That would be the effect of the
13 change, yes.

14 MR. McCALPIN: Then, you're going to take the
15 whole paragraph out?

16 CHAIR BATTLE: Because it says, "litigation,"
17 I think you can, yeah.

18 MR. TULL: And that's the recommendation that
19 I started with that --

20 CHAIR BATTLE: Yeah. I agree.

21 MR. TULL: -- that was an expansion for a
22 specific reason which, upon research of the law, turns

1 out not to be a proceeding which is administratively
2 followed, and therefore we can take it out.

3 MR. McCALPIN: So you eliminate the whole
4 paragraph but the bottom of page 3?

5 MS. GLASOW: Basically, any change we've made
6 in the text we will have to go back and revise the ream
7 able to reflect that.

8 CHAIR BATTLE: Okay.

9 MS. GLASOW: We may, for instance, need to
10 expand on the preamble to reflect adding language to
11 Purpose in Section 2, but I'll have to go back and look
12 at that. But we'll make sure that --

13 CHAIR BATTLE: If you go back and make the
14 appropriate changes to the commentary.

15 MS. GLASOW: Right.

16 CHAIR BATTLE: Okay.

17 MS. GLASOW: John was just pointing out to me
18 that in paragraph (c) of Section 2 on emergency
19 situation that we probably need to work on that
20 language a little bit to reflect what it is we're
21 actually trying to say so that we --

22 CHAIR BATTLE: You'll do that --

1 MR. TULL: We don't say -- we just say you may
2 proceed with the litigation or negotiation. What we
3 don't say is the key language which is "without
4 preparation of the signed statement," or "preparation
5 and signing of the required statement."

6 CHAIR BATTLE: We say "provided that the
7 statement is signed as soon as thereafter." I caught
8 it. All three of us caught it. That means everybody
9 else is going to catch it. Okay.

10 MR. FORGER: So it's all right as it is?

11 MR. TULL: I would recommend we add language
12 which would say specifically you can proceed without
13 preparation of the statement so long as it's signed as
14 soon as possible.

15 MS. PERLE: I was going to make that
16 suggestion, but I thought that that came under -- from
17 my perspective,, kind of, came under the category of
18 things that were too picky to raise with you, but as
19 long as you raise it, I agree.

20 MS. GLASOW: So we'll fix that.

21 CHAIR BATTLE: Okay. 1636.3, "Access to
22 Written Statement." And this really tracks, again, the

1 language in the statute, doesn't it? "Available to any
2 federal department or agency that's monitoring the
3 activities of the Corporation, any auditor."

4 MS. GLASOW: This also, I believe, takes into
5 account some of the provisions in Section 509 that
6 talks about certain information to be made available to
7 auditors, and so that incorporates sections of that.

8 CHAIR BATTLE: I think that Section (b) makes
9 it clear that though the statute seems to indicate that
10 possibly the other side could get this information --
11 and I'm just doing this by memory -- that it doesn't
12 give any additional right other than what would be
13 normally available through discovery to acquiring the
14 information. Is that correct?

15 MR. TULL: That's right.

16 MS. GLASOW: Section 509 of the Appropriations
17 Act gives access to certain types of information to
18 certain types of categories of people, auditors and
19 whatever.

20 And so we're saying that we're not going
21 beyond that, and we're protecting the information,
22 access to that information to anyone else, and that

1 would only be covered by the discovery rules of the
2 court.

3 MR. McCALPIN: Let me ask you would this
4 statement fall within the attorney work product
5 exception, therefore it would not be available on
6 discovery? Is this attorney work product?

7 MR. TULL: I think, in many jurisdictions, it
8 would not be. That's correct.

9 CHAIR BATTLE: Statement by the plaintiff of
10 the facts based upon which the plaintiff has filed a
11 complaint in court.

12 MR. McCALPIN: Based on the interrogation
13 between the attorney and the client, presumably. So I
14 would think it's part of the work product which,
15 basically, would mean it's not going to be available.

16 MR. FORGER: So under the discovery rules, it
17 would not be available, presumably.

18 MR. McCALPIN: I would think likely.

19 MR. TULL: And our understanding of the
20 language in the Act in 504(a)(8), which says,
21 "Litigation insure have access to the statement of
22 facts only through the discovery process after

1 litigation has begun" is intended to make clear that
2 they are not seeking to create a new right to have
3 defendants who are being sued by programs have access
4 to information they do not otherwise have.

5 MR. FORGER: If you get it at all, it has to
6 be through a process --

7 MR. TULL: It's got to be under some rule that
8 would have permitted you to have it already. And your
9 read may well be correct, that they can't get it, but
10 that's what Congress intended.

11 MS. PERLE: And if they complain to the
12 Corporation, the Corporation's response would be, "Yes,
13 they've done it."

14 MR. TULL: Yeah, because the Corporation can
15 see it, but we can't disclose the information in it to
16 any other party, including the defendant.

17 CHAIR BATTLE: Yeah. I think that (b) tracks
18 with what the statute says, "only through the discovery
19 process after litigation has begun."

20 MR. FORGER: We can't change the statute.

21 CHAIR BATTLE: Now, I did raise a question
22 with, now we've got applicability, and it applies to

1 PAI cases. We don't have a time frame for how
2 recipients must assure us that they have adopted
3 procedures to comply with all of these new regulations.
4

5 And I think we at some point, either in the
6 commentary or somewhere, need to address how that's
7 going to occur.

8 MR. McCALPIN: Well, that really gets to .5,
9 and I have registered a general objection to laying for
10 bureaucratic requirements on these programs in the
11 field.

12 Isn't it enough that eventually we'll have an
13 auditor go out and say, "Do you have these? Have you
14 disclosed clients?"

15 What good does it do to have a written policy
16 and procedure, if an auditor can go out and say, "Do
17 you have a written policy and procedure?" "Yes, we
18 do." "Okay."

19 The real thrust is have they followed it. So
20 what we're really going to be requiring is the
21 underlying thing. Have they obtained these statements?
22 Have they disclosed clients?

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1 And I think to lay upon the programs more and
2 more and more bureaucratic obligations of draft and
3 follow-up policies and procedures is just loading too
4 much on.

5 MR. TULL: Actually, the thought behind this
6 was, and an important level, is really to save programs
7 time and money rather than cause them time and money.

8 We've been in conversations with the Inspector
9 General on this issue and had reached a similar
10 conclusion when we were responsible for monitoring that
11 a significant cost of compliance monitoring, whether
12 done by an auditor or as we did it involves, first,
13 determining what is the policy of the program.

14 And in areas where the regulations have
15 required a written policy, that's a very short, quick
16 process. You read it. Where there is no reason
17 policy, it involves having to ask people to describe it
18 and to verify, in fact, that that's the policy that is
19 followed.

20 The Inspector General has strongly encouraged
21 this so that auditors, as a part of their audit, don't
22 have to spend time and money identifying what the

1 program deems to be its policy regarding this or any
2 other particular --

3 MR. McCALPIN: My point, John, is that the
4 policy doesn't make any difference. It's the practice.

5
6 CHAIR BATTLE: I have a question about this.
7 Would the policy be just to adopt this reg locally?

8 MR. TULL: That's what I would do if I were a
9 board. It's a matter of --

10 CHAIR BATTLE: Just say this reg is now in
11 effect, or is there something more that we're requiring
12 the programs to do?

13 MR. TULL: What an auditor needs to do is
14 determine if the practice is consistent with the
15 policy. So it is the practice, that is correct. But
16 compliance oversight involves first determining what's
17 the program policy, one, and two, does the program
18 follow it in practice.

19 The first step is a necessary condition to
20 determining whether the practice is consistent --

21 MR. McCALPIN: What they have to determine is
22 whether they are following this regulation, not some

1 policy, with this regulation.

2 CHAIR BATTLE: Linda?

3 MS. PERLE: I agree absolutely with Bill. I
4 mean, I think that there are certain of these
5 regulations, 1609, for example, where the programs
6 really do have to develop some policies, a policy on
7 referral, a policy on -- I mean, a whole bunch of
8 things.

9 But for this rule, you're right. What they
10 have to do is follow the rule.

11 MR. McCALPIN: Follow the reg.

12 MS. PERLE: And so the policy of the program
13 is this regulation, and why do they have to go through
14 this extra step, which John says most programs would
15 just simply adopt as their policy, why should they be
16 required to do that and to be potentially sanctioned
17 for failure to do that?

18 CHAIR BATTLE: What are we getting back, John?
19 Did you hear the concern Linda raised? And that's why
20 I raise the question what is the policy?

21 If the policy is to take this reg and say,
22 okay, now we have adopted this, I'm pretty sure all the

1 programs, once these regs are implemented, are going to
2 say, "We've adopted all of these."

3 MR. McCALPIN: We're following.

4 CHAIR BATTLE: Yeah. "This is our obligation
5 to do all of these things." Now, is that -- I'm just
6 wondering if the board hasn't met and they're in the
7 midst of a monitoring but the practice is, of course,
8 to follow the regs, would the program be in violation
9 of this reg because they don't have a specific board
10 action adopting a policy to adopt the reg?

11 MR. TULL: Well, there are two issues. One is
12 the language "recipient shall adopt written policies"
13 is deliberate and doesn't involve necessarily the
14 governing body.

15 And that was based on some concerns expressed
16 that given the fact that this is an interim reg and we
17 need immediate action on it that we shouldn't require
18 there be -- the underlying notion, however, that it
19 will facilitate the review by auditors if there are
20 written policies and procedures as to how their program
21 is suppose to proceed I think is a different issue.

22 It's really a matter of -- I'm certainly

1 speaking based on my experience as the -- when we were
2 involved in compliance reviews, we found that in areas
3 where programs don't have written policies and
4 procedures because they weren't required, it made more
5 difficult our compliance oversight because we had --
6 because it is an issue of making certain that they're
7 in compliance with the reg.

8 But if you look at the policy to determine if
9 the policy, in fact, is consistent with the reg, then,
10 when an auditor or a compliance reviewer looks and sees
11 if the papers which are deemed to be appropriate to
12 comply with the procedures, the program is adopted,
13 it's a much quicker procedure to just check that
14 against what the program says it's going to do than to
15 have to, for an auditor, a monitor to look at the
16 procedure and to compare it against the reg without
17 that intervening step of what is the best review. So
18 the Board certainly -- I understand the concern about
19 not laying more on programs than they already have.
20 Certainly, my strong counsel, based on my experience
21 with the monitoring, would be this doesn't lay more.

22 It lays less because it really short circuits

1 that intervening step of having to, in a review,
2 interview a whole number of persons to find out what
3 your procedures are and then make a judgment as to
4 whether the procedures do, in fact, comply with the
5 regulation, which is a necessary part of monitoring.

6 We, I know, in the process of designing the
7 system we had, came to feel very strongly that we were
8 hamstrung, and it cost us and programs money where we
9 were monitoring regulations that didn't have this
10 provision in it.

11 CHAIR BATTLE: Laurie. I'm sorry. I see
12 Laurie's hand, and then Linda.

13 MS. TARANTOWICZ: Well, I was, of course, just
14 going to -- I'd like to part what John said, and I
15 guess before he said his last comment I was going to
16 add that as far as expense is concerned it may be a
17 case it will cost either way because the compliance
18 monitoring will be more expensive, could be more
19 expensive if these procedures aren't in place to make
20 the monitoring simpler and easier for the auditors.

21 CHAIR BATTLE: Linda.

22 MS. PERLE: Would you be willing to put in the

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1 preamble a statement that says, "In most cases,
2 programs can fulfill this requirement by simply
3 adopting the regulation as their own policy"?

4 CHAIR BATTLE: I think that's probably a fair
5 way. If what John is saying is that if we were the
6 recipient, that did what he would do, I think --

7 MS. PERLE: I think in some situations that's
8 not appropriate.

9 CHAIR BATTLE: Yeah. But it just gives
10 guidance -- when we drop 15 regs on a program as to
11 what it is they must do, I think it is helpful for them
12 to have guidance as to how they could fulfill their
13 obligation --

14 MR. TULL: As a matter of management of a
15 program, if I were a project director, now, and I were
16 implementing this regulation, I would want to have
17 written procedures which go -- which are far more
18 descriptive than the regulation, and I don't quarrel
19 with your suggestion in terms of what we would require.

20

21 But as far as of sound management, this is a
22 very intrusive requirement that's going to affect every

1 piece of work that a program does, and someone has got
2 to make a judgment, "Have we made a decision that we
3 are going to represent this person in litigation."

4 A judgment has to be made as to whether, in
5 fact -- if a matter falls within the reg or not, as a
6 matter of having people be clear about what they would
7 want to do, I can't imagine going into this particular
8 one without developing procedures which clarify that
9 for people.

10 This is going to affect virtually everyone in
11 the program. So I don't --

12 MS. PERLE: Well, I'm not suggesting that we
13 necessarily give that as advice as to what you should
14 do. My concern is the concern I raised before, which
15 is if you fail to do this, what are the consequences?
16 Does that constitute a violation of these regulations?

17 If the answer is yes, then, you need to give
18 some guidance as to what would constitute the minimal
19 compliance.

20 MR. McCALPIN: John, you know, I remember when
21 months ago I was given a bunch of outlines of
22 compliance monitoring regulation by regulation.

1 And under each one, there were questions to be
2 asked of the program with respect to the requirements
3 of the particular regulation.

4 And it seems to me that's all they have to do.
5 You send out for the monitors questions to be asked
6 with respect to 1636. "Have you taken -- have you
7 disclosed the clients' names in complaint filed and in
8 presettlement negotiations?

9 "Have you taken written statements of fact on
10 which complaints are based? Yes or no? Okay. Let's
11 see a representative sample."

12 I think that's all that's required, and you go
13 through a lot of -- you become a bureaucrat in the
14 process.

15 MR. FORGER: Well, if I were a program
16 director, I suppose I would want to give my staff some
17 guidance in regards of, for example, in the event of an
18 emergency where the recipient reasonably believes --
19 I've gotten lawyers on staff. Who is the recipient?
20 Is it the board of directors? Is it the particular
21 lawyer who gets the case?

22 How does one follow that through rather than

1 just tacking this up on the wall? And then, when the
2 monitor comes in, "Well, who decided that was an
3 emergency and on what basis?"

4 So I think just sound management, Bill, if you
5 got a program of just one later you don't need to adopt
6 policies and procedures.

7 MR. McCALPIN: I think it's sound management,
8 Alex, but I don't think we need to get into the
9 business of telling each program director how to run
10 his program.

11 MR. FORGER: Well, that's what Congress has us
12 doing.

13 CHAIR BATTLE: Well, there are two issues, it
14 seems to me, and one has to do -- and this is why my
15 first concern had to do with time frame.

16 Once this is done -- I mean, this is not a
17 situation where you've got to draft a policy every year
18 on how to do this.

19 You've got a new regulation in a new area with
20 new requirements and new restrictions, and what we're
21 attempting to do is to figure out a way to get the
22 information out, number one, by doing a regulation, and

1 number two, assure its implementation.

2 And one way to assure it is to have some
3 action that the program has to take once they receive
4 this so it's not just read but they also have to do
5 something.

6 And it's a one-time thing. My question is
7 does it need to be in the regulation, or can it be in
8 the commentary? I mean, can it be that one way to
9 fulfill the obligation under this is to establish a
10 policy and say that in the commentary and not make it a
11 regulatory requirement? Because it will come up one
12 time and one time only at the onset.

13 If you're setting up a new program, it will
14 come up then, or it comes up when you first get this
15 regulation, and you do it, and it's in place. And
16 then, from then on, what you do is monitor its
17 application.

18 MR. McCALPIN: And the fact that the program
19 sets up a policy or procedure doesn't guarantee that
20 it's going to be followed.

21 CHAIR BATTLE: Well, the following is a
22 separate issue. All I'm trying to get at is --

1 MR. McCALPIN: The following is what is
2 important.

3 CHAIR BATTLE: It's a monitoring issue. I
4 mean, it means that we have to go out to make sure that
5 it's done. What we're trying to do is figure out the
6 most effective way to communicate that it must be done.

7
8 MR. McCALPIN: Every year the IPAs are going
9 to be investigating compliance with this and every
10 other regulation.

11 CHAIR BATTLE: Exactly. That's true.

12 MR. TULL: Suzanne was suggesting that the OIG
13 has, obviously, got a serious interest in this
14 question, since they're --

15 CHAIR BATTLE: Well, let's hear from Laurie.
16 My question is -- I'm with Linda -- does this need to
17 be a requirement itself that can then hamstring a
18 program, not that you're not actually doing it but that
19 you forgot to adopt a policy that this is what you're
20 doing, and therefore you're in violation of the regs
21 for that purpose?

22 MR. TULL: Can I speak to the issue that --

1 and then, perhaps, Laurie can jump in with the IG piece
2 of this. The reason this is of some moment to the way
3 the Corporation will carry out its business is what we
4 have contemplated as the way to go forward under
5 Section 509 of the Appropriation, in terms of
6 assignment of responsibilities is -- there are two
7 pieces of it which are going to be significant.

8 The first is that it will be auditors who will
9 be the principal on-site monitors of programs. They
10 are persons who don't come into the compliance process
11 with a deep understanding and engagement in these
12 issues.

13 They're folks who may do two programs a year
14 or only one. So a piece of what we're concerned about
15 and I understand the IG to be concerned about is it is
16 that there are two steps in determining whether or not
17 a program is in compliance with restriction.

18 One is does it have a procedure, whether it's
19 written or not, a policy or procedure, whether it's
20 written or not, which it uses to implement the
21 restriction? And is that procedure consistent with the
22 restrictions or not?

1 For an auditor to make that judgment, an
2 auditor has to develop an understanding of the
3 regulation, all the nuance that we're talking about,
4 read the procedure or talk to people about what the
5 procedure is to determine if, in fact, it is consistent
6 with the Act, one.

7 And then two, determine if it's followed in
8 practice. The design of the monitoring process under
9 509 is one in which what has been commonplace in our
10 conversations with the Inspector General is that the
11 management side of the Corporation would do a desk
12 review of programs to make a determination if their
13 procedures are consistent with the regulation so that
14 an auditor would not have to make a determination about
15 that.

16 So that all the auditor has to do, then, is
17 look and see if the procedures the program has adopted
18 has been followed, and that's a matter of checking two
19 or three or five or six transactions.

20 If that intervening step is missing, they have
21 to make a judgment about whether or not not only is the
22 piece of paper in the file, but is the piece of paper

1 in the file consistent with what the regulation
2 requires.

3 And it will significantly increase the amount
4 of time that they need to take --

5 CHAIR BATTLE: Okay. I'm finally
6 understanding. In part, what you're saying is part of
7 what the procedure being in place does is to
8 communicate to us whether the programs understand and
9 have adopted something in place that is reflective of
10 the intent in the statute and the regulation.

11 And then, once you have that, then, from an
12 auditor's standpoint of view, all they do is take a
13 representative sample, take the policy and see whether
14 or not that representative sample is in compliance with
15 the policy.

16 If you don't have that policy, they've got to
17 do something else.

18 MR. TULL: Correct.

19 CHAIR BATTLE: And you're saying the policy,
20 then, is what makes that process of auditing work, of
21 going in, looking at a policy and seeing whether it's
22 implemented in a way that having just a regulation

1 without that policy will not necessarily deal with,
2 because you don't know what it is you need to go look
3 for; whereas, a policy may say our Form A-6 is what you
4 will record the plaintiff's statement on, or whatever
5 it is.

6 I, at least understand that now. For auditing
7 purposes and requirements, do we have -- this is my
8 question. Do we have regulations which set out of the
9 policies that must be in place for purposes of audits?

10 MR. TULL: No.

11 CHAIR BATTLE: No.

12 MR. TULL: Now do we have?

13 CHAIR BATTLE: Yeah. Do we? Do we need them?
14 And if we don't need them, do we need this one? Is
15 circuitous, but it gets back to the point that I'm
16 concerned about here.

17 MS. GLASOW: I guess another way of putting
18 that is saying the purpose of this section is to make
19 sure recipients are ready for the auditors.

20 And either that's going to have to be spelled
21 out at length in the commentary and then we hope they
22 read it, say, "This is why we're asking you to do this

1 because this is what the auditors are going to want to
2 know," or make the requirement in each of the rules.

3 MR. McCALPIN: My point is that if the
4 policies or procedures are consistent with the
5 regulation, they are an unnecessary piece of paper.

6 CHAIR BATTLE: No. I don't agree from this
7 standpoint of view: If they're consistent, then, from
8 an auditor's standpoint of view, that means that the
9 program has read the reg, adopted a policy, and all
10 they have to do is a sample to see whether or not
11 they're conforming with the policy?

12 MR. McCALPIN: They could do the same thing to
13 see whether they're conforming with the reg.

14 CHAIR BATTLE: Well, yes and no. I can see
15 the point in having to have the recipient adopt
16 something that says, "I know that this exists, and this
17 is how I do it."

18 Now, how you go about figuring out how it's
19 being done in a particular program is going to require
20 some work, if you don't have a local policy setting out
21 what it is.

22 So I'm at the point where I at least

1 understand the point that John is raising and the
2 concern that the OIG has. My concern becomes whether
3 that overlays into a regulatory concern or whether
4 that's a concern that can be addressed at some other
5 level. Linda.

6 MS. PERLE: I think consistent with that point
7 what if a program does take seriously an obligation to
8 write written policies and procedures and then do a lot
9 of very complicated and, you know, requirements within
10 their own procedures?

11 The auditor looks at those procedures and
12 finds that they haven't followed them, that the staff
13 doesn't follow them, but what the staff has done is
14 perfectly consistent with this regulation.

15 What does that do? Does that say -- does the
16 auditor then say there has been a violation?

17 MR. ASKEW: That's a management issue, not a
18 regulatory issue.

19 MS. PERLE: Well, that's right. That's
20 exactly right. I think that's the point that LaVeeda
21 was making.

22 MR. McCALPIN: What we're after is compliance

1 with this regulation, not whether there is a policy
2 which reflects the regulation.

3 MS. PERLE: Right. I mean, it strikes me that
4 something I thought Suzanne was suggesting before or
5 maybe --

6 CHAIR BATTLE: I suggested.

7 MS. PERLE: You suggested it, which is that we
8 put a provision -- a section in the preamble that says
9 the Corporation recommendation that programs adopt
10 policies with respect to these issues to guide their
11 staff and to insure that they do comply, or something
12 like that.

13 M O T I O N

14 MR. McCALPIN: Let me see if we can bring this
15 to a head. I move that we eliminate 1636.5 and include
16 in the commentary the suggestion that there is a
17 recommendation that the program, in the exercise of
18 good management practice, will adopt procedures to
19 assure compliance with the Act.

20 CHAIR BATTLE: Okay. Is there a second to
21 that motion?

22 MS. WATLINGTON: Second.

1 CHAIR BATTLE: Okay. Let's have some
2 discussion on that. Laurie, I just want to make sure
3 that from the Inspector General's standpoint of view --
4 it seems to me you can still do the audits.

5 There is a recommendation to the programs as
6 to how they can assure that that audit will go smoothly
7 without it being an audit requirement being raised to
8 the level of a regulatory requirement, which would
9 carry, in my view, different sanctions for
10 noncompliance.

11 You've got an audit requirement which can come
12 out in the Audit Guide, and we will here, in the
13 regulations, say our recommendation is you that adopt a
14 policy.

15 In your Audit Guide, you may say you should
16 have a policy on this, but it's not a regulatory
17 requirement which may carry a different view of, if you
18 haven't done this, where the program really is. Does
19 that satisfy the concern?

20 MS. TARANTOWICZ: I understand what you're
21 saying. I think we all might benefit from hearing from
22 one of our audit staff, and I'm trying to get him up

1 here, because they certainly would be better able to
2 speak to this than I would, having no expertise.

3 And I don't think that right now I'm in a
4 position to add anything beyond what John, I think, has
5 forcefully argued. I think you might benefit from
6 hearing from them, and I'm trying to get them up here
7 now, if you would wait for that.

8 MS. GLASOW: LaVeeda, we have this provision
9 in almost every rule we have before you.

10 MR. McCALPIN: That's my complaint.

11 MS. GLASOW: So we don't necessarily have to
12 resolve it with this rule. We can --

13 CHAIR BATTLE: Resolve it as we go through.

14 MS. GLASOW: -- resolve it as applied to --

15 CHAIR BATTLE: Is that fair, Bill? I would
16 like to certainly hear from the Inspector General about
17 their concern before we make a final decision, but I'm
18 inclined to go along and make it unanimous, unless I
19 hear that there is some reason this ought to be
20 regulatory, as opposed to an audit requirement exactly
21 why we have it in each of the regulations that we have
22 before us.

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1 MS. GLASOW: Okay.

2 CHAIR BATTLE: All right. So can we table
3 consideration of this motion until --

4 MR. McCALPIN: Well, to table takes a two-
5 thirds vote to take it off the table.

6 CHAIR BATTLE: Well, that's not going to be
7 hard. Just one other thing, 1636.4, I don't think you
8 need the (a) if you don't have a (b) or (c).

9 MS. GLASOW: Thank you.

10 CHAIR BATTLE: Okay. Now --

11 MR. McCALPIN: Is that the end of 1636?

12 CHAIR BATTLE: Yeah. That's the end of 1636
13 for now. Class actions. Okay. The food has been here
14 for about an hour and a half. Would you all be
15 inclined to take a break now and start up with class
16 actions after lunch so it won't be too, too cold.

17 MR. FORGER: Hot food or cold food?

18 CHAIR BATTLE: It's cold now.

19 MS. TARANTOWICZ: Luke warm.

20 CHAIR BATTLE: I didn't think we'd finish it
21 in 15 minutes, but I had minimally set 12:30 at the
22 time, but we actually got --

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

1
2 CHAIR BATTLE: We are continuing our meeting
3 to discuss the interim regs that have been noticed.
4 The next reg which we noticed for review today is 1617,
5 and it pertains to class actions. I believe John Tull
6 is now joining us. Okay.

7 Essentially, there are just, really, two
8 provisions in the definitions section and a prohibition
9 in the rule at present. But Suzanne, will you give us
10 some of the background contained in the commentary on
11 class actions and from whence the provisions that we
12 now have in the rule have come?

13 MS. GLASOW: Okay. This is an amended rule.
14 The prior rule, basically, allowed recipients to take
15 class action cases if they followed certain procedures.
16

17 This rule absolutely prohibits involvement in
18 class action suits. So it's one of those rules that
19 Bill pointed out we need to point out in the commentary
20 that it has been almost completely revised, although
21 there are certainly some similarities to the prior
22 rule, especially in the definition of "class action,"

1 which has stayed pretty much the same.

2 CHAIR BATTLE: Okay.

3 MS. GLASOW: And the legislative prohibition,
4 as I point out in Section 504 of our Appropriations
5 Act, basically, prohibits our recipients from engaging
6 in class action suits.

7 CHAIR BATTLE: Okay. I just have one editing
8 change in the comments, and this is -- we're generally
9 kind of puffering editing changes in the comments
10 before we go section by section in the rule.

11 We're on 1617, page 4, the second full
12 paragraph you say, "Certain types of situations are not
13 within the definition and are thus not prohibited by
14 this rule." "Certain situations" are not within the
15 definition, it seems to me, as clear.

16 MS. GLASOW: "Certain situations," get rid of
17 "types of"?

18 CHAIR BATTLE: Yeah.

19 MS. GLASOW: Okay.

20 CHAIR BATTLE: There is also -- I had a note
21 to myself on page 2, really, I guess, stemming from the
22 language in the statute, which probably doesn't mean

1 that we have to make any adjustments, actually. We can
2 just continue. Were there any other just
3 editing changes to the comments by anyone? Then
4 let's -- go ahead.

5 MR. McCALPIN: I think we got to come to grips
6 with the real problem, and it will lapse over into the
7 comments, and that is I just frankly disagree flatly
8 with .2(b). I think you're wrong.

9 CHAIR BATTLE: Okay. We will --

10 MR. McCALPIN: And that relates to the comment
11 as well.

12 CHAIR BATTLE: Yeah.

13 MR. McCALPIN: I think that when you say
14 "maintaining involvement prior to the final judgment,"
15 well, I think that what you have said here in .2, page
16 4 would prevent you to advise a client whether to opt
17 in or opt out of the class.

18 And I think that's participating in the --
19 particularly if you advise them to opt in. Then, you
20 are participating. You are advising participation in
21 the class action.

22 But much more seriously, I don't think that

1 you can have anything to do with the judgment in the
2 class action. Class actions ordinarily terminate in
3 one of two ways, a settlement agreement or a judgment.

4 In either case, what you will have is likely
5 litigation over the terms of the settlement or the
6 terms of the judgment, and I can't imagine, for
7 instance, that it would be permissible to have 10, 15,
8 20 or 100 members of the class come to the program to
9 seek enforcement of the final judgment against the
10 defendant.

11 That's indistinguishable, virtually, from the
12 class action. I don't think that you can take on any
13 client who says, "I am the beneficiary of this," and
14 then you get into look at it, and you have to determine
15 whether he really is a member of the class, whether the
16 terms of the settlement or the judgment really apply to
17 that particular client.

18 You may have to go back and negotiate with the
19 defendant, and all of that, it seems to me, is
20 participation in the class action.

21 MR. TULL: What this was aimed as trying to
22 address was -- the first example you gave of seeking to

1 enforce a judgment, there is no question that that
2 would be participation. We agree.

3 I mean, the regulation should, and the
4 language maybe doesn't accomplish that, but the extent
5 is to say that that would be participation and would
6 not be permitted.

7 There is a narrow set of circumstances where
8 if a court enters an order creating, for instance, a
9 referee to administer persons who have beneficiaries of
10 the class coming in and applying for benefits, let's
11 say, which is an example that comes to mine where
12 precisely that arrangement is set up and where an
13 individual, as a beneficiary of the class, is entitled
14 to apply for a benefit which the Social Security
15 Administration or a local agency is supposed to provide
16 to persons who fit in that contained of -- in the
17 class.

18 What this would -- what this is designed to do
19 is distinguish between where an individual comes to a
20 program and says, "I think I'm entitled to benefits
21 under that, and I'd like you to represent me before the
22 referee" -- of course, really akin to an administrative

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1 procedure.

2 It's like going to a welfare department that
3 happens to be one created under the order that, in that
4 circumstance, that a person could represent an
5 individual, and that wouldn't be participation is the
6 intent.

7 MR. McCALPIN: I think that's participating in
8 a class action. Certainly, it's participate in the
9 proceeds or benefits of a class action, and I think --
10 I guess I'm fixed on -- I was involved in one where we
11 settled it in six weeks and litigated the settlement
12 for five years.

13 Because there are all kinds of issues that
14 arise as to whether a particular claim fits within the
15 settlement or the judgment involved, and I just don't
16 think that you can get involved in a class action. I
17 think it's a flat prohibition. Stay out.

18 CHAIR BATTLE: I understand the dilemma that
19 we faced particularly on this issue of class actions
20 because, on the one hand, I think that what Congress is
21 specifically initiating or participates in a class
22 action lawsuit saying there is, "We don't want Legal

1 Services programs to be the driving force in bringing
2 class action lawsuits against defendants."

3 And by using the language "initiates or
4 participates in class actions," my view is that being
5 the driving force, being adversarial, bringing massive
6 lawsuits using government funds is something that
7 Congress was looking to prohibit.

8 I think that what John is getting at is -- and
9 let me say this: I think it's a very difficult issue
10 to address and to get your hands around for the very
11 same reason that Bill pointed out, because I'm involved
12 in class action litigation as well, and I understand
13 how it works -- is a situation where you are not
14 adversarial, where all you're doing is assisting
15 someone with getting access to benefits to which they
16 may be entitled, through assisting them in going
17 through some sort of administrative procedure or some
18 sort of compliance with getting the word out to people
19 that may be clients, which is not adversarial, which is
20 not participating in litigating to the point of
21 judgment but participating in the implementation of the
22 remedy, which comes after all of the adversarial piece

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1 to it.

2 I can give you an example. I've involved in
3 the Firefighters' litigation in Birmingham, and that
4 case was initiated in 1976. There was some litigation.

5
6 There was a settlement agreement reached in
7 1981, and we are still yet, in 1996, modifying that
8 decree after it has been up to the Eleventh Circuit and
9 the Supreme Court twice.

10 So the question is, in a situation like that,
11 at what point are you simply monitoring and
12 nonadversarial? With class action litigation,
13 oftentimes you don't know.

14 And if you're to construct some sort of
15 exception which will allow Legal Services programs to
16 participate in the nonadversarial monitoring aspect of
17 it, it would have to be extremely narrow and specific,
18 because I really think that this language "initiates or
19 participates" says at any point that there is anything
20 adversarial about it or if there is any driving force
21 to keeping the litigation going or being involved in
22 it, then we're out of it.

1 And I don't know exactly how -- you know, I
2 had questions when you say it does not include
3 monitoring a final order, what about appeals? We've
4 got a final order. It has not been appealed, but yet,
5 in the whole area of compliance, if there is a problem
6 with compliance, you may have to litigate the
7 compliance and not the final order itself.

8 So it's difficult to draw a line wherein you
9 have a point at which you say and there is no longer
10 any adversarial potential in this case, and therefore
11 we can be involved administratively.

12 And unless we can get to that, then I think
13 there is some real difficulty with drawing a line to
14 allow for some sort of participation beyond what we
15 know is to be prohibited by the statute.

16 MR. TULL: This is, obviously, a difficult
17 problem to define, the point at which a matter and the
18 remedy which flows from it ceases to be the class
19 action and becomes something else.

20 We, sort of, came at it, I think, in terms of
21 trying to respond to some issues that were raised by
22 programs that call us up and said, "We have XYZ

1 situation. Is this going to be covered?" And then,
2 sort of, wrestling with the, sort of, circumstances
3 that they encountered.

4 The most extreme example of what I presume
5 would be permitted, although I think the way you stated
6 it, Bill, even this would not be permitted, is where as
7 a result of an order, a court creates some system -- it
8 enters an order creating some right, and then it's out
9 of it.

10 It has no more jurisdiction, and an agency is
11 administering it or someone that -- an entity which is
12 created by the court as a referee is administering a
13 program created by a court order.

14 And the class action, in terms of
15 jurisdiction, is gone and over. Now, somebody might go
16 in and challenge whether or not the order is being
17 complied with, that's correct.

18 But just a person going and seeking the
19 benefits of that order would, in our judgment, in
20 looking at that, was that that is not a class action
21 and not participation any more than if a class action
22 were -- or a current class action where an order has

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1 gone to a welfare department that they have to change
2 their rule.

3 And that is now over. Persons who go to the
4 welfare department to get those benefits are
5 beneficiaries of that order, but they're certainly not
6 participating in the class. They're just applying for
7 the benefits that the judge has ruled are required.

8 MR. McCALPIN: Let me give you an example from
9 Missouri where the welfare department was ordered to
10 process claims in a certain period of time.

11 They didn't do it. A second action held the
12 welfare department in contempt. Now, wouldn't that be
13 a continuation of the class action?

14 MR. TULL: Would I think isn't the question.
15 Would the action seeking them, if they're found to be
16 in contempt of the order?

17 MR. McCALPIN: Yeah.

18 MR. TULL: I would presume it would be and
19 that a program couldn't do that.

20 CHAIR BATTLE: See, at any point that it's
21 adversarial then I think that this statute is saying
22 "initiates and participating in the class action" is

1 out.

2 MR. TULL: But saying that, Bill, doesn't
3 really answer the question, does it, as to whether or
4 not an individual seeking the benefits created by an
5 order can ask for those benefits?

6 MR. McCALPIN: Well, the problem is I don't
7 think there is a fine line as to when it's adversarial
8 or not. I've participated in settlements where a sum
9 of money was put in and the court appoints a retired
10 judge to do it.

11 But there get to be questions about
12 eligibility, and the retired judge may have to go back
13 to the court that entered the order and get a
14 clarification of the order.

15 I think that's participating in a class
16 action, and I don't know whether that's adversarial or
17 not. It might be but not necessarily.

18 But if you have to get a clarification of the
19 judgment of the settlement, you're participating in the
20 class action.

21 MR. TULL: I mean, that's -- with all these,
22 we're, obviously, trying to find a balance which

1 relates to the reality of the practices that programs
2 have and being mindful of the wrong which Congress was
3 seeking to correct.

4 I think our judgment on this one was that
5 where a remedy has been created by a class action --
6 and, in the future will, obviously, be a class action
7 filed by someone else -- that where a remedy is created
8 by a court that -- you are correct that it is not a
9 fine -- it is not a bright line when you are a distance
10 from when it is a class action or not.

11 But our judgment, I think, in recommending the
12 regulation that you have before you is that an
13 individual who is an individual as an individual
14 seeking the benefits of an order is not an evil, if you
15 will, that Congress was seeking to put a stop to.

16 CHAIR BATTLE: What about this --

17 MR. TULL: What Congress is concerned about is
18 class actions that are, sort of, full representation in
19 order to --

20 CHAIR BATTLE: Let me make a suggestion. It
21 does not include nonadversarial monitoring of a final
22 order entered by a court or involved in the enforcement

1 of a final order as long as the recipient represents an
2 individual client and not the class.

3 In my view, the key thing is not adversarial,
4 just compliance. If what you're trying to do is assure
5 that someone who is coming to the office who is
6 qualified for benefits under a class action can make
7 their proper application to get it in a nonadversarial
8 way, then I think that that doesn't go against the
9 grain of what Congress is attempting to make us do,
10 which is no not initiate and participate in the
11 litigation of a class action.

12 MR. McCALPIN: You know, I think it's worth
13 recounting for a moment the legislative history of this
14 provision.

15 It all started in the migrant workers and in
16 the McCollum bills that were filed over the years, and
17 it was limited then to nongovernmental --
18 nongovernmental.

19 And what he was doing was protecting the
20 growers. The real impetus for the present provision
21 came from the Senate and particularly from Senator
22 Domenici.

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1 It has never been quite clear what was
2 motivating him, but it's unlikely that it was the
3 migrant motivation that gave rise to McCollum.

4 And I think it's worth recalling that Domenici
5 is somebody who we don't want to get crosswise with.

6 CHAIR BATTLE: Okay. I've got the language
7 right here.

8 MR. McCALPIN: In what?

9 CHAIR BATTLE: The Senate debate on class
10 actions, the text and some of the background and some
11 of the statements by Senator Domenici on this whole
12 issue.

13 He says, "No class action lawsuits, no class
14 action lawsuits can be filed." And he goes on to say,
15 "My closing remarks are if you're worried about the
16 abuses about class actions, about suits against
17 legislators or governors or welfares, those are gone in
18 the Domenici amendment, finished. They are not around
19 anymore."

20 MS. GLASOW: Read the second sentence of the
21 first part you read.

22 CHAIR BATTLE: Okay. "Individual legal

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1 staffed by volunteers where individuals who help
2 persons who may be eligible for that to process their
3 claim to determine if they fit into the requirements,
4 if they meet the standard, and, if so, to file a
5 petition on their behalf before whoever the court has
6 created as the person to hear these issues.

7 And then a determination is made whether they
8 qualify or not. That is an unusual case in that it's
9 an order which has created a whole, sort of, dynamic of
10 its own within the state and within the program.

11 But it's not unusual in the sense that the
12 difficulty of determining what the dividing line is
13 between simply being a beneficiary and looking for your
14 benefits as an individual and what you are concerned
15 about, which is, as you enforce that, if at the point
16 at which, in enforcing that, you then intrude into the
17 actual order and seek to have the court change the
18 order as it affects the entire class.

19 Now, I think where we want to -- I mean, as a
20 matter of what is a legitimate need of clients, to not
21 over extend this, but being mindful of what Congress is
22 concerned about that the line needs to be drawn where,

1 in seeking to represent that individual, there would be
2 a crossing into the court's jurisdiction and seeking to
3 have them enforce the order as to everybody.

4 If the interpretation is that virtually any
5 benefit which flows from that remedy is one that a
6 program can't even advise a client about, it will have
7 a significant impact on an area of work that, as we
8 look at this in our judgment, Congress would not say,
9 "Boy, we want to put a stop to
10 that" --

11 CHAIR BATTLE: Yeah. I tend to think --

12 MR. TULL: -- definition of what Linda said,
13 which is individual representation to get people what
14 they have a right to.

15 CHAIR BATTLE: Having read what Senator
16 Domenici said in September of 1995 and his distinction
17 in class actions from representation of many to
18 individual representation, I would suggest that we just
19 reorder this sentence to say, "It does not include the
20 recipient's individual representation of a client in
21 the nonadversarial monitoring of a final order entered
22 by the court or involved in enforcement of the final

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1 order."

2 So that you're making it clear that you're
3 talking about individual representation only.

4 MR. McCALPIN: But there is many settled not
5 by a court order but by a settlement agreement.

6 CHAIR BATTLE: But as a final order, the final
7 order -- usually, when you got a settlement decree
8 entered, you get it approved. And so you have a final
9 order that's approved by the court, even though the
10 parties have agreed to it.

11 So, in any instance -- generally, in any
12 instance, you're going to have some sort of final order
13 entered by the court entered on that settlement
14 agreement.

15 What we're doing is we're drawing two lines,
16 one to show that you're not involved in the litigation
17 of the class action issues but only after the final
18 order has been entered and only on behalf of an
19 individual client.

20 MS. PERLE: There are other examples that
21 programs have raised with us, situations where there
22 have been class actions that have gone on for many

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1 years where they're the recipients of reports from the
2 defendant. They're not taking any action. They're
3 just --

4 CHAIR BATTLE: Compliance reports of some
5 sort.

6 MS. PERLE: Just receiving reports, reading
7 them, and if they are to get -- and the fact that the
8 reports are sent to them, kind of, keeps the
9 defendants, basically, acting consistent with what the
10 order is.

11 Their concern, then, if they're not even
12 allowed to get those reports any more to do that kind
13 of monitoring not on behalf of an individual client --

14 CHAIR BATTLE: I think, again, the cut that I
15 see at least on class actions is if they're receiving
16 that report on behalf of the class, then that's going
17 to have to go to somebody else.

18 If they're receiving it on behalf of an
19 individual client, maybe they intervened on behalf of
20 an individual client in a class action lawsuit, then I
21 think they can continue to receive it.

22 But if they're receiving that report pursuant

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1 to their class representation, I think they're going to
2 have to wind that down. That's my view of the cut.

3 If you look at what Senator Domenici said
4 during the debate on this issue, it was a question of
5 individual representation, as opposed to group
6 representation.

7 MR. FORGER: He was not opposed to all class
8 actions either.

9 CHAIR BATTLE: Yeah.

10 MS. PERLE: He wasn't?

11 MR. FORGER: No.

12 MR. McCALPIN: He was dead set against all of
13 them.

14 MR. FORGER: Not for me. I
15 had a specific conversation with him.

16 MR. McCALPIN: Really?

17 MR. FORGER: I did, indeed.

18 MR. McCALPIN: What would he permit?

19 MR. FORGER: I beg your pardon?

20 MR. McCALPIN: What would he permit?

21 MR. FORGER: He went to the total -- it was a
22 distinction between class actions against government or
class actions against individuals.

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1 He concluded, in the elevator where we had our
2 discussion on class actions, that it would be wiser in
3 order to achieve his objective to ban all class
4 actions, although he did not think that was essential.

5 I think his objection was the impact case
6 where we were seeking to change the world by bringing
7 on -- I would be surprised if he would object to our
8 representing an individual who is seeking to obtain the
9 benefit of an action that was instituted by others or
10 carried on by others.

11 CHAIR BATTLE: I think the slice --

12 MR. FORGER: I don't know how you phrase it.

13 CHAIR BATTLE: I think the slice that I'm
14 suggesting that we do to this is consistent with at
15 least part of the Senate debate that Domenici entered
16 into which would allow us to continue to monitor on
17 behalf of individuals' compliance and benefits under a
18 class action so long as it is not as a class
19 representative and it is not on behalf of a group.

20 MR. FORGER: Why do you need to put -- just a
21 point of information. Why do you need to put "monitor
22 on behalf of an individual" if what we're, basically,

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1 seeking to do is make certain the individual has the
2 benefit of it?

3 CHAIR BATTLE: Because generally, what you
4 have in a class action litigation is some sort of final
5 order that's entered, and then the implementation of
6 that order is where you get into monitoring.

7 MR. FORGER: But isn't it only for my -- if
8 we're representing individuals and I want to come in
9 under the umbrella of what's decided, I don't know as I
10 need to have the word "monitoring" --

11 CHAIR BATTLE: Monitoring, which seems to --

12 MR. FORGER: -- as distinct from obtaining the
13 benefit of that.

14 CHAIR BATTLE: Okay. Obtaining the benefits?

15 MR. FORGER: Monitor looks like a more
16 official activity and overseeing this and enforcing it
17 for the world.

18 CHAIR BATTLE: Obtaining the benefits for that
19 individual client?

20 MR. FORGER: Yes.

21 CHAIR BATTLE: Okay.

22 MR. FORGER: However it could best be --

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1 CHAIR BATTLE: That's a good point, because
2 monitoring generally is on behalf of a class. I mean,
3 you have some party, as Linda pointed out, who is
4 receiving reports showing that certain class relief is
5 being implemented appropriately.

6 MR. FORGER: It sounds like being the
7 enforcer, and we don't want --

8 CHAIR BATTLE: Okay. "It does not include the
9 recipient's individual representation of a client in
10 efforts to obtain the benefits of a final order entered
11 by the court or involvement in enforcement of the final
12 order," it seems to me.

13 MR. McCALPIN: Let me go back to the earlier
14 one. Do you think a program can advise a client to opt
15 into a class or opt out?

16 CHAIR BATTLE: The opting in or out comes
17 before the final judgment.

18 MR. McCALPIN: Well, of course.

19 CHAIR BATTLE: So we're talking about post
20 judgment decisions.

21 MR. McCALPIN: No, no. No.

22 CHAIR BATTLE: Final order.

1 MR. McCALPIN: Look on page 4. "May advise
2 clients about the pendency of a class action or its
3 effect on the client and what the client would need to
4 do to benefit from the case."

5 CHAIR BATTLE: That goes --

6 MS. PERLE: I actually had some -- there was
7 some discussion -- and I haven't shared this with John
8 and Suzanne because it, kind of, came up after we
9 discussed this.

10 There were several people who said that they
11 weren't sure what it meant to say that it does not --
12 "You may not provide legal assistance to an individual
13 who is involved in a suit but is not a member of the
14 class" and suggested that we change it to clarify that
15 it says, "You're not to provide legal assistance to an
16 individual client to seeks to withdraw from, intervene
17 in or modify the class."

18 In other words, taking into account the kinds
19 of situations that you were talking about so that the
20 person who wants to opt out -- in order to opt out, you
21 have to be part of the class, and so you're, obviously,
22 participating.

1 may have passed away. I don't know where I file -- I
2 mean, what we get is the reports.

3 We just get the reports. We look them over
4 and then maybe go to the court somewhere, but I'm not
5 sure where they file them.

6 But the government, state government, feels an
7 obligation to continue to make these reports showing
8 they're in compliance with what the court thought they
9 were out of compliance with before. We're just a
10 depository.

11 CHAIR BATTLE: Yeah. I understand that.

12 MR. FORGER: So you're a beneficiary of this
13 order.

14 MR. TEITELMAN: I don't know.
I got to file these things.

15 MR. McCALPIN: Can't you withdraw?

16 MR. TEITELMAN: Pardon me?

17 MR. McCALPIN: Can't you withdraw?

18 MR. TEITELMAN: The case is closed. There is
19 no jurisdiction in the court. Whatever file might be
20 microfiched somewhere --

21 CHAIR BATTLE: Reports come to Legal Services?
22

1 MR. TEITELMAN: Yes, on a regular basis, every
2 quarter, every six months. For the past 15 years,
3 they've been sending these reports in.

4 CHAIR BATTLE: What is the Legal Services
5 obligation once you receive that report? Let's say you
6 receive --

7 MR. TEITELMAN: We have no obligation.

8 CHAIR BATTLE: Just to receive the report.

9 MR. TEITELMAN: The report gave us no -- they
10 don't want to pay us fees, so I don't think they want
11 us to have a monitoring obligation. It's just that we
12 get the reports.

13 At this point, when a case is closed -- well,
14 we had -- individual clients backed out. It was a
15 class action. It was clearly a class action.

16 CHAIR BATTLE: It just seems to me under that
17 circumstance, particularly where you have no
18 monitoring, I don't know what your -- the court doesn't
19 maintain jurisdiction. Your clients are no longer your
20 clients.

21 MR. FORGER: Must be a recycling program.

22 MR. TEITELMAN: We may get some money for

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1 recycling -- that's an example of what goes on in a
2 number -- CHAIR BATTLE: You know,
3 that's why I started out with nonadversarial
4 monitoring, because I'm familiar with just this being a
5 repository of reports, being a part of how class
6 actions ultimately end up operating.

7 MR. TEITELMAN: We feel no obligation --
8 clearly, it would be against the law to represent the
9 class in contempt, and I don't know who would file the
10 contempt motion. All the same, we're getting these
11 reports.

12 Now, the state doesn't want to file these
13 reports anymore, but I don't know why they do. I mean,
14 there is no one going to -- a federal judge speaks even
15 15 years ago, even from the grave at this point they
16 still follow the orders of the federal judge.

17 CHAIR BATTLE: And there was no time frame for
18 this to end?

19 MR. TEITELMAN: None. They could have called
20 in and asked for a modification and said, "We've been
21 doing it 15 years." They've never done that. I'd
22 suggest that to them.

1 MR. TULL: That's really a good fundraising
2 thing.

3 MS. PERLE: I think that's an extreme example
4 of what I was talking about before, but I mean, I think
5 there are other examples where the monitoring does
6 serve some function, but they're not participating --
7 there is nothing happening in the class action.

8 The monitoring serves the function of, kind
9 of, ensuring that nothing happens, in a sense. I think
10 that the notion of nonadversarial monitoring is okay as
11 long as you don't tie it to representation of an
12 individual client in that situation.

13 In other words, that monitoring is going on.
14 The class action is not really going on anymore. There
15 are no issues necessarily to be decided.

16 CHAIR BATTLE: Nonadversarial monitoring I
17 don't think was --

18 MR. FORGER: What is that?

19 CHAIR BATTLE: Nonadversarial monitoring?

20 MR. FORGER: Yeah.

21 CHAIR BATTLE: We're going to have to pay for
22 that in Birmingham pretty soon to the white

1 firefighters.

2 MR. FORGER: What is nonadversarial
3 monitoring?

4 CHAIR BATTLE: It just means there is an order
5 put in place, and the parties are instructed to do
6 certain things, and there is reporting that goes from
7 the party who has to do the work to the other people to
8 let them know that it's going on, and they receive
9 those reports.

10 MR. FORGER: But do nothing with it.

11 CHAIR BATTLE: But do nothing.

12 MR. FORGER: Because they can't.

13 CHAIR BATTLE: Well, in some instances, if
14 you're not doing what you're supposed to do, you can go
15 back into court --

16 MR. FORGER: It becomes adversarial then.

17 CHAIR BATTLE: -- if the judge is still alive
18 and say, "They're not doing what they're supposed to
19 do." At that point it becomes adversarial.

20 And once it becomes adversarial, what we're
21 saying, "You can't do that." But if what you're doing
22 is nonadversarial monitoring, receiving reports, right

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1 now I don't envision from what I read in both the
2 debate that took place on this and in the statutory
3 language that there is any real problem with that.

4 But that does go on. I mean, I can
5 understand, based on what Rick said, what Linda has
6 said and what my own experience has been that, in class
7 action litigation, you do have nonadversarial
8 monitoring.

9 My concern was this, and the question that I
10 raised when I first read this is the potential that you
11 just raised, Alex, which is at any point this
12 nonadversarial monitoring could become adversarial.

13 So you're going to have to cut at some point
14 and give this reporting function to someone else who
15 can challenge those things.

16 Because otherwise, what happens is you've got
17 a program who has this monitoring function, and they
18 cannot become adversarial with it, but if there is a
19 problem with it, it's going to have to be handed off to
20 someone else to raise those issues at some point, I
21 don't know who, but somebody, it seems to me.

22 Well, we've got two things. One, I think we

1 have resolved the question of the recipient being able
2 to represent an individual in their efforts to obtain
3 relief under an order granting relief, and that has
4 nothing to do with the actual litigation in the class
5 action.

6 Then, we've got this issue of the
7 nonadversarial monitoring.

8 MR. FORGER: It sounds good.

9 CHAIR BATTLE: Yeah. Nonadversarial
10 monitoring. And if it becomes adversarial, you can't
11 do it, and maybe we need to just construct some
12 language around both of those issues to resolve this
13 very limited scope of how and if programs can
14 participate in class actions.

15 MS. GLASOW: Can you repeat that first one
16 again?

17 MS. BERGMARK: It seems to me that the first
18 issue is unrepresented to the issue of pending class
19 actions. The way a program is going to wind up in the
20 second box is because they handled the class action to
21 begin with. It's, sort of, a pending case issue.

22 Now, whether there is a distinction there and

1 this off.

2 If you've got a case like this, you can only
3 have it so long as it is not adversarial. Once there
4 is any issue, it's going to have to be handed off. So
5 it's really time now to start looking.

6 MS. PERLE: And I think programs do understand
7 that part of it. I think that you can handle that by
8 putting that in the preamble.

9 CHAIR BATTLE: Okay. And I think the other
10 question you asked, Martha, was how were we going to
11 word the first. "It does not include the recipient's
12 individual representation of a client in the client's
13 effort to obtain the benefits of an order granting
14 relief entered by the court or involvement in the
15 enforcement of an order granting relief."

16 That's consistent with the language we
17 discussed a moment ago.

18 MS. BERGMARK: I don't even think you need the
19 "or involvement in the enforcement." That's redundant.

20

21 CHAIR BATTLE: Okay.

22 MS. GLASOW: Could you repeat that?

1 CHAIR BATTLE: "It does not include the
2 recipient's individual representation of a client in
3 the client's efforts to obtain the benefits of an order
4 granting relief entered by the court."

5 And Martha is suggesting that we strike the
6 rest, "or involvement in the enforcement of an order."

7 MS. PERLE: What about the monitoring?

8 CHAIR BATTLE: The second one, I haven't
9 really worded it, but it does not include
10 nonadversarial monitoring of a class action so long
11 as -- and I haven't really put any language to that.

12 MS. PERLE: John was talking before about a
13 situation where there is a special master that's
14 appointed to administer something.

15 I've been informed about situations where the
16 recipient was appointed by the court to administer the
17 class action. Say that there was a fund created by the
18 litigation and that the program was appointed to
19 administer that fund.

20 CHAIR BATTLE: I think there is going to have
21 to be a handoff to someone else, if it's still class
22 representation is my view.

1 And I have an appreciation for what you're
2 saying. Hand off to whom? To where?

3 MS. PERLE: Well, and also, I mean, you're
4 really in a situation where the administration of it
5 consists of making a determination about whether
6 individual members of the class are entitled to relief.

7
8 So it, sort of, fits -- maybe we could, sort
9 of, fold that in under your individual representation.
10 Not exactly.

11 CHAIR BATTLE: No.

12 MR. TULL: They might become a defendant.

13 CHAIR BATTLE: They could become a defendant.
14 I think that's a handoff situation where someone else
15 is going to have to do that.

16 Sometimes federal courts don't agree. We can
17 have a statute -- we can have a regulation that says,
18 "You've got to get out of this," and you can make an
19 application and fight that statute and the judge say,
20 "I don't have anybody else to give this to. You got to
21 stay in this, because who else am I going to give this
22 responsibility to? Request to withdraw denied," and

1 then you've got a program that's stuck. MS. PERLE: The
2 Corporation is stuck.

3 CHAIR BATTLE: And the Corporation is --

4 MR. FORGER: It's no longer a program, LSC.
5 It's a pro bono effort.

6 MR. TULL: Isn't this an area that -- what
7 Linda has said, I think is probably instructive to us,
8 which is the variations of issues that may come up in
9 this area are probably much greater than any of us can
10 foresee.

11 I can imagine a class action where a court, as
12 a part of an order, gives money to a program to create
13 a program to represent battered women.

14 I mean, it's out of punitive damages to a
15 defendant, and there are simply putting the money
16 somewhere to be spent, and they're out of it and gone
17 and, basically, has funded an office that has done a
18 particular kind of work, and the class is all gone, and
19 the case is gone.

20 I don't know whether such a thing exists, but
21 it's certainly possible that it is.

22 MS. PERLE: I think it does. I've heard of

1 those situations.

2 MR. TULL: Those kinds of things, I assume,
3 are going to have to come to general counsel for a
4 review and set of opinions because we can't draft a reg
5 which will -- we can draft a reg which sets the
6 principles, which I think are ones which are -- it's
7 important to do what I think has been done, which is to
8 be very clear that this has to do with drawing a very
9 sharp line between work which involves the class and
10 any activity which will affect the class and work which
11 involves an individual in his or her capacity as a
12 beneficiary and only affect's that individual's rights.

13

14 It's not an easy draw to make because the
15 circumstances are so varied, but I think that is the
16 principle which --

17 MS. PERLE: But I think that you're right.
18 There are going to have to be lots of situations where
19 the General Counsel's Office is going to have to really
20 look at a situation and determine which side of that
21 line it goes on.

22 There are so many myriad variations in terms

1 of the way these cases have played out and the role
2 that the recipients are playing in them in this, sort
3 of, post judgment period.

4 CHAIR BATTLE: If it's post judgment,
5 "initiate and participate," which is the language in
6 the statutes, seems to indicate prejudgment.

7 And post judgment I think we are going to have
8 to use some judgment calls on, but I think clearly part
9 of what this is about is what Senator Domenici said,
10 "Individual legal services for individual Americans in
11 need for their cases and their causes" is going to end
12 up being the bottom line.

13 And the closer the situation comes to meeting
14 that, the greater the likelihood that can continue, and
15 the further away from that, whatever that function is,
16 the more apt it is to be found not to be within the
17 scope of what would be allowed.

18 And we'll just have to use that as, probably,
19 part of the dividing line post judgment for determining
20 what programs can do.

21 MS. PERLE: I think we also ought to put in
22 the preamble to this interim reg to the extent it's

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1 being used as a proposed reg -- we should really ask
2 for -- the Corporation should really ask for comments.

3 CHAIR BATTLE: Comments on this area so we
4 will understand.

5 MS. PERLE: Because there will be lots of -- I
6 think you need more input in terms of what's going to
7 work and what's not going to work in real life.

8 CHAIR BATTLE: Inspector General, there were
9 some comments on this. Have we satisfied those,
10 Laurie?

11 MS. TARANTOWICZ: Oh, yes.

12 CHAIR BATTLE: Okay. All right. In the
13 prohibition section, 1617.3, Prohibition, I think that
14 comes straight out of the set, and I don't think there
15 is any reason for us to discuss that.

16 Anything else on class actions, 1617? It's
17 pretty clear. Okay. The next regulation that we have
18 is 1638.

19 MS. PERLE: I want to get Alan Houseman in
20 here for that.

21 CHAIR BATTLE: Okay. All right. Thanks for
22 joining us, Alan.

1 MR. HOUSEMAN: Thank you.

2 CHAIR BATTLE: We are about to undertake 1638,
3 Restrictions on Solicitation, the interim proposed
4 rule. Suzanne, do you want to give us some background
5 on this one?

6 MS. GLASOW: This is a brand new rule, and it
7 is an attempt to implement a new statutory restriction
8 on staff of Legal Services programs taking on clients
9 where there has been in-person unsolicited advice
10 given.

11 CHAIR BATTLE: Okay. Why don't we take a look
12 at the actual -- are there any comments about the
13 comments? I did have a couple.

14 "Unsolicited advice" is defined, and in part,
15 it includes the prospect of a discussion with an
16 individual where there is not an attorney-client
17 relationship.

18 And so the question that I had was at what
19 point does that relationship begin? So often you have
20 brief contact with clients, and you give them brief
21 advice, and you send them on their way.

22 Have you established an attorney-client

1 relationship so that that brief advice or contact is
2 covered, or would it be unsolicited to go beyond the
3 scope of why someone has contacted you about some sort
4 of brief advice issue?

5 If the advice given that's brief doesn't
6 really resolve the problem and the person returns to
7 you, is that return the formation of a new relationship
8 so that it's not solicited, based on what you said last
9 time? This is a muddy, to me, area.

10 MR. TULL: The distinction here -- in both
11 examples you gave, this regulation would not prevent
12 the program from advising the client that she or he
13 should do something even if it was not precisely within
14 the parameters of what the person described.

15 And that's based on the responsibility any
16 lawyer has to a client, which is once the attorney-
17 client relationship is established -- and it is
18 established even when just advice is given -- the
19 lawyer has a duty of loyalty to that client and a duty
20 to protect the client's interest.

21 And if that means saying that here is a matter
22 which I'm aware of because of the facts you've given to

1 me because you've come to me that the lawyer can't
2 withhold that information because it would be somehow
3 unsolicited and improper.

4 That would be not only proper but would be
5 expected as a part of the attorney-client relationship,
6 including, as we would understand this, to be if the
7 client had left the program and then your --

8 CHAIR BATTLE: Right.

9 MR. TULL: -- which is coming back a second
10 time, sort of, lost the thread on what the -- but I
11 heard you say it. I think we were clear, as we thought
12 about this, that that would not be covered.

13 The concern that this is aimed at is programs
14 going out and appearing to someone who he is not a
15 client of theirs, has established no relationship with
16 them and volunteering advice to them, "You should see a
17 lawyer," and "We'll be your lawyer" --

18 CHAIR BATTLE: Right. Yeah. I think that the
19 last thing that you said, John, points out the clear
20 issue, which is going out to people that are not
21 clients, who are not within the rubric of having a
22 relationship with a program and giving them advice.

1 The question I had was since it really hinges
2 on this attorney-client relationship, when does that
3 begin? And what you're saying is if somebody comes in
4 the door to ask for advice, once they come into the
5 door -- which means we haven't solicited them; they
6 have come to us -- can we give talk to them and give
7 them advice is the basic question that I'm asking.

8 And whether or not we form an attorney-client
9 privileged relationship by actually taking a case or
10 not, can we give them a full scope of advice because
11 they have come to us?

12 Which gets to breaking out "unsolicited" from
13 "advice" a little bit, at least in my thinking.

14 MS. GLASOW: I think maybe part of the
15 problem -- I was just asking Alan -- in the definition
16 of "unsolicited advice" is we say "does not have an
17 attorney-client relationship and who did not seek legal
18 advice."

19 I think it should be "or," because if someone
20 calls in to your hotline or even just to your program
21 and says, "I have a problem. I need help," they are
22 the ones who are seeking the legal advice.

1 So in that case, it's not unsolicited. If you
2 already have an attorney-client relationship with a
3 particular person, that's not unsolicited if you happen
4 to call that client and say, "There is this new issue I
5 want you to be aware of. It has to do with your
6 interests."

7 CHAIR BATTLE: I think "or" does it.

8 MS. GLASOW: Because of our attorney-client
9 relationship --

10 CHAIR BATTLE: Because it provides the
11 alternative there of someone -- as long as that person
12 has sought the program out, once they get there, they
13 with give them whatever advice they need whether we've
14 formed that relationship or not, and I think that's the
15 point that I was getting at.

16 I would edit, in 1638, in the commentary under
17 prohibition -- it's no big deal -- it's the next to the
18 last line. "It also prohibits recipients and their
19 employees who have given," strike "such" to
20 "unsolicited advice from referring the person receiving
21 the advice to another LSC recipient."

22 MR. McCALPIN: Let me raise a question on that

1 point. Do you mean to leave open that they could refer
2 them to a PAI adjunct of the program?

3 MS. GLASOW: Are we talking about the
4 definition of "unsolicited" again?

5 MR. McCALPIN: No. We're talking about the
6 same sentence that LaVeeda read.

7 CHAIR BATTLE: I just read the last sentence
8 in 1638.3 in the commentary under Prohibition.

9 MR. McCALPIN: It says here that they
10 prohibited "from referring the person receiving the
11 advice to another LSC recipient," but did you intend
12 specifically to leave open referral to a PAI adjunct of
13 the program?

14 MR. TULL: The answer is did we do anything
15 regarding that deliberately is no.

16 MR. ASKEW: The PAI adjunct is the program,
17 right?

18 MR. TULL: Yeah. I think if we get back to
19 this distinction can you refer someone to a private
20 lawyer who is going to take it as a volunteer case,
21 you've just referred it, and that's what you're doing,
22 you know, you're, basically, ridding yourself of the

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1 case.

2 The answer to that, I assume, would be yes.
3 But referring it to a PAI program set up by the
4 program, run and then -- then the answer to that would
5 be no.

6 MR. McCALPIN: Rick has 1,700 lawyers signed
7 up, volunteer lawyer program, which is an adjunct of
8 Legal Services of Eastern Missouri. Can he refer it to
9 one of those 1,700 lawyers?

10 CHAIR BATTLE: Yes, if it's pro bono.

11 MR. McCALPIN: Sure it's pro bono.

12 CHAIR BATTLE: If it's pro bono, yes. That's
13 what it's all about. I mean, when people come to you
14 and you can't take their case, then you can refer that
15 matter, whatever it is, to a private attorney.

16 MR. McCALPIN: I'm not sure that's what they
17 were thinking.

18 MR. TEITELMAN: We also have in-house
19 volunteer programs.

20 MR. TULL: What we're talking about here --
21 let's get clear what we're talking about is
22 unsolicited -- everything has to follow from the fact

1 the reg.

2 MR. McCALPIN: So that we did leave it open,
3 what we said was not reference to another LSC
4 recipient. We meant another LSC recipient.

5 MR. TULL: And "recipient" is a term of art
6 throughout the regs.

7 MR. McCALPIN: Yeah. So you, in effect, can
8 look locally by sending him out to a PAI attorney.

9 MR. TULL: Well, by sending it out to a
10 private attorney, if you sent it out to a PAI attorney
11 as a part of your PAI program, that is a part of the --

12 MR. McCALPIN: I don't know what's part of a
13 PAI program. You've got 1,700 lawyers that signed up.
14 Is
15 that --

16 CHAIR BATTLE: This is what the statute
17 actually says: "Unless such person or entity agrees
18 that the person and the employees of the person or
19 entity will not accept employment resulting from in-
20 person unsolicited advice to a nonattorney."

21 Now, it seems to me -- "and," it goes further,
22 "will not refer such nonattorney to another person or

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1 entity or employee of the person that is receiving
2 Corporation funds."

3 So really, the way that this is drafted is
4 specific to the two things that are mentioned in the
5 statute, unsolicited advice, that no employee of a
6 recipient will take a case that was brought to it from
7 in-person unsolicited advice -- that's number one --
8 nor will they refer it to another program that is
9 receiving LSC funds.

10 That is all that is proscribed by the statute.
11 Any referrals to private attorneys in private practice
12 who have the option of taking or not taking the case,
13 of forming an attorney-client relationship or not are
14 free to do that.

15 This statute really speaks to what it is one
16 may do with federal funds, and one may not in-person
17 unsolicited give advice and then take the case or refer
18 it to another program.

19 MR. FORGER: A variation. Legal Aid Society
20 of New York has a volunteer division that is funded by
21 the PAI, and they have pro bono attorneys that
22 function. I would suppose they are prohibited in that

1 context --

2 CHAIR BATTLE: Yes.

3 MR. FORGER: Even though it's pro bono
4 attorneys working --

5 CHAIR BATTLE: With LSC funds, yeah. As long
6 as you're working with LSC funds, it's prohibited.
7 Once you're completely in the private sector, you're --

8 MR. McCALPIN: How are they working with LSC
9 funds? If they're sitting in your law firm and they
10 get a phone call, "Will you take this case?"

11 MR. FORGER: I mean, it's processed through
12 the volunteer division with oversight and all that sort
13 of stuff. I think if they're simply sending paper
14 airplanes out to the world at large or faxes, "Will
15 anybody take this case?" it's different.

16 MR. McCALPIN: But then you're saying they
17 can't send it to one of Rick's 1,700 lawyers.

18 MR. FORGER: No. My distinction, volunteer
19 division, is somewhat different in New York, I guess,
20 where it is there. It exists, and it's helping the
21 attorneys with the assignments and the follow-through
22 and the oversight and all of that junk, as distinct

1 from calling you on the phone saying, "Here is a case.
2 Would you like to take it? Talk to the client." But
3 that's a distinction.

4 CHAIR BATTLE: Rick, I see your hand up. I'm
5 sorry.

6 MR. TEITELMAN: When you're talking about
7 solicited or unsolicited, I think that's a distinction
8 of note because even the outreach center, if we're at a
9 church in Webster Groves and those attorneys who were
10 mentioned earlier are at this church, and they're
11 sitting there waiting for people to come in and ask for
12 advice, that's solicited.

13 So under almost every circumstance we have,
14 there are 1,700 volunteer lawyers. If there is 1,500
15 outreach centers -- I mean, 15 outreach centers, every
16 time they walk into a shelter and ask for advice and
17 they say, "Oh, there are the lawyers here today. We're
18 going to ask them for advice," they're soliciting the
19 advice.

20 I can't imagine, given the number of cases we
21 have, go out and say, "Here, we want to give you
22 advice."

1 MR. TEITELMAN: It's not.

2 MR. HOUSEMAN: Okay.

3 CHAIR BATTLE: He's saying it's not. He's
4 saying they come and ask you. You're the lawyer on
5 site, but people are coming to you saying --

6 MR. ASKEW: The clients are soliciting the
7 lawyer.

8 MR. HOUSEMAN: That's fine. That's not
9 prohibited by anything.

10 CHAIR BATTLE: Ernestine?

11 MS. WATLINGTON: I think clearly addresses the
12 issue where the Legal Services attorneys had been
13 accused of going out soliciting doing their on clients.
14 I think this clearly addresses that and put it in the
15 rule. I think it's understandable. It's
16 understandable to me.

17 CHAIR BATTLE: Okay. Alex?

18 MR. FORGER: Just a point of information.
19 I'll get Alan to counsel me here. The definition of
20 "advice" is quite narrow. The statute talks about not
21 discussing the merits of a case or the causes of action
22 or the pros and cons, but it is simply advice, if you

1 call it advice, a suggestion that you obtain counsel or
2 actually take legal action.

3 Whereas, if I'm discussing with you the
4 circumstances of what is a habitable place or what's a
5 minimum wage and that 3.50 is below a minimum wage, da-
6 da-da-da-da-da, that, by this definition, is not giving
7 unsolicited level advice. Legal advice, but the state,
8 is saying get a lawyer.

9 MR. HOUSEMAN: Right. I agree with that
10 completely.

11 MR. FORGER: Not that, "You've got a good case
12 here, Mac, and your rights have been violated." That's
13 not legal advice.

14 So if that be literally so, the phrase
15 "unsolicited advice" as defined as advice given, I
16 would modify that as you have in 1638.3, advice to take
17 legal action or obtain counsel.

18 I mean, it is a very narrow kind of advice.
19 It isn't advice generally about your rights and
20 remedies. So I would insert that after that word is
21 defined as "advice" to take legal action or to counsel
22 to make it consistent with what you've got in the

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1 prohibition, at least make the definition -- you've got
2 a definition that is very broad, and then your
3 prohibition is very narrow.

4 MR. HOUSEMAN: Right.

5 MR. FORGER: It ought to be -- certainly, they
6 ought to be consistently narrow.

7 CHAIR BATTLE: I agree. And what can you do
8 is 1638.2, Definitions (b), change that to say,
9 "Unsolicited advice means," and then I don't know how
10 it needs to be edited, but --

11 MS. GLASOW: "Advice to obtain counsel or take
12 legal action."

13 CHAIR BATTLE: Yeah. "Advice to take --"
14 yeah, "to contain counsel or to take legal action."

15 MR. HOUSEMAN: To an individual, I guess.

16 CHAIR BATTLE: "Advice to an individual to
17 take legal action or to obtain counsel given by a
18 recipient" --

19 MR. TULL: That solves a problem that we've
20 been struggling with here.

21 CHAIR BATTLE: Is that right? Okay.

22 MR. TULL: When I wasn't paying attention to

1 Alex.

2 CHAIR BATTLE: But Alex raised the problem,
3 and he solved it.

4 MR. HOUSEMAN: Alex solved it better. My deal
5 was worse.

6 MR. McCALPIN: Well, I'll keep talking, then,
7 Alan. MR. HOUSEMAN: Evening that
8 would take care of the concerns that --

9 MR. ASKEW: Let me ask this: If there is a
10 tenants association meeting and a staff attorney from
11 the Legal Aid program speaks to the tenants and says,
12 "These are your rights as public housing tenants," and
13 then a tenant walks up to a Legal Aid lawyer after the
14 meeting is over and says, "I heard what you said. I
15 think I fall within one of those categories. I'd like
16 for you to represent me." That's perfectly fine under
17 this regulation?

18 CHAIR BATTLE: Yeah.

19 MR. ASKEW: Okay.

20 MR. HOUSEMAN: The way we read it.

21 CHAIR BATTLE: Okay. So we've amended the
22 language in 1638.2 (b). I have some concerns. This,

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1 kind of, follows what Bucky has raised. "Not sought."
2 Later on in (b) we talk about "advice given by a
3 recipient not sought."

4 And I thought about scope because it could be
5 that you're there talking about a tenant problem, and
6 they walk up and say, "Can you help me with a divorce,"
7 or walk up to you --

8 MR. ASKEW: That's even cleaner, I would
9 think, than it would be if they came up and asked you
10 about a tenancy problem.

11 CHAIR BATTLE: Yeah.

12 MR. ASKEW: But can the staff attorney say,
13 "And we are here to represent you if you have these
14 problems"?

15 MR. FORGER: I would think not.

16 MR. ASKEW: So that's where you stop.

17 MR. HOUSEMAN: That is right.

18 MR. ASKEW: Right.

19 MR. HOUSEMAN: Yeah. There is a line here.

20 CHAIR BATTLE: Okay. Laurie, did you have a -

21 -

22 MS. TARANTOWICZ: I was just going to address

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1 a similar issue. By adding "to an individual" into the
2 definition," to me it makes it a bit confusing, because
3 if you're giving a presentation to a group, you're not
4 directly talking to one person, but you can tell the
5 group, and properly, I think, under this regulation,
6 "And if you have this problem, come and see me. If any
7 of you here who are similarly situated have this
8 problem, come and see me."

9 That's not directed to an individual, but I
10 think that's what --

11 CHAIR BATTLE: So you would take out "to an
12 individual" and just simply say "unsolicited advice
13 means advice to obtain counsel or to take legal action
14 given by a recipient that's not sought"?

15 MS. TARANTOWICZ: Right.

16 MR. HOUSEMAN: There may be a better way to do
17 it, which is to use the statutory term "nonattorney."
18 I'm not sure that solves the problem completely, but at
19 least it uses the statutory term, "that is given to a
20 nonattorney."

21 CHAIR BATTLE: Yeah. That's almost like using
22 "mutually exclusively worlds" to define it.

1 MR. HOUSEMAN: Okay.

2 CHAIR BATTLE: Anything else in (b)?

3 Anything -- I'm sorry. 1638.1, the Purpose, any
4 problem with the Purpose? And then let's move on to
5 Definitions. We, kind of, skipped over that part.
6 Anything in (a)?

7 We just covered (b). 1638.3, Prohibition.

8 MR. FORGER: How does (b) now read?

9 CHAIR BATTLE: (b) should read, "Unsolicited
10 advice means advice to obtain counsel or to take legal
11 action given by a recipient or its employees not sought
12 by --" we talked about the nonattorney but just the
13 individual or "an individual."

14 MR. FORGER: Well, Laurie's point.

15 MS. TARANTOWICZ: I'm sorry. I understand
16 this definition -- I don't know -- why can't you just
17 define "unsolicited" and take out the "advice" part,
18 because you use advice to obtain counsel, blah, blah,
19 blah, in the reg.

20 So if you just define "unsolicited" -- just
21 because -- as you're reading, I'm getting -- I know
22 what it says, but it's getting very long.

1 I'm just suggesting -- and I'm not -- I don't
2 feel strongly about this. I'm just suggesting that
3 perhaps it might be clearer if you just defined
4 "unsolicited" and then, in the reg, use "advice to
5 obtain counsel or take legal action" in the
6 prohibition --

7 CHAIR BATTLE: Do we ever use -- you're saying
8 we never use the term "unsolicited advice" anywhere in
9 the reg other than the definition?

10 MR. TEITELMAN: No. I'm saying that you use
11 it, but every time you use "advice," if you say "advice
12 to obtain --" in other words, in the Prohibition, if
13 you say, "In-person unsolicited advice to obtain
14 counsel or take legal action." So therefore -- I don't
15 know why "advice" needs to be in.

16 MS. GLASOW: I think we're trying to talk
17 about there are different kind of advice, and one is
18 unsolicited advice, "and unsolicited advice is the type
19 of advice," et cetera, et cetera.

20 So I think it's legitimate to have them both
21 in. I think it makes it easier for the reader of this
22 rule to know -- if we do word by word, I think it's

1 going to get somewhat -- I mean, I can see her point,
2 but I think in this case it's better to keep the --

3 MS. TARANTOWICZ: I didn't mean that needed to
4 define "advice" in the Definitions.

5 MS. GLASOW: No. I understand that, but in
6 this case I would recommend --

7 CHAIR BATTLE: Laurie, do you have an
8 alternative proposal that you'd like for (b) in terms
9 of how it ought to be set out?

10 MS. TARANTOWICZ: I was just suggesting you
11 just define "unsolicited." "Unsolicited means not
12 sought by an individual." Oh, I see, but then you have
13 the attorney-client -- I see.

14 MR. HOUSEMAN: I think -- we've been through
15 this, some of us, thinking about this. My own sense is
16 this is a better way -- to keep "unsolicited advice"
17 together is a better approach than trying to go any
18 further in segmenting the definitions.

19 CHAIR BATTLE: Okay. There are three terms
20 used --

21 MR. HOUSEMAN: John and I have been over this
22 100 times.

1 CHAIR BATTLE: Yeah. There are three terms
2 used in the statute, "in person" "unsolicited" and
3 "advice." In "unsolicited advice," rather than
4 breaking out "advice" and defining it separate from
5 "unsolicited" kind of makes sense.

6 But I think what I'm hearing Laurie say is
7 that the real key and pivotal part of it is not so much
8 the "advice" part as it is "unsolicited."

9 And in our definition, we need to make sure
10 that people understand what the difference is between
11 "solicited advice" and "unsolicited advice" and how we
12 set it out.

13 Does that get at the point?

14 MS. TARANTOWICZ: That's fine. I was just
15 trying to make a suggestion so that you didn't try to
16 include too many things in this definition.

17 But I see as you try to break it out you do
18 need some follow-up for that.

19 CHAIR BATTLE: Maybe in the commentary we
20 could, as Bucky's suggest that he pointed out, the
21 example that he used, distinguish "solicited" from
22 "unsolicited," because that's really the key, the

1 question of whether it's solicited or not.

2 MS. GLASOW: And I think most attorneys have a
3 general idea of what solicitation is of a client
4 anyway. I mean, we've had professional rules on it
5 historically. So I think this definition is probably
6 going to give the most comfort to the reader.

7 CHAIR BATTLE: Okay. Taking that into
8 account, where are we now? Do we need to make any
9 additional adjustments other than the ones we've talked
10 about so far?

11 We want to be able to make it clear that it's
12 not just to an individual but also to a group somehow,
13 and we also want to clarify the distinction between
14 "solicited" and "unsolicited." Okay. Let's give it to
15 the masters to do and move on.

16 MR. FORGER: Can I just make one grammatical
17 observation? There is the phrase, which to me is
18 durational, "so long as," and it's always used in the
19 context of "conditional."

20 I mean, you may do this if, and there is this
21 "as long as" as if at some duration it may shift. I
22 mean, in this instance, it's at the end of (b). "You

1 can accept as long as --" or "so long as" here "the
2 request does not --" I guess it's "if."

3 But it runs through most of the regs. I just
4 reached my tilting point.

5 CHAIR BATTLE: Where is that?

6 MR. TULL: It actually means you can just have
7 a real short relationship with a person --

8 MR. FORGER: I realize it's three words
9 instead of one, but even so.

10 MS. GLASOW: Linda and I had a long discussion
11 one day whether we should say "as long as" or "so long
12 as." How about "if"?

13 MR. TULL: I think we should say, "For the
14 period that the request does not result in" --

15 CHAIR BATTLE: We're, kind of, jumping ahead.
16 Let's look at 1638.3 Prohibition, (a) and (b).

17 MS. GLASOW: I already have some suggested
18 changes.

CHAIR BATTLE: Okay.

19 MS. GLASOW: For (a), we take out "as defined
20 in this part," which is in the parentheses.

21 CHAIR BATTLE: Okay.

22 MS. GLASOW: And in (b), after the word

1 "unsolicited advice" we add the language "to obtain
2 counsel or take legal action," and we take out "as
3 defined in this part."

4 MR. TULL: Although, by defining it up here --

5 MS. GLASOW: Maybe we don't need to do that
6 where we --

7 MR. TULL: Yeah, it's better. It's better.

8 MR. HOUSEMAN: Stylistically, it may be right,
9 but I think you got to say it again.

10 MR. ASKEW: Why do you use the term "from
11 accepting employment"?

12 MR. HOUSEMAN: Linda just mentioned that.

13 MR. McCALPIN: I would much prefer "from
14 representing of client as a result of in-person
15 unsolicited advice."

16 CHAIR BATTLE: That language comes out of the
17 statute. It says, "will not accept employment
18 resulting from in-person unsolicited advice."

19 MS. PERLE: Doesn't that suggest that you're
20 paying somebody?

21 MR. McCALPIN: Let us now write the statute.

22 MR. HOUSEMAN: I mean, it seems to me Bill's

1 suggestion doesn't -- the fact that we track the
2 statutory language, either we can explain what this
3 means in the commentary, or we could write it into
4 the -- we have the power to interpret it, you do, at
5 least. You could put in Bill's suggestion --

6 CHAIR BATTLE: From accepting -- what did you
7 say, Bill?

8 MR. McCALPIN: Representing a client as a
9 result of in-person unsolicited advice.

10 MR. HOUSEMAN: Representing --

11 MR. McCALPIN: A client.

12 MR. HOUSEMAN: As a result of.

13 MR. ASKEW: So long as.

14 MR. HOUSEMAN: I mean, we could say why we use
15 this language in the commentary and then explain it.
16 It's a simple point.

17 MS. GLASOW: We all agree.

18 CHAIR BATTLE: Anything else? We've got some
19 changes to (a) and (b). Anything else in (a) and (b)?
20 Let's move on down to 1638.4, Permissible Activities.

21 "This part does not prohibit recipients or
22 their employees from providing information regarding

1 legal rights and responsibilities, intake procedures,
2 community legal education activities such as outreach,
3 public service announcements."

4 MR. McCALPIN: Is there any real practice of
5 "presence in a courthouse to provide advice at the
6 invitation of the court"?

7 MR. TULL: Yeah. It's not uncommon to have
8 a --

9 MR. McCALPIN: Really?

10 MR. TULL: -- in a housing court -- where a
11 court is dedicated just to housing law, they often ask
12 a Legal Services program to have a lawyer there, and
13 they will refer people back to them.

14 CHAIR BATTLE: Almost like a public defender.

15 MR. McCALPIN: That's what, in Canada, they
16 refer to as "duty counsel."

17 MR. TULL: It probably feels like that to the
18 folks --

19 CHAIR BATTLE: Okay. Any questions about (a)
20 and how it's drafted, (b)? We took the "so long as"
21 out and put "if."

22 MS. GLASOW: We probably want to change

1 "employment" in this one, too.

2 MR. FORGER: Like representation.

3 MR. ASKEW: May represent client.

4 CHAIR BATTLE: Or may represent --

5 MR. HOUSEMAN: Provide representation, too.

6 CHAIR BATTLE: Provide -- may represent.

7 MR. HOUSEMAN: It's three words where one

8 would do. CHAIR BATTLE: May represent.

9 MR. HOUSEMAN: Recipient may represent an
10 otherwise eligible individual seeking legal assistance.

11

12 CHAIR BATTLE: "May represent" is fine.

13 MR. FORGER: But can he accept employment?

14 CHAIR BATTLE: "May represent" I think is
15 fine.

16 MR. ASKEW: Continue to get those high wages.

17 CHAIR BATTLE: Now, we've got "Recipients
18 shall adopt written policies and procedures to insure
19 compliance." Do we have --

20 MR. McCALPIN: In my view, totally
21 unnecessary.

22 MR. TULL: Didn't we agree to have -- when we

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1 have the whole issue of reporting was the Inspector
2 General to visit this as to all regs?

3 CHAIR BATTLE: Yeah, we will. This goes under
4 the tabled motion on this.

5 MR. McCALPIN: Special order of business.

6 CHAIR BATTLE: Yeah. We'll take that up at
7 the same time. Anything else on solicitation?

8 MR. McCALPIN: Well, it seems to me you'd
9 better keep track of what regulations you're talking
10 about, because I'm not sure we ought to have the same
11 answer on every one.

12 CHAIR BATTLE: This solicitation one, to me,
13 is a hard one to track. I mean, if you're not supposed
14 to take solicitation, then how are you going to have --
15 all you do is tell your people don't take unsolicited
16 cases.

17 MR. McCALPIN: Another way you might do it is
18 abide by the model Rules of Professional Conduct.

19 CHAIR BATTLE: Right. I just think this one
20 is going to be -- I can understand you wanting to have
21 a policy, a local policy so that everybody is on the
22 same sheet the music about not taking unsolicited

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1 cases, but I just don't see what else you can do.

2 You're not going to have people keep records
3 of times they had the opportunity to give unsolicited
4 advice.

5 MR. TULL: A list of all the cases you didn't
6 take because they were --

7 CHAIR BATTLE: Anything from the OIG on this
8 one that we haven't covered, Laurie?

9 MS. TARANTOWICZ: No.

10 CHAIR BATTLE: No? All right. Okay. I am
11 astounded as we move to our No. 5 for the day. Thank
12 you so much for joining us on this, Alex.

13 1610. Do you guys really want to take up 1610
14 today? 1610 pertains to the use of nonLSC funds, and
15 it provides the listing of all of the examples where we
16 now are prohibited from engaging in certain restricted
17 conduct based on our statutes and appropriation law in
18 the use of what we do with funds other than LSC funds
19 by this regulation.

20 Suzanne, do you want to give us the background
21 on it?

22 MS. GLASOW: This is another rule that has

1 been completely revised. We've also made -- there are
2 two definitions -- there used to be one -- "Purposes
3 prohibited by the LSC Act."

4 We've made revisions to that in a couple of
5 ways. One, technical revisions for sections referred
6 to in the LSC Act that no longer exist, so we corrected
7 it to -- we updated it to the law.

8 And we took out restrictions that now belong
9 under the second definition, which are those activities
10 prohibited by Section 504 of the Appropriations Act,
11 because what that restriction largely does is prohibit
12 the activity regardless of what funds you're using.

13 So we moved some of the restrictions that were
14 formerly under just the LSC Act. Now they're under the
15 definition of restrictions under 504.

16 And one other change in the first definition,
17 "Purposes prohibited by the LSC Act" is we took out
18 fee-generating cases because those are not prohibited
19 by the LSC Act. You can take those cases as long as
20 you follow certain procedures.

21 And this committee had discussed that issue
22 under the prior consideration of Part 1609, which you

1 will be discussing in one of the next two days.

2 So we've left that there to see if that is
3 still what you want to do. Of course, now, as you
4 know, even if you take fee-generating cases, you can't
5 keep attorneys fees. So the attorney fees
6 restriction is under the second definition in this
7 part.

8 CHAIR BATTLE: Okay.

9 MR. McCALPIN: Can I raise a general question
10 that I should have raised sooner? Is there something
11 in the Administrative Procedure Act that says that we
12 have to have 30 days for comments on all of these
13 interim rules?

14 You remember we early on gave 60 days on many
15 of them at the request of the ABA so the bars could
16 comment, but I just wondered is there something that
17 requires us to stick to 30 days in an interim rule?

18 CHAIR BATTLE: Suzanne?

19 MS. GLASOW: Our LSC Act requires 30 days at a
20 minimum. We put 30 days in each of these rules with
21 the understanding that we were going to try to get all
22 of them back before the Board for the October meeting.

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1 CHAIR BATTLE: Yeah.

2 MS. GLASOW: Which we would need to do. But I
3 had a discussion with LaVeeda earlier that -- you know,
4 we can change that number.

5 CHAIR BATTLE: My view is this: I think what
6 we ought to do is stagger them. And there are some
7 that are just the extension of an already existing
8 prohibition to private funds that I think we can
9 request back some comment in 30 days.

10 I would prefer to see us go 60 on others
11 because of the fact that we've got so many that we're
12 going to be putting out, and programs are really going
13 to need time to be able to respond to them.

14 And as we go through this process, we may be
15 able to identify those that really -- you know, the
16 restriction is straightforward.

17 There is very little room for comment or
18 change, and all we're doing is either taking an
19 existing restriction for which we've already gotten
20 comments from the field and from other interested
21 parties already and we're applying it to private funds
22 or nonLSC funds as well.

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1 So we really don't need the additional time.
2 So I would stagger them, and we may go through and
3 identify them as we look at them today. Linda.

4 MS. PERLE: I just want to note that if you
5 think about the time line, these will probably be
6 published -- August 1st. And I know in Washington and
7 some other places, but August is have very difficult
8 time for people to, kind of, get together and make any
9 judgments on these things.

10 But I think that you ought to, at least for
11 those that do have --

12 CHAIR BATTLE: That's my suggestion. We can
13 have some work to do in October but not this whole
14 move. So Bill, in response to your question, if the
15 statute has a minimum time frame of 30 days --

16 MR. McCALPIN: I was not thinking of reducing
17 it at all. I just wonder if the Administrative
18 Procedure Act required a flat 30 days.

19 MS. PERLE: Well, first of all, the
20 Administrative Procedure Act allows you to do interim
21 regs, and there is no period.

22 MS. GLASOW: That was going to be a caution I

1 was going to add that you could extend the comment
2 period, but I think to be an interim where you can't
3 let it go on forever. You have to be showing that
4 you're making the effort to --

5 CHAIR BATTLE: To work on a proposed rule,
6 yeah.

7 MS. GLASOW: -- follow a normal process and
8 get a final rule back in. So you have to -- you can't
9 go too far either way in that sense.

10 MS. PERLE: Well, of course, the normal
11 process at this point is you give 60 days.

12 CHAIR BATTLE: So what we'll do is we'll
13 stagger. We'll take a few at 30 that don't require a
14 lot of work and comment, and then we'll put the rest on
15 a 60-day time frame, I think.

16 MR. McCALPIN: Recognizing that we won't get
17 to those in October.

18 CHAIR BATTLE: Yes. Yes, we won't. We won't
19 be able to get to the ones put out for 60 days in
20 October for sure.

21 MS. GLASOW: That's right.

22 CHAIR BATTLE: Okay. Now, are there any other

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1 comments?

2 MR. TULL: Can I just make one comment, which
3 is -- this isn't at all to say that the suggestion of
4 extending some to 60 is wrong, but it does also
5 implicate -- there is a second wave of regulations that
6 we contemplate that have to do with enforcement of --
7 with Section 509.

8 We've been in conversations with the Inspector
9 General's Office about a set of regulations to
10 implement that, changing that -- or at least addressing
11 a question whether we should change 1630, which is the
12 cost procedures, and 1627, a small portion of which is
13 changed here, but there is a much larger body of 1627
14 that was not touched in this round.

15 So it will have a ripple effect. That's not
16 to say it's a bad decision --

17 CHAIR BATTLE: It will never be over.

18 MR. TULL: That is a consequence.

19 CHAIR BATTLE: We know. Taking into account
20 you're right, we do have some additional regulations
21 that we'll have to take through this process as well.
22 Can we walk through 1610? Okay.

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1 MR. ASKEW: You've been confirmed for another
2 three years. We can work on this for three more years.

3

4 CHAIR BATTLE: I've got until 1998, guys.

5 MR. TULL: Full-time job processing regs.

6 CHAIR BATTLE: Are there any questions about
7 1610.1, the Purpose?

8 MR. McCALPIN: I wonder if we should define
9 "nonLSC funds" as "all funds received by a recipient
10 from sources other than the LSC."

11 Maybe it's self-explanatory. I don't know.
12 It's intended to include private funds, public funds,
13 everything, and I -- when I looked on the use of nonLSC
14 funds, I wondered if we needed to be more expansive
15 about what we were talking about.

16 CHAIR BATTLE: I think that a definition would
17 be helpful. I think that's a good suggestion. I
18 notice that we don't actually define "nonLSC funds, and
19 I think it would be helpful." Okay. Can we do that?

20 MS. GLASOW: Sure.

21 CHAIR BATTLE: Okay. All right. And that's
22 really 1610.2, which brings us to 1610.2, if there are

1 no other --

2 MR. FORGER: 1610.1, "The purpose of this
3 rule," is that where we are?

4 MS. GLASOW: Yes.

5 MR. FORGER: "-- is to implement statutory
6 restrictions on a recipient's activities." I think
7 it's in the use of nonLSC funds. This isn't a two-
8 pronged regulation, one to restrict a recipient's
9 activities and then also restrict the use of nonLSC
10 funds.

11 CHAIR BATTLE: How would you state it?

12 MR. FORGER: I'd just strike the "and" because
13 it's not a conjunctive, a two-prong, "on a recipient's
14 activities in the use" --

15 MR. McCALPIN: Alex, what page are you on?

16 CHAIR BATTLE: It's actually in the commentary
17 instead of the rule.

18 MR. FORGER: You skipped to the --

19 CHAIR BATTLE: Yeah. What we've been doing
20 really is going through the actual rule, but let me
21 just do this because, in all fairness, Alex, you're
22 right.

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1 What I've been doing is if there are any
2 editing changes to the commentary, I've generally taken
3 that up first. So I think that's fair. We can make
4 that change now. MR. FORGER: It's the
5 restriction on the use of nonLSC money is, basically,
6 what we're talking about.

7 CHAIR BATTLE: Yeah.

8 MR. FORGER: So if you just struck the word
9 "and" and say "in the."

10 MS. PERLE: Or just restrict -- just take out
11 "activities" --

12 MR. FORGER: Sure.

13 MR. McCALPIN: If you're looking at that, then
14 I would look at the second line on page 2 and the words
15 "directly from LSC." To any person or entity receiving
16 LSC funds, doesn't this apply to subgrants as well?
17 And they would not get them directly from the LSC.

18 CHAIR BATTLE: A subgrant is only of the LSC
19 funds.

20 MR. McCALPIN: Yeah, but
21 they're not directly from LSC.

22 MR. TULL: I'm sorry, Bill. Which line are
you on? CHAIR BATTLE: Why do we need

1 "directly from LSC"?

2 MR. McCALPIN: I don't think we do.

3 MS. PERLE: But if you do --

4 CHAIR BATTLE: Let's go back -- I'm sorry.

5 And that was my error.

6 MR. McCALPIN: Page 2, second line.

7 CHAIR BATTLE: Let's go back and edit the
8 commentary first. No. That's fine. Can you take out
9 the "directly from LSC" completely?

10 MR. McCALPIN: Yes.

11 CHAIR BATTLE: "If you receive LSC funds."

12 MS. PERLE: Well, about if you receive LSC --
13 all right. Never mind. Sorry. You're right.

14 CHAIR BATTLE: Okay.

15 MR. McCALPIN: Further down the page, I don't
16 know why we have to wear a sack cloth and ashes by
17 pointing out that it was in 1977 that we last did this,
18 well, or the Congress. I don't know why we need to put
19 the 1977 in there. It's not our doing.

20 CHAIR BATTLE: Sometimes that history is
21 wonderful to know.

22 MR. ASKEW: Just say 20 years ago.

1 CHAIR BATTLE: When we get into this second
2 one, I just -- it's an editing change. "Second, it
3 incorporates the restrictions imposed by the 1996
4 Appropriations Bill," which are is fine, "which apply
5 to" take out "both" "a recipient's nonLSC funds and its
6 LSC funds." The word "both" is unnecessary.

7 MR. McCALPIN: I would convert those. "Both
8 LSC funds and nonLSC funds."

9 CHAIR BATTLE: I was doing a lot of flipping
10 in this because, really, my view was the reason for
11 this interim reg really, number one, is to implement
12 the Corporation's FY 1996 Appropriations Act, and then,
13 two, to make technical corrections.

14 And that flips the stated intention at the
15 beginning, as opposed to saying the reason we're doing
16 this interim reg is to make this difficult, because
17 that's not really the primary reason. I would flip
18 that to make that -- and then, once you flip that, I
19 think it reoccurs later on down in here somewhere.

20 MR. McCALPIN: I think we got the word
21 "directly" in the second to the last line on that page
22 again.

1 MS. GLASOW: Okay. Got it.

2 CHAIR BATTLE: And then that flip that I'm
3 talking about comes up in that last paragraph,
4 "Generally, this interim rule serves two purposes.
5 First, the technical --" make that the second, and make
6 the first thing the restrictions, because that's the
7 purpose for the interim rule.

8 I would take out the word "it." "The language
9 has also been revised to make clear that the
10 restrictions on private funds apply only to those
11 specified --"

12 MR. McCALPIN: Where are you reading?

13 CHAIR BATTLE: I'm in the middle 1610.2(a),
14 "Purposes prohibited by the LSC Act."

15 MR. McCALPIN: Oh, you're way ahead of us.
16 You're way ahead of us.

17 CHAIR BATTLE: Oh, I'm sorry. A whole page
18 ahead, okay.

19 MS. GLASOW: Language has been revised to
20 what?

21 CHAIR BATTLE: "The language has also been
22 revised to make clear that the restrictions on private

1 funds apply only to those specified," instead of "make
2 it clear."

3 MR. McCALPIN: I agree with you, but again,
4 why use "private funds"? Why not use "nonLSC funds,
5 which we have defined above"?

6 MS. PERLE: Because this one applies to
7 private funds. The restrictions that are in the LSC
8 Act only apply to private funds. They don't apply to
9 nonLSC --

10 MR. McCALPIN: Oh, the Act. You're right.
11 You're right. You're right.

12 CHAIR BATTLE: Okay.

13 MR. McCALPIN: Back up to 1610.1, I think it
14 might be useful to put the citation of the LSC Act --

15 CHAIR BATTLE: I said that, too. Yeah, you're
16 right.

17 MR. McCALPIN: I would cite the LSC Act in
18 1610.1, 42 U.S.C. 2996 --

19 MS. GLASOW: In the commentary?

20 MR. McCALPIN: Yeah.

21 CHAIR BATTLE: In the commentary.

22 MR. McCALPIN: We're on page 3.

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1 CHAIR BATTLE: Yeah. Anything else on page 3?
2 I had a little note to myself as I read this at the
3 bottom of page 3. "Account the references to
4 legislative and administrative representation and to
5 advocacy training were deleted from the definition and
6 moved because the restrictions in the appropriations
7 act regarding these activities are broader than those
8 in the LSC Act."

9 If, for any reason, the appropriations
10 restrictions are later stricken, then where are we by
11 doing this?

12 MR. McCALPIN: Where are you, LaVeeda?

13 CHAIR BATTLE: I'm at the bottom of page 3,
14 the last sentence, the top of page 4. What we're doing
15 is since the LSC restrictions are a subset of the
16 appropriations restrictions, which are a larger set, we
17 are just consuming or subsuming the act restrictions
18 into the appropriations restrictions.

19 And my question is if the appropriations
20 restrictions for some reason dissolve, then where are
21 we?

22 MS. GLASOW: We will have to revise this rule.

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1 We found that, really, that was true for most of these
2 regulations.

3 We first started off trying to find language,
4 where the appropriations language disappeared, the
5 rule, by itself, would no longer be applicable.

6 But we just ran into so many problems doing
7 that it just wasn't working, and it also began to look
8 like it was kind of an effort to say, well, I'm doing
9 this because --

10 CHAIR BATTLE: Yeah. Well, all I would like
11 for us to do is to preserve this history so that if
12 that occurs we have someplace keynoted how to at that
13 point go back and address all of this.

14 MS. GLASOW: We can be more specific in the
15 preamble what restrictions are carried over into 504.

16 CHAIR BATTLE: Yeah. I think that's
17 important. I think that's important. Okay.

18 MS. PERLE: Originally, there was an effort in
19 each reg to make a distinction what was nonLSC, and
20 then we thought it would be better to do it simply here
21 in one place, and that way we could revise this reg and
22 would take care of many of the problems.

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1 CHAIR BATTLE: Yeah. It does.

2 MS. PERLE: Rather than having to necessarily
3 go back -- we still may have to make some changes in
4 some of them, like 1612, because there are differences
5 in how LSC funds are handled within that.

6 CHAIR BATTLE: Okay. Anything else on page 4?
7 I had one suggestion. In 1610.2(b), when we speak of
8 Inspection 504(a) of the, I think we ought to say 1996
9 Appropriations Act throughout any time we mentioned it.
10

11 In 1610.2(c), IOLTA funds, "This definition is
12 added to conform with the term as it is used in the
13 revised section," rather than using "This definition is
14 added to define."

15 MR. McCALPIN: Can we back up --

16 MS. PERLE: No, no. This is defining the term
17 that's used. It's not conforming.

18 CHAIR BATTLE: "As it is used in the revised
19 section on authorized uses of nonLSC funds"?

20 MS. PERLE: We've used IOLTA in this -- we
21 specified IOLTA funds in this rule. It wasn't before.
22 So this is defining what IOLTA funds means.

1 CHAIR BATTLE: Okay. It's not anywhere else?
2 I -- okay.

3 MS. GLASOW: We did intend to define IOLTA
4 funds.

5 CHAIR BATTLE: Okay.

6 MS. GLASOW: To provide a definition --

7 CHAIR BATTLE: Used in the revised section --

8 MS. PERLE: There was no definition of IOLTA
9 before.

10 MS. GLASOW: So it's a brand new definition in
11 the rule.

12 CHAIR BATTLE: Define. Okay.

13 MR. McCALPIN: Let's go back up to the
14 sentence that immediately precedes 2(b). Now, without
15 prejudging where we're going to get with that, in the
16 parenthesis, I think it's "for cases or claims under
17 the statute."

18 And then, since you have referred to 1609 in
19 the first part of the sentence, it seems to me in the
20 prohibition part you ought to refer to 1642.

21 In other words, you say "attorneys fees, which
22 are also dealt with under the current version of 1609

1 but are prohibited (for cases not pending on April 26)
2 under Part 1642 under the appropriations act are dealt
3 with in 1610.2(b)(9.) "

4 In other words, having referred to 1609, it
5 seems to me it was only appropriate to refer to 1642.

6 CHAIR BATTLE: Yeah. That makes sense.

7 Anything else?

8 MR. FORGER: Right back to 1610.2(a)? We're
9 past that?

10 CHAIR BATTLE: No. You can. You can back up
11 to that.

12 MR. FORGER: "The reference to fee-generating
13 cases," four lines from the top, "was deleted because
14 neither the LSC Act nor appropriations bill "prohibits"
15 rather than "prohibit."

16 MR. McCALPIN: Then go another line, Alex --

17 MR. FORGER: And I got a "so long as."

18 MS. PERLE: Where are you? I'm sorry.

19 MR. FORGER: I was on the fifth line, one,
20 two, three, four, fifth line of page 4, the third word
21 would make it a singular.

22 MR. McCALPIN: Right.

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1 CHAIR BATTLE: "Prohibit" with an "s."

2 MR. McCALPIN: "Neither the Act nor the bill
3 prohibits."

4 MR. FORGER: And the next line I would strike
5 another --

6 CHAIR BATTLE: "So long as." You're here to
7 make sure we have no "so long as" in here.

8 MR. McCALPIN: Alex, you're feeling about "so
9 long as" is the way mine is about split infinitives.

10 MR. FORGER: Yes, I know, except when they're
11 more graphic.

12 MS. PERLE: Did Suzanne and I ever tell you
13 the story about the time that we tried to, in an effort
14 to accommodate your concern about split infinitives, we
15 decided to take one of these regulations and put it
16 through Grammatik, which is one of these programs, so
17 it would pick up all the split infinitives?

18 It picked up everything, and it took us about
19 three hours to get through about one page. It kept
20 telling us the sentences were too -- this is a passive
21 line. We were going crazy. We never did that again.
22 It was really funny, though.

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1 MR. TULL: We did end -- we answered a report
2 that we did in two Commentaries with a preposition.

3 MR. McCALPIN: One ends with "i-n." I circled
4 that.

5 MR. TULL: We remembered you never end a
6 regulation with a preposition. That's the way I think
7 of them.

8 MR. McCALPIN: You don't end a sentence with -
9 -

10 CHAIR BATTLE: A sentence or a regulation.

11 MR. TULL: I know we've gotten into editing
12 the commentary. Is that a conscious choice because
13 this is such an integral part of the reg?

14 CHAIR BATTLE: It was just -- we started doing
15 that and --

16 MS. BERGMARK: In sort of a lapse?

17 CHAIR BATTLE: It was a lapse. But actually,
18 I think it was a healthy one because --

19 MS. GLASOW: In an interest of saving time --

20 CHAIR BATTLE: Do you want to handle the same
21 sections together and go back and forth or finish
22 this editing?

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1 MS. GLASOW: Yeah.

2 CHAIR BATTLE: Okay. All right.

3 MS. GLASOW: We had made a decision earlier
4 that for, you know, just stylistic changes we might
5 have them passed on to us.

6 So I'm just concerned if we spend too much
7 time on that we may lose --

8 MR. FORGER: I think so long as we're
9 referring to --

10 CHAIR BATTLE: We're down to 1610.2(b), which
11 will take us into it. Do we have -- are there any just
12 straight editing changes, any other editing changes?

13 MS. PERLE: Are we still -- are we talking
14 about the --

15 CHAIR BATTLE: Commentary, yeah. While we're
16 here, let's finish the sweep. Do you see anything
17 else?

18 MR. McCALPIN: Let me raise something that's
19 not exactly that. You have defined "private attorney"
20 as "one engaged in the private practice of law on a
21 for-profit basis." What does that do to house counsel
22 or government attorneys?

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1 MR. TULL: Well, house counsel --

2 MR. McCALPIN: Are they in the private
3 practice maybe?

4 MR. TULL: I don't think they would be.

5 CHAIR BATTLE: They're still for-profit. It's
6 government attorneys that are not-for-profit.

7 MR. TULL: Not-for-profit. Yeah, which is
8 on -- where is that

9 MR. McCALPIN: I don't know where we use it.

10 CHAIR BATTLE: What page are we on, 5? 4 and
11 5, page 4 and 5.

12 MS. PERLE: I honestly think that's something
13 that we could deal with if the issue were ever really
14 to arise that the General Counsel's Office could deal
15 with that through interpretation.

16 MR. TULL: What's the import of that? I can't
17 remember what the impart on that is.

18 MS. PERLE: It's in the applicability --

19 MR. TULL: I think that for purposes of this
20 regulation that appears not to be a problem, but the
21 degree to which we use the term "private attorney"
22 elsewhere and refer to pro bono lawyers there is an

1 effort underway to encourage government lawyers to
2 participate in pro bono programs.

3 MR. McCALPIN: And they're doing it.

4 MR. TULL: Exactly. So this particular one
5 has to do where there is a contract with a private
6 attorney and then, sort of, a follow-up from that,
7 which I presume you would never contract with a
8 government lawyer to carry out one of these functions.

9 So it may not be a problem here, but the
10 degree to which this definition becomes something which
11 is referred to elsewhere we need to probably address
12 that in the commentary and say specifically that this
13 has to do with a very specific application.

14 CHAIR BATTLE: Is there anything else?

15 MR. FORGER: On page 6, you refer -- I think
16 the first time I recall that the committee had a
17 particular view. Is that something that's proper in
18 the commentary, I mean, as distinct from Legal Services
19 Corporation?

20 CHAIR BATTLE: Yeah. We do that from time to
21 time.

MR. FORGER: Do you?

22 CHAIR BATTLE: Yeah.

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1 MR. FORGER: Okay.

2 MS. GLASOW: There are some places where I've
3 used the term "committee" where I should have said
4 "board," and I have to go through and check that.
5 Because if it's going to be an interim regular --

6 CHAIR BATTLE: It needs to be "board" as
7 opposed to "proposed reg."

8 MS. GLASOW: Right.

9 MR. FORGER: I don't care for any of that
10 sentence --

11 CHAIR BATTLE: "The board felt."

12 MS. PERLE: Or "decided" I think is what --

13 CHAIR BATTLE: That was one of those 9 p.m.
14 kind of statements.

15 MR. FORGER: In view of the fact that the
16 board --

17 MR. McCALPIN: I think it's also kind of
18 clumsy to talk about "an entity of attorneys."

19 MS. PERLE: Well, that's, again, the statutory
20 language.

21 MR. McCALPIN: Huh?

22 MS. PERLE: That's statutory language.

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1 MR. McCALPIN: That's statutory? Is it?

2 CHAIR BATTLE: Yeah, it is.

3 MS. PERLE: From the LSC Act.

4 MR. McCALPIN: The LSC Act?

5 MS. PERLE: Yes.

6 CHAIR BATTLE: Okay. We're getting down to

7 1610.6. MR. McCALPIN: .6?

8 MR. FORGER: Right.

9 CHAIR BATTLE: That's on page 7.

10 MR. FORGER: What's a self-execution exception
11 as distinct from an exception?

12 MS. PERLE: Where are we?

13 CHAIR BATTLE: 1610.6. And it gets to
14 something Alex is raising. I didn't understand this
15 self-executing exception and why it's a grant of a
16 self-execution exception and then later "without
17 affirmatively granting waivers."

18 I guess what we're trying to get at, and this
19 we'll look at when we get to the statute, is the fact
20 that what we're saying is that this applies -- these
21 restrictions apply, and exceptions are not something
22 that one seeks a waiver for. Is that the point that

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1 we're making?

2 MS. GLASOW: We can take out "self-execution."

3

4 CHAIR BATTLE: There might be some way to word
5 this that doesn't get into double --

6 MS. PERLE: The point was that the old rule
7 had a waiver. We had to seek a waiver.

8 CHAIR BATTLE: Okay.

9 MS. PERLE: And we didn't think there was
10 really a need to seek a waiver, and, in fact, waivers
11 have never been sought.

12 The Corporation just made its decisions about
13 these grants without going through any kind of a
14 process of waiver, and they took into consideration
15 these issues and requirements or exceptions to the
16 requirements as they were making their decisions about
17 to whom the grants were going to be made.

18 That's why I said it was self-executing in the
19 sense that there wasn't any necessity to go through a
20 process which was required under this -- under the
21 previous rule but never really followed.

22 MR. FORGER: But since we're addressing

1 current stuff, I guess --

2 MS. GLASOW: We can fix this.

3 CHAIR BATTLE: Can we fix that?

4 MS. GLASOW: Sure.

5 MR. FORGER: Just say "grants on" --

6 MS. GLASOW: Rewriting.

7 MR. FORGER: Because I then would have to know
8 how I go about getting a self-executing exception, and
9 that might take --

10 MS. GLASOW: Actually, I thought about taking
11 that out before. I must have missed it.

12 CHAIR BATTLE: Okay. When we get down to
13 about, one, two, three, four lines from the bottom
14 where we start -- "This subsection makes it clear that
15 the appropriations act restrictions or representation
16 of prisoners does not apply to such lawyers," there are
17 so many different types of lawyers.

18 You've got private attorneys, law firms, legal
19 aid programs. Are we talking about that same group, or
20 are we just talking about private attorneys?

21 If we're talking about private attorneys, we
22 say it earlier. Why don't we just say "private

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1 attorneys, law firms and legal aid organizations." And
2 why do we say "legal aid organizations" down here and
3 then "legal aid programs" up a little bit earlier.

4 MR. McCALPIN: Let me back up even beyond
5 that. If you look over on page 12 at the actual
6 provision of the regulation, "If the Corporation makes
7 a contract with" and 2 is "a legal aid organization
8 that provides criminal -- legal aid organization accept
9 criminal related cases -- don't apply."

10 So really, in 1, what we're talking about is a
11 private attorney, law firm, state or local entity of
12 attorneys which represent clients in criminal cases.

13 In other words, aren't all the of these
14 relating to representation in criminal cases?

15 CHAIR BATTLE: Yeah. Yeah.

16 MR. McCALPIN: So 1, stated as it is, is too
17 broad.

18 MS. PERLE: So you're
19 suggesting adding before the comma "that represents
20 clients of criminal cases"?

21 MR. McCALPIN: Yeah. Now, if you go back to
22 where you were, LaVeeda --

CHAIR BATTLE: Yeah.

1 MS. PERLE: And that is stated in the -- in
2 the preamble, it does say "which handle criminal cases
3 in their nonLSC" --

4 CHAIR BATTLE: Right. But all I want to do is
5 just be consistent in our language using. If we're
6 going to talk about private attorneys, let's say that
7 in both places. If we're going to talk about law
8 firms, say that, and legal aid organizations, say that
9 instead of programs and then organizations. Okay.

10 Anything else in the commentary? We were in
11 Definitions. There is nothing else in the commentary,
12 when we leapt back into the commentary and began to do
13 our editing.

14 So let's just go back through Definitions and
15 see is there anything else, other than what Bill has
16 already pointed out that we need to define "nonLSC
17 funds" under Definitions.

18 MS. PERLE: I have a question. If we define
19 "nonLSC funds," do we have to define "private funds"
20 and "public funds" separately?

21 CHAIR BATTLE: There are instances where
22 nonLSC funds are -- where we've got an appropriations

1 law that says you cannot use nonLSC funds for certain
2 things, but our act says private funds.

3 So I think that those definitions --

4 MS. PERLE: And there is a difference?

5 CHAIR BATTLE: Yeah. I think those
6 definitions are still useful.

7 MS. PERLE: Well, my question was do we have
8 to define "private funds" and "public funds" in
9 addition to "nonLSC funds" and "IOLTA funds" and
10 "travel funds"? Do we have to define all of those
11 things?

12 MR. McCALPIN: We may have to.

13 CHAIR BATTLE: Yeah, I think so. We have
14 IOLTA funds already in the definitions. We need to add
15 private funds and nonLSC funds to the definitions.

16 MS. PERLE: And public funds.

17 CHAIR BATTLE: And public funds.

18 MS. PERLE: Okay.

19 MR. FORGER: And nonLSC embraces everything
20 except LSC.

21 CHAIR BATTLE: Yeah.

22 MR. McCALPIN: LaVeeda, where are you now?

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1 CHAIR BATTLE: We are in the Definitions
2 section in the actual rule 1610.2.

3 MS. BERGMARK: Page 9.

4 CHAIR BATTLE: Page 9.

5 MR. McCALPIN: Okay. Let me suggest that we
6 have regularly -- it says here, "'Purpose prohibited by
7 act' means any activity prohibited by the following
8 sections of the LSC Act," and we list all those down
9 and those provisions of the regulations that implement
10 that section.

11 Here I think we ought to refer to those. In
12 other words, I think we ought to say Part 1608 after
13 line 1, Part 1613 after line 3. In other words, if
14 we're citing to the statute, if we say "Pursuant to the
15 statute and regulations," and we cite to the statute,
16 then I think we ought to cite to the regulation as
17 well.

18 CHAIR BATTLE: Okay.

19 MR. McCALPIN: This is not in the --

20 MS. PERLE: Some of them we don't have
21 regulations for them.

22 CHAIR BATTLE: Some there are not --

1 MS. PERLE: Some there are no regulations.

2 MR. McCALPIN: What?

3 MS. PERLE: Some there are no regulations.

4 MR. McCALPIN: Yes, No. 2. No. 2 there is
5 none.

6 MS. PERLE: 6 --

7 CHAIR BATTLE: 6, 7, 8.

8 MR. McCALPIN: And the same is true under
9 subsection (b).

10 CHAIR BATTLE: Well, and subsection (b) --

11 MR. McCALPIN: We have part 1617 on class
12 actions, 32 on redistricting, 20 on priorities, 42 on
13 attorneys fees.

14 MS. GLASOW: All the new regs would be under
15 that. All the brand new regulations --

16 MR. McCALPIN: Well, no.

17 CHAIR BATTLE: But we don't have rates for all
18 of these sections.

19 MR. McCALPIN: 17 and 20 --

20 MS. GLASOW: In addition to all the new ones.

21 CHAIR BATTLE: Anything else in Definitions?

22 MR. McCALPIN: Yeah. Under (f), "State or

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1 local entity of attorneys' means involuntary or
2 mandatory bar association, pro bono program, private
3 not-for-profit organization."

4 It seems to me you may have private not-for-
5 profit organizations which are not entities of
6 attorneys, or you may have private not-for-profit
7 corporation, including attorneys, which are not what
8 you're talking about here.

9 CHAIR BATTLE: Legal organizations, private
10 not-for-profit legal organizations?

11 MR. McCALPIN: I don't know, but it just
12 seemed to me that the private not-for-profit
13 organization was not consistent with what we were
14 talking about.

15 MS. PERLE: Well, you know, Congress didn't
16 define what they meant by "state or local entity of
17 attorneys" --

18 MR. McCALPIN: Where is that?

19 MS. PERLE: It's in Section 1010(c) of the
20 Act.

21 MR. McCALPIN: 1010(c)?

22 CHAIR BATTLE: I can think of a private

1 nonprofit legal organization in Alabama. The Southern
2 Poverty Law Center is a nonprofit organization. It's
3 organized as a not-for-profit organization.

4 It is not a -- it's not public. It's not a
5 private attorney organization for profit. But the
6 question is a private not-for-profit organization,
7 corporation or similar entity of attorneys.

8 MR. McCALPIN: Yeah. We're not talking about
9 every private not-for-profit organization, but since
10 it's part of a definition of an entity of attorneys,
11 maybe it's assumed that --

12 CHAIR BATTLE: Yeah.

13 MS. PERLE: Well, we could add "of attorneys"
14 at the end.

15 CHAIR BATTLE: Yeah. That's my suggestion.

16 MS. PERLE: Or we could put "private nonprofit
17 legal organizations, corporation or similar entities of
18 attorneys."

19 CHAIR BATTLE: But what we're really doing is
20 we're defining "entity of attorneys." We're defining
21 "entity" by saying "private not-for-profit
22 organization, corporation or similar entity of

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1 attorneys."

2 But you are defining an entity of attorneys by
3 saying it's an entity of attorneys, defining the term
4 by --

5 MS. PERLE: Well, do you want to say "legal
6 organization, corporation or other similar entity"?
7 Does that do it?

8 CHAIR BATTLE: We can. But I don't know if
9 there is such a thing as a nonprofit legal
10 organization, is there?

11 MS. PERLE: Yeah, the Southern Poverty Law
12 Center.

13 CHAIR BATTLE: Lawyers committee is a not-for-
14 profit organization --

15 MR. McCALPIN: Or your reference service might
16 be.

17 CHAIR BATTLE: Okay.

18 MS. PERLE: Yeah, lawyer referral service.

19 MR. McCALPIN: Legal Aid Society.

20 CHAIR BATTLE: Okay. Anything else in
21 Definition? Prohibition, 1610.3.

22 MR. McCALPIN: Why do we not include the

1 prohibition contained in Section 506?

2 MS. PERLE: What's 506?

3 MR. McCALPIN: Suits against the Corporation.

4 MS. PERLE: Because that's only with LSC
5 funds.

6 MS. BERGMARK: That's an LSC funds
7 restriction.

8 MS. PERLE: We didn't include any of the
9 restrictions that are only LSC fund restrictions except
10 for those that are, sort of, exceptions to the other
11 ones, like on legislative --

12 CHAIR BATTLE: I wondered why we didn't have a
13 reg on Section 506.

14 MS. PERLE: There is no reg.

15 CHAIR BATTLE: I know.

16 MS. PERLE: I don't think you need a reg.

17 MS. BERGMARK: Yeah. We're going to have time
18 for it, it looks like.

19 CHAIR BATTLE: This isn't enough work for us.

20 MS. PERLE: I don't think you need a reg. I
21 mean, I think --

22 CHAIR BATTLE: It's pretty straightforward.

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1 MS. PERLE: One of the OMB circulars that
2 provide guidance to the Corporation prohibit the use
3 of --

4 CHAIR BATTLE: LSC funds.

5 MS. PERLE: -- federal funds to sue the -- to
6 sue the federal government, and I think it's sort of a
7 similar thing here. That's the reason that that's not
8 included because this is only nonLSC funds.

9 MR. McCALPIN: Okay.

10 CHAIR BATTLE: Okay. 1610.4, Authorized use
11 of other funds." This is a section with three
12 subsections, subsets. Any questions about the three of
13 them?

14 MR. McCALPIN: I don't see why you say "may
15 receive public or IOLTA." Why don't you say "A
16 recipient may receive public funds, including IOLTA,"
17 and use them in accordance --

18 CHAIR BATTLE: Is IOLTA just defined as
19 public? How do we define IOLTA?

20 MR. McCALPIN: Well, we've always held --

21 CHAIR BATTLE: We define IOLTA as "fund
22 derived from programs established by state court

1 rules," and we don't even mention the fact that they're
2 public funds.

3 MS. GLASOW: We never have defined them
4 clearly as public funds. In an earlier version of
5 1610, I think we were talking about treating them like
6 public funds, but we never have done a formal
7 definition of them.

8 MS. PERLE: Well, the Corporation has always
9 treated IOLTA funds as public after that first set of
10 opinions that were several years ago.

11 Some states, for a variety of reasons, within
12 the state don't treat them -- they may be public for
13 certain purposes and not public for other purposes, but
14 for purposes of LSC, we want to be consistent in terms
15 of the way IOLTA funds work.

16 CHAIR BATTLE: But the definition of IOLTA
17 funds doesn't mention that they're public funds.
18 That's the point that I'm raising.

19 MS. GLASOW: Right. So either when we define
20 "public funds" for this rule, we can include them in
21 that, or we can add language to the IOLTA definition
22 that defines them as public.

1 CHAIR BATTLE: We just need to make it clear.

2 MS. PERLE: Well, I think by changing the way
3 that Bill suggested, it says that for purposes of this
4 rule we're going to treat them in the same way we're
5 treating public funds, and I think that's the best way
6 to handle that.

7 Excuse me. Now I remember. That's why the
8 "or" was in there instead of "including," because some
9 of the IOLTA providers were perfectly happy to say that
10 for purposes of LSC IOLTA should be treated as public
11 funds, but they didn't want it to be defined --

12 CHAIR BATTLE: As public funds.

13 MS. PERLE: Because in their states, for a
14 variety of reasons --

15 CHAIR BATTLE: They're not.

16 MS. PERLE: They're not.

17 CHAIR BATTLE: Okay. So public or IOLTA
18 serves that purpose.

19 MS. PERLE: So I would suggest that we leave
20 it the way it's written.

21 CHAIR BATTLE: Okay.

22 MR. FORGER: How do you exclude private

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1 contributions?

2 MS. PERLE: Pardon me?

3 MR. FORGER: Unless that's public funds. How
4 broad is -- if I contribute \$5, is that public funds?

5 MS. PERLE: No. That's private.

6 MR. FORGER: And is that excluded? I can't
7 use it for the purpose given?

8 MS. PERLE: That's right.

9 MS. GLASOW: Correct.

10 MS. PERLE: Under the LSC Act provisions.

11 MR. FORGER: But can I use it if it's not
12 consistent with 504?

13 MS. PERLE: No. The LSC Act -- 1050 of the
14 LSC Act
15 restricts private funds to the same degree that LSC
16 funds are restricted. There is an exception for public
17 funds in the LSC Act restriction.

18 MR. FORGER: Not with 504.

19 MS. PERLE: Not with 504. There is no
20 exception for private funds -- for public funds.
21 Excuse me.

22 MR. FORGER: I mean, for me, being naive, just

1 reading (b), it says to me that I can't accept private
2 funds even if they're not used for an activity
3 prohibited by 504.

4 MS. PERLE: I'm sorry. I'm confused.

5 MR. FORGER: That's probably me, Linda. On
6 (b) --

7 MS. PERLE: 1610.4 (b)?

8 MR. FORGER: Yes. When I read this, I can
9 receive public and IOLTA funds, but I can't receive any
10 private funds.

11 MR. TULL: Because this is written as an
12 authorization to (c), as opposed to an authorization to
13 spend inconsistent with the Act so long as used for
14 purposes for which they were granted.

15 MS. GLASOW: I think (b) was written, the
16 first long clause, allows you to receive public or
17 IOLTA funds and use them in accordance with the purpose
18 they're provided, which would allow you to use them for
19 purposes prohibited by the LSC Act.

20 But then you hit the 504 restrictions that say
21 you can't do that activity regardless of what funds
22 you're using. So that's we added "so long as they're

1 not used for anything prohibited by Section 504."

2 MR. McCALPIN: So long as.

3 CHAIR BATTLE: But he's saying private, public
4 or IOLTA.

5 MS. PERLE: But I think that what Alex is
6 suggesting, and I don't think it will hurt, would be to
7 add another --

8 CHAIR BATTLE: Yeah, private.

9 MS. PERLE: "Recipient may use private funds
10 only --"

11 MR. McCALPIN: "Consistent with the LSC Act."

12 MS. PERLE: "Consistent with the LSC Act and
13 Section 504."

14 MR. McCALPIN: You're adding another provision
15 to it.

16 MS. PERLE: Right. Okay. Okay. I see.

17 MS. BERGMARK: And then you've covered every
18 category of nonLSC funds that you've defined.

19 MS. PERLE: Right.

20 MS. BERGMARK: Right?

21 MS. PERLE: Right.

22 CHAIR BATTLE: We've got another "so long as"

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1 Alex.

2 MR. FORGER: Yeah, I know.

3 MS. GLASOW: I've circled it.

4 CHAIR BATTLE: Any changes to (c)? Laurie?

5 MS. TARANTOWICZ: I just have a question.

6 1610.4 (a) (b) and (c) use -- (a) uses "in accordance
7 with the specific purposes for which funds are
8 provided," (b) says that "in accordance with the
9 purposes for which they were provided," and (c) says,
10 "funds used for specific purposes for which they were
11 received." Is there a reason that it's three different
12 formulations?

13 MS. PERLE: There is a reason why one is
14 specific and one is not specific. The LSC Act doesn't
15 have the word "specific" in it.

16 MS. TARANTOWICZ: Right.

17 MS. PERLE: There was some confusion on the
18 tribal, because the LSC Act says -- doesn't say
19 "specific," and in 504, I think it does. We could at
20 "specific" for all of them. I don't really think that
21 there is any significant difference.

22 MR. TULL: Does "specific" mean that the grant

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1 states the purpose, as opposed to, sort of, a broader -
2 -

3 MS. PERLE: Well, of course, if you get a
4 general assistance grant, that means you can do
5 anything with it. In other words, if you get -- if a
6 recipient gets a grant from a foundation which says,
7 "Here, you can use this money for whatever you want to
8 use it for" --

9 MS. GLASOW: For legal services to the poor.

10 MS. PERLE: For legal services to the poor.

11 MS. GLASOW: As long as you're within the
12 grant terms. It does not mean that you can only use it
13 for housing cases, only if the grant says specifically
14 you can use it for housing cases.

15 If the grant allows you within broad terms to
16 do a variety of legal assistance cases, it would
17 include housing. It doesn't have to be that specific
18 to allow you to use them for the purposes --

19 CHAIR BATTLE: Okay. Can we edit the "so long
20 as(s) in (b) and (c)?"

21 MS. GLASOW: Yes.

22 CHAIR BATTLE: The other point that I think --

1 well, Laurie raised a point that Linda addressed in
2 part why we have "specific purposes" in (a) and just
3 "purposes" in (b). And then, in (c), we have "specific
4 purposes."

5 MS. TARANTOWICZ: And then, in (c), you have
6 "received," and in (b) and (a) you have "provided."

7 CHAIR BATTLE: We could just make that
8 language. If it's specific, then we will use one
9 methodology for clarifying that, and if it's not
10 specific, I think we can -- we can make that editing
11 change in (c).

12 Anything in 1610.5, Notification? Anything in
13 1610 -- I'm sorry. Rick?

14 MR. TEITELMAN: There is an inconsistency in
15 the preamble that talks about the IRS requiring
16 notification of donations of more than \$250, and it's
17 in the preamble -- want to be consistent with the
18 Internal Revenue Code.

19 This says less than \$250, which makes a big
20 difference if you're the person setting up
21 notifications.

22 MS. PERLE: Right.

1 CHAIR BATTLE: More than.

2 MR. McCALPIN: If it's \$250, you have to
3 notify the IRS.

4 MS. PERLE: I think that's right, yes.

5 MR. TEITELMAN: It says more than \$250, but
6 I'm just saying --

7 MR. McCALPIN: 250 or more.

8 MR. TEITELMAN: This says less than 250.

9 MS. GLASOW: We will check that and make it
10 consistent.

11 CHAIR BATTLE: It should be -- so should it be
12 \$250 or less? Is that what you're?

13 MS. PERLE: No, no. In the preamble, it
14 should be \$250 or more.

15 MR. FORGER: The reg is correct, right? It
16 says less than 250.

17 CHAIR BATTLE: Okay. And there is this -- you
18 know, I've raised a question, when I read 1610.5, if
19 you've got a banquet and you're getting lawyers to buy
20 tables for the banquet and that's a donation to a Legal
21 Services program and you're going to have to send out,
22 as people make donations for their tables, a list of

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1 the restrictions to everybody saying, "Thank you for
2 your donation, and by the way, we can't use this money
3 for these purposes."

4 MS. PERLE: I don't think that LSC is -- I
5 think in the program letter it didn't list all the
6 specific restrictions. It just said that the money has
7 to be used consistent with the restrictions in the Act.

8
9 CHAIR BATTLE: But you've got to send a thank
10 you letter with a little --

11 MS. PERLE: With a little tab note.

12 CHAIR BATTLE: At the bottom saying, but this
13 money cannot be used in a manner inconsistent with the
14 Act or the regulations or the law.

15 MR. TULL: Correct, and not specifically
16 listing all those.

17 CHAIR BATTLE: Okay.

18 MR. McCALPIN: Just like the other -- the IRS
19 notice says that no consideration was received.

20 CHAIR BATTLE: Yeah. But that's -- that adds
21 another administrative burden.

22 MR. McCALPIN: Yeah.

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1 CHAIR BATTLE: You can't just call people up
2 and thank them for the donation anymore.

3 MS. PERLE: Well, but the point is we put in
4 the \$250 threshold specifically so that you could for
5 those people just call them up and say thanks you.

6 Since you have --

7 MR. McCALPIN: Not for 250.

8 MS. PERLE: No, under 250. But since -- we
9 assumed that since, under the IRS rules, you have some
10 obligation of providing acknowledgment anyway, if it's
11 250 or above.

12 CHAIR BATTLE: Then you'll provide that
13 acknowledge with a caveat -- okay.

14 MR. FORGER: Suppose you're eating a roast
15 beef dinner for your 250.

16 MS. PERLE: Well, you subtract the cost of the
17 dinner, and it is less than 250.

18 MR. FORGER: So maybe one simply interprets
19 this -- this is for the on-site monitors -- that the
20 contribution means that amount which exceeds the value
21 of that which you have consumed.

22 If you paid 250 for a ticket to the dinner,

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1 they are required to tell you that the dinner cost
2 \$23.08. So your contribution is not 250.

3 MR. TULL: What is the -- and that's, I'm
4 sure, stated precisely in the IRS regulations on it.

5 MS. PERLE: And I read it, but I honestly
6 don't remember --

7 MR. TULL: We should have brought that.

8 MS. BERGMARK: It should be the same as the
9 IRS requirements.

10 MR. TULL: The triggering mechanism, whether
11 the triggering mechanism is the gross amount --

12 MR. McCALPIN: Gross.

13 MR. TULL: -- or the actual value of the
14 contribution.

15 MR. McCALPIN: Gross.

16 MR. TULL: The gross amount?

17 MR. McCALPIN: Gross.

18 MS. GLASOW: We could cite the IRA regulation
19 in the preamble so that people --

20 MS. PERLE: I think we did --

21 CHAIR BATTLE: That's helpful. I think that
22 would be helpful if you did.

1 MS. PERLE: We cited the IRS, the code
2 section.

3 MR. FORGER: So that's a gross figure? And if
4 you're giving him a good dinner, you know, they still
5 have to -- I mean, then it's not --

6 CHAIR BATTLE: If it's chicken, you don't have
7 to report it.

8 MR. TULL: But the theory being that under IRS
9 regulation you already got -- so it's just adding one
10 sentence to it.

11 So if the IRS says it's the gross figure,
12 then --

13 MR. FORGER: Even if you get a gross dinner.

14 MS. BERGMARK: And you probably did.

15 CHAIR BATTLE: Applicability, 1610.6. We've,
16 kind of, covered this in part just a moment ago,
17 (a)(1), we made a change to (1).

18 MR. McCALPIN: I think we take a period out
19 after "appointment" because the thing runs on.

20 CHAIR BATTLE: Yeah.

21 MS. PERLE: It's not -- it's a comma.

22 MR. McCALPIN: Looks like a period on mine.

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1 CHAIR BATTLE: Anything else on (a)
2 Applicability, (b) or (c)? And 1610.7, Accounting,
3 "Funds received by a recipient from a source other than
4 the Corporation shall be accounted for as separate and
5 distinct receipts and disbursements" in a manner that
6 we prescribe. Anything else? Okay. We have just
7 covered 1610, the Use of nonLSC funds with 30 minutes
8 to spare on the day.

9 Let's take a break. Let's take a break.
10 Let's look at what else we got. We got a real short
11 one on redistricting. We might be able to get it done.

12

13 MR. McCALPIN: Oh, I think so.

14 CHAIR BATTLE: Let's take a five-minute break.

15

16 (A brief recess was taken.)

17 CHAIR BATTLE: We will, following our brief
18 five-minute break now, entertaining discussion on 1632
19 on Redistricting.

20 This is a very short reg, and it simply is an
21 interim reg which will allow us to now apply the
22 existing restriction which we have with regard to

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1 redistricting to funds that were formerly
2 unredistricted in the past based on language in 504.

3 Can you give us the background on this,
4 Suzanne?

5 MS. GLASOW: Basically, we fundamentally
6 changed this rule to comply with the new requirement
7 that the restriction apply regardless of what funds are
8 being used. It's what we call in-house an entity
9 restriction.

10 However, in the process, we did make a few
11 other changes just to clarify some terms. It was
12 pointed out to us by several, including your IG, that
13 some of the definitions were redundant in language that
14 made it confusing that suggested, perhaps, that we were
15 saying something else or meaning more than the
16 definition was meant to say.

17 CHAIR BATTLE: Okay.

18 MS. GLASOW: So we really just revised a
19 couple of sections in this rule.

20 CHAIR BATTLE: Okay. Were aren't publishing
21 the full --

22 MR. McCALPIN: The document that I have does

1 not have a 1632.1. Now, does that mean that you are
2 not amending it?

3 MS. GLASOW: Yes. I only put in this rule --
4 this is one of the first ones I did, and because we
5 were making so few revisions, I was only printing the
6 sections that we were actually amending.

7 When you're only amending a few provisions in
8 a rule and it goes to the Federal Register, you don't
9 print the whole rule normally. So that was my
10 intention here.

11 We had comments, I think, in your memo and
12 several others that it would be preferable to publish
13 the whole rule and just point out which sections were
14 being amended.

15 And we can do that very easily, and we can put
16 that in for the next meeting, if you like.

17 MR. McCALPIN: The Federal Register is one
18 thing. The people that have to live with these rules
19 are something else.

20 I think that if this goes out like this, a
21 program is not going to realize that there is another
22 section which is apart of this rule which isn't here.

1 MS. PERLE: And I also think that it's very
2 difficult for you, as a Board, to understand exactly
3 what you're doing if you don't see it in the context of
4 the rest of the rule.

5 MR. McCALPIN: That's right.

6 MS. PERLE: That's was the objection that I
7 had to it.

8 MR. McCALPIN: I'm sensitive to your cost
9 problem, but this is a relatively minor cost. It's one
10 paragraph. When we get to aliens, that's a very big
11 one.

12 CHAIR BATTLE: Yeah.

13 MR. McCALPIN: But I still think it's
14 important to do it.

15 CHAIR BATTLE: How much is missing?

16 MR. McCALPIN: One paragraph.

17 CHAIR BATTLE: Just one paragraph? Okay.
18 Well, then, that's not a major cost factor, it seems to
19 me. That's 1632.

20 Then, when we print out 1632, why don't we
21 just include the Purpose section, 1632, the Purpose
22 section, now reads, "This part is intended to insure

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1 that funds available to recipients will be utilized to
2 the maximum extent for the delivery of basic day-to-day
3 legal services to eligible poor clients.

4 "Involvement in redistricting activities does
5 not constitute the provision of basic day-to-day legal
6 services and is prohibited by this part."

7 So it did not need to be amended to include
8 the issue of nonLSC funds, but when we print this out,
9 we'll include that language.

10 Okay. 1632.2, Definitions. Pretty much these
11 definitions do track the existing rule. Is that
12 correct? Are there any specific changes to this?

13 MR. McCALPIN: No. There is no change to the
14 first one, is there?

15 MS. GLASOW: No.

16 CHAIR BATTLE: To the advocating or opposing
17 any plan is the same. Recipient --

18 MS. GLASOW: There is no change to these.

19 CHAIR BATTLE: To recipient -- redistricting
20 is changed, right?

21 MS. GLASOW: That is correct.

22 CHAIR BATTLE: Okay. Tell us about the

1 changes in redistricting.

2 MS. GLASOW: What we did is we took some of
3 the language from the prohibition and added it to the
4 term "redistricting" -- I would have to, actually,
5 have --

6 MR. McCALPIN: What you're doing, you took it
7 out of .4. Let me suggest to you that's an
8 inappropriate way of doing it.

9 I would suggest that you eliminate the last
10 sentence under (c) at the top of page 5 and that you
11 include a new paragraph 2 under 1632.3, which would
12 read, "This part does not prohibit service to an
13 eligible client under the Voting Right Act of 1965, as
14 amended," with the cite, "which does not involve
15 redistricting as herein above defined."

16 MS. PERLE: Because otherwise, you're defining
17 "redistricting," and then you're saying so long as it
18 doesn't involve redistricting.

19 MR. McCALPIN: Well, it seems to me you put
20 the prohibition and the exception from the prohibition
21 right at the same place so that you see the full
22 parameter of what you can do or not do in one

1 paragraph.

2 CHAIR BATTLE: You're suggesting, Bill, that
3 we have a separate section (d)?

4 MR. McCALPIN: No. No. I'm suggesting that
5 you have a separate section sub 2 under 1632.3.

6 CHAIR BATTLE: Okay. So you say (a) for
7 neither and then (b).

8 MR. McCALPIN: Is it (a) or (1)?

9 CHAIR BATTLE: It would be (a).

10 MR. McCALPIN: Okay. Whatever. That becomes
11 (a) or (1), and then, what I just read becomes (b) or
12 (2).

13 CHAIR BATTLE: Okay.

14 MR. McCALPIN: And that takes out that
15 sentence in (c).

16 CHAIR BATTLE: Okay. Any other changes to
17 1632.3? We have stricken the previous existing
18 Permissible Activities section in favor of including
19 under the prohibition of subsection (b), which pulls
20 part of what was contained in 1632.4(a) up.

21 MR. McCALPIN: Well, except that we haven't
22 said yea or nay as to whether we've rescinded .4.

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1 MS. PERLE: Well, it says --

2 MS. GLASOW: You mean in the preamble?

3 MS. PERLE: Well, I don't know about the
4 preamble, but it says on page 5 --

5 CHAIR BATTLE: 3, that it's deleted.

6 MS. PERLE: Section 1632 .4 is deleted.

7 CHAIR BATTLE: A new section becomes --

8 MR. McCALPIN: Well, then, I would delete the
9 new section 4 also.

10 CHAIR BATTLE: The written policy.

11 MR. ASKEW: I move to table. Oh, I'm not on
12 the committee.

13 MS. GLASOW: Actually, this section 4, again,
14 was one of your earlier regulations we did we changed
15 "governing body" to "recipient policies and
16 procedures," and that's not reflected in your copy.

17 CHAIR BATTLE: Okay. All right. And this is,
18 again, the table on -- John, maybe you can help me.
19 How is this monitored now? Are there written
20 procedures?

21 We did not previously have a provision in the
22 redistricting regulation that addressed this adoption

1 of written procedures. So how does the monitoring take
2 place now?

3 MR. TULL: Well, immediately right now we're
4 in the process of figuring that out with the inspector
5 general in terms of how this will be looked at by
6 auditors.

7 I'd have to look, to be honest with you, and
8 see what questions we --

9 CHAIR BATTLE: Okay. Can we do that before we
10 meet tomorrow?

11 MR. TULL: Sure.

12 CHAIR BATTLE: Because my thinking is there
13 are several regulations that are just an extension of
14 the present application of prohibitions on the use of
15 LSC funds to private funds, and with that we're adding
16 this requirement of a policy.

17 And I'd like to know what used to take place,
18 how we handled it, how we monitored it so that we can
19 assess whether or not there is this need to implement a
20 requirement on programs to have a written policy in
21 each of these areas. Okay?

22 MR. TULL: Okay.

1 CHAIR BATTLE: Okay. All right. Is there
2 anything else that we need to look at on redistricting?

3
4 MS. PERLE: I have a question.

5 CHAIR BATTLE: Okay.

6 MS. PERLE: When you took out 1632.4(c) and
7 (d), are you taking those out because you think they're
8 unnecessary, or does that suggest that this activity is
9 no longer permitted?

10 MR. TULL: No, because they're unnecessary.

11 MS. GLASOW: Unnecessary.

12 MS. PERLE: I think you ought to make that
13 statement, if you haven't done that, in the preamble,
14 because I don't want to suggest --

15 MR. TULL: Right, that somehow this is a
16 change of policy.

17 MS. PERLE: That it's a change of policy.

18 CHAIR BATTLE: Well taken. Well taken,
19 because there were two other aspects to that. Is there
20 anything else on 1634 -- I'm sorry, 1632.4? Anything
21 else? Okay. Ernestine?

22 MS. WATLINGTON: Since we have a full copy of

1 these minutes, do you want to address that?

2 CHAIR BATTLE: Yeah, I can. Let me do that.

3 MR. McCALPIN: Are relieving (d) out also
4 deliberately?

5 MS. GLASOW: (C) and (d) and, of course, (b),
6 travel funds, you still can use travel funds for this.

7 MR. McCALPIN: That's right.

8 MR. TULL: The thought was that 1610 addresses
9 what is now covered in (b). So it's really redundant
10 about that, but (c) is the policy of the Corporation
11 with regard to everything. And we, sort of, singled
12 out this one particular one to say you can do this
13 under these circumstances.

14 And (d) is explicitly permitted under 1604,
15 and that would be a part of it.

16 MS. PERLE: I think you need to make that --

17 MR. TULL: Clear in the commentary.

18 MS. PERLE: -- clear in the commentary.

19 MR. TULL: What we didn't want to do is to
20 have a statement of a prohibition and then a listing of
21 ways that looks like it was advice to programs as to
22 how to go ahead and do it.

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1 It's an issue of topics, among other things,
2 and this is here because of the sensitivity when this
3 regulation was first adopted initially because -- I
4 mean, this would be fixed by the fact that we don't
5 have to republish the whole reg, but the initial
6 rendition of this the only thing changed was 1632.4.

7 So the actual reg that we would have sent over
8 to the Federal Register just had a listing of things
9 you could do and took out the section (b), which didn't
10 appear to be precisely the message we wanted to send.
11 So that's the reason.

12 CHAIR BATTLE: Okay. Are there any other
13 suggested changes? I don't see anyone from the OIG's
14 office, but we had comments, suggestions for typos,
15 clarity. Have we already taken those into account and
16 had some discussion?

17 The copy I have is dated June 19th, so I'm
18 assuming the staff -- well, this was to Victor Fortunato.
19 So you've taken these into account. Okay.

20 And Ernestine has brought up a good point. We
21 have now passed around to all the Board members the
22 final page to the February 23, 1996, minutes.

1 And I'm hoping that each of you have had an
2 opportunity to review those minutes and, in doing so --

3 MR. McCALPIN: What have we got?

4 CHAIR BATTLE: Bucky passed you --

5 MR. McCALPIN: I got a new set of May 19th.

6 CHAIR BATTLE: No. You should have gotten
7 February 23rd.

8 MR. ASKEW: I slid it over here to you this
9 morning.

10 MR. McCALPIN: Well, this is what I got, and
11 this is May 19th, which used to be two pages, and now
12 it's three.

13 CHAIR BATTLE: No. You should have gotten
14 this.

15 MS. WATLINGTON: You should have got this one.

16

17 CHAIR BATTLE: Because we had only gotten
18 pages 1 and 2 and not -- that's my only copy, Bill.

19 MR. McCALPIN: Okay. I'll give it back to
20 you.

21 MS. WATLINGTON: I think I got two. So they
22 gave me yours, probably. I just noticed that.

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1 CHAIR BATTLE: Okay. Well, then, I'll take
2 this one. You can keep that.

3 MR. McCALPIN: I'll give it back to you, but
4 let me show you here is February 23, which I've gotten
5 just now for the first time from you. Here is the May
6 19th that I was operating on this morning. No. Here
7 is the one I was operating on this morning. These are
8 just two pages.

9 CHAIR BATTLE: Well, there was a front and a
10 back to the pages this morning.

11 MR. McCALPIN: This is it.

12 CHAIR BATTLE: Yeah. The copy that I have was
13 much like -- this is Ernestine's copy. I had May 19th
14 like this, front, back and then this.

15 MR. McCALPIN: I had nothing on the back.

16 CHAIR BATTLE: Oh, okay. Well, there was a
17 problem.

18 MR. McCALPIN: We approved those this morning.
19 Okay.

20 CHAIR BATTLE: So now what we have is February
21 23rd, this one, which has page 2. That was the page
22 that was missing.

1 Okay. Let me just say now that both of my
2 Board members have had an opportunity to review the
3 draft minutes for February 23, 1996, I will entertain a
4 motion to approve these minutes.

5 M O T I O N

6 MS. WATLINGTON: I move.

7 MR. McCALPIN: Second.

8 CHAIR BATTLE: Okay. It has been properly
9 moved and seconded. All in favor?

10 (A chorus of ayes.)

11 CHAIR BATTLE: Okay. Motion carries. Just as
12 a matter of process, at this point, though we have gone
13 over, to my glee and surprise, six regulations at this
14 point in time, out of the 15 that we have on our agenda
15 for this meeting, we are not at a point that we need to
16 move anything, because we've got substantial revisions
17 that will need to be made to these.

18 And we will get an opportunity to look at
19 those revisions when we meet again just before the
20 board meeting, and at that point in time I think we can
21 entertain a motion from the committee members to adopt
22 a resolution or make a recommendation -- well, but even

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1 so, what we normally do is send them out for
2 publication.

3 So we would adopt a motion that they go out
4 for publication, because this interim rule -- now, tell
5 me, Suzanne, does this go to the Board?

6 MS. GLASOW: This? Yes.

7 CHAIR BATTLE: Okay.

8 MS. GLASOW: Because it's an interim rule, it
9 is effective. In other words, it's not --

10 CHAIR BATTLE: So we should make our
11 presentation - MS. GLASOW: The day that it
12 becomes effective it's a requirement on our recipients.

13

14 CHAIR BATTLE: So we have to, then, adopt --
15 we have to do a resolution to the Board to adopt these
16 as at our next meeting?

17 MS. GLASOW: That's correct.

18 CHAIR BATTLE: So as we do these --

19 MR. McCALPIN: We would adopt --

20 CHAIR BATTLE: -- editing changes --

21 MR. McCALPIN: We would adopt a resolution on
22 the 19th recommending that the Board adopt them on the

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1 20th as interim rules.

2 CHAIR BATTLE: That's right. Exactly. So we
3 need to have that drafted along with what we're doing,
4 those resolutions, so we can present them at the Board
5 meeting on the 20th.

6 MS. GLASOW: All right.

7 CHAIR BATTLE: Okay.

8 MR. McCALPIN: Maybe we can just have one
9 resolution listing all the --

10 CHAIR BATTLE: Yeah, but I think we have
11 included in the past just the substance of the rule for
12 the Board members that are not part of this committee.

13 I mean, it's just a word processing trick, but
14 we've got some work to do on that. Alex, did you have
15 anything you wanted to add?

16 MR. FORGER: Are you going to review once
17 again the revisions of those that we've just looked at?

18

19 CHAIR BATTLE: No.

20 MR. McCALPIN: We're going to look at those on
21 the 19th.

22 CHAIR BATTLE: We look at them on the 19th.

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1 MR. FORGER: Okay. We're going to send it out
2 to the Board this week, I assume.

3 CHAIR BATTLE: Well, what we will do, the
4 Board will receive these prior to the board meeting,
5 and we will receive them prior to the board meeting for
6 next week. Right?

7 MS. GLASOW: As quickly -- we only have about
8 a week to do this. I can't promise how quickly we will
9 get them out.

10 MR. FORGER: Presumably, the Board has got to
11 rely, in large measure, on the recommendation of the
12 Ops & Regs.

13 CHAIR BATTLE: Yes.

14 MR. FORGER: You can point out policy issues
15 that are implicit, but probably the language and
16 editing can await the public comment. So I suppose it
17 can be a fairly narrow focus for the Board as a whole
18 rather than go through what you have --

19 CHAIR BATTLE: Oh, yeah. We have always just
20 simply --

21 MR. McCALPIN: I don't think there have been
22 any instances where we have recommended to the Board

1 adoption of something as final that it was even
2 debated.

3 MR. FORGER: Well, I remember on our
4 evictions, you know, we got into the issue should it be
5 prisoners or convictions within a year and the like.

6 I mean, that still could be reserved for
7 public --

8 MR. McCALPIN: I wasn't here for --

9 CHAIR BATTLE: Yeah. That was one.

10 MS. WATLINGTON: That was the only one --

11 CHAIR BATTLE: That was the only one out of
12 all the ones that we've done so far.

13 MS. WATLINGTON: Downstairs I just told him
14 about that.

15 CHAIR BATTLE: But in any event, I just wanted
16 to mention that because, as a point of process, when we
17 get our next packet, it should have these provisions,
18 and we should be prepared at our next meeting to also
19 have that resolution that we adopt for the Board, that
20 we recommended to the Board for adoption.

21 We will continue it seems to me. I'm going to
22 entertain a motion that we recess in just a moment, but

1 what we will do is, so that people can prepare for
2 tomorrow, we're going to continue as we have with the
3 regulations as they are set out on our agenda.

4 So if you want to just go forward from where
5 we are to preparing yourself, you may. My thought is
6 that we're going to cover as much as we can tomorrow.

7 I don't expect that we're going to cover all
8 of them. If we do, then we won't need our third day.
9 If we don't, then we've got a third day to cover
10 whatever is remaining after we complete tomorrow's
11 task.

12 MS. WATLINGTON: What time are we convening?

13 CHAIR BATTLE: 9 o'clock.

14 M O T I O N

15 MR. McCALPIN: I move that we stand in recess
16 until 9 o'clock tomorrow morning.

17 MS. WATLINGTON: I second it.

18 CHAIR BATTLE: Okay. It has been properly
19 moved and seconded that we stand in recess until
20 tomorrow morning at 9 o'clock. All in favor?

21 (A chorus of ayes.)

22 CHAIR BATTLE: All opposed?