

ORIGINAL

LEGAL SERVICES CORPORATION

BOARD OF DIRECTORS

RETURN TO CORPORATION
SECRETARY ARCHIVES FILE

OPERATIONS AND REGULATIONS COMMITTEE MEETING

OPEN SESSION

June 19, 1994

9:14 a.m.

Legal Services Corporation
750 First Street, N.E., 11th Floor
The Board Room
Washington, D.C.

Diversified Reporting Services, Inc.

918 16TH STREET, N.W. SUITE 803

WASHINGTON, D.C. 20006

(202) 296-2929

BOARD MEMBERS PRESENT:

LaVeeda Morgan Battle, Chair
Hulett "Bucky" Askew
John G. Brooks
Maria Luisa Mercado
F. William McCalpin
Ernestine P. Watlington

STAFF PRESENT:

Martha Bergmark, Executive Vice President
Patricia D. Batie, Secretary
Victor Fortuno, General Counsel
Edouard Quatrevaux, Inspector General

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C O N T E N T S	PAGE
Approval of Agenda - Motion	4
Executive Session - Motion	5
Approval of minutes - 5/13/94 - Motion	5
Consideration of Update on Reauthorization Legislative Process	6
Proposed Revisions to Part 1607	25
Proposed Changes to Part 1608	27
Proposed Changes to Part 1621	122

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P R O C E E D I N G S

1
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CHAIR BATTLE: I will go ahead and call to order a meeting of the Operations and Regulations Committee. This is June 19th. We have present all three of the members, all four of the members, of this committee.

I believe Doug Eakeley, who is ex-officio to all of the committees, is not going to be here with us today. however, we have Bucky Askew with us as well.

The first order of business is approval of the agenda.

M O T I O N

MR. McCALPIN: So moved.

MS. WATLINGTON: Second.

CHAIR BATTLE: All in favor?

(A chorus of ayes.)

CHAIR BATTLE: Any opposition?

(No response.)

CHAIR BATTLE: Motion carries.

The next item on the agenda is approval of the minutes of -- I am sorry -- is for us to go into executive session.

I will entertain a motion at this time for a closed

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1 session.

2 M O T I O N

3 MR. BROOKS: So moved.

4 MS. WATLINGTON: Second.

5 CHAIR BATTLE: Any opposition?

6 (No response.)

7 CHAIR BATTLE: Motion carries.

8 (Whereupon, at 9:16 a.m., the meeting was adjourned
9 to executive session.)

10 * * * * *

11 CHAIR BATTLE: Well, good morning. I guess we are
12 back in open session.

13 This is virtually going to be a continuation of a
14 process that was described to us, I think yesterday, as
15 staggering through the regulations. But what we will do
16 today is, in large measure, to give consideration to the
17 regulations that we have identified on our agenda.

18 The next item of business that we have is the
19 approval of minutes of the May 13, 1994 meeting. They are
20 contained in your book.

21 M O T I O N

22 MR. McCALPIN: So moved.

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1 MS. WATLINGTON: Second.

2 CHAIR BATTLE: Moved and seconded.

3 Any opposition?

4 (No response.)

5 CHAIR BATTLE: The minutes are approved.

6 We next have Consideration of Update on

7 Reauthorization of the Legislative Process on our agenda.

8 And I believe all of the board members received a copy of a
9 memo from the Transition Team which essentially gives us an
10 update as to where things were on reauthorization, what
11 happened with the subcommittee markup.

12 I did come up for the subcommittee markup in the
13 House, and attended those proceedings chaired by
14 Representative Bryant. And my sense was, at least in the
15 subcommittee, that we had the amendments that we expected
16 would be proposed by Gekas, proposed. There was not support
17 for those amendments.

18 The basic track of the legislation was approved by
19 the subcommittee as it was originally tendered. And that's
20 essentially what this memo addresses.

21 My understanding in the Senate is that because at
22 this point there are several other items that have taken

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1 priority, based both from the standpoint of the
2 administration and because of the assignments that the
3 committee has, that we are really not going forward at
4 present on the Senate side. So we'll have to just see how
5 that part of it develops, it seems to me.

6 MR. McCALPIN: Well, the worst part of it is I
7 understand the House has decided they won't to take it to the
8 floor unless there is some assurance the senators will act.

9 But let me bring on a question that maybe you are
10 willing to probe and help us. Yesterday the Inspector
11 General told us that there is in this bill before the House a
12 provision which would require us in effect to reprogram every
13 action of the Corporation.

14 Grant assurances, grant conditions. It was a total
15 surprise to me when he said that yesterday. He didn't point
16 to a specific provision.

17 When did you know of anything which extends the
18 obligation for reprogramming, that's in the Bill, as it was
19 marked up and approved by the Committee?

20 MS. PERLE: Beyond what's in the Bill --

21 MR. McCALPIN: No.

22 MS. PERLE: I'm Linda Perle, for the record.

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1 There is a provision in the Bill that, as I
2 understand it, is modeled primarily on the rider, the current
3 rider. I think that -- I don't have the Bill in front of me,
4 and I apologize for that. I intended to bring it. I think
5 that it does extend the reprogramming provision to, not just
6 the Appropriations Committee. I think it also extends to the
7 Oversight Committee.

8 I think you may want to get the Bill. But I don't
9 think it extends -- the reach -- beyond what's in the current
10 rider in terms of what has to be reprogrammed. I haven't
11 looked at it in a while. I apologize for that.

12 From what you said, my guess is that the IG's
13 interpretation is a bit of an overstatement of what's in the
14 legislation. But I don't have it in front of me. And I will
15 check.

16 CHAIR BATTLE: I think -- is Vic bringing
17 something? We did get a line-by-line analysis, I think, from
18 the staff of some of the provisions in the new bill.

19 MR. McCALPIN: But I don't think this was in it.

20 CHAIR BATTLE: No.

21 MS. PERLE: Section 23.

22 It did say, "The Corporation may not promulgate

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1 rules, regulations, guidelines or instructions." Those are
2 the things that have to be published for notice and comment.

3 "Under this title, unless the Corporation has so
4 notified the Committee on Appropriations and the Committee on
5 the Judiciary of the House of Representatives, and the
6 Committee on Appropriations and the Committee on Labor and
7 Human Resources of the Senate at least 15 days before
8 publication of the rules, regulations, guidelines or
9 instructions, and has given such committees an opportunity to
10 comment on such rules, regulations, guidelines and
11 instructions."

12 So what you have to do is -- the reprogramming
13 requirement applies to all of those things that you would
14 have to publish for notice and comment, anyway.

15 I don't think that this is substantially broader
16 than what's in the rider now, other than you have to send it
17 to the oversight committees as well as the appropriations
18 committees.

19 MR. FORTUNO: Certainly the LSC Act contains a
20 publication requirement. But, soon after we publish for
21 comment, others have to be published only when final. In an
22 event, there is a publication requirement. There is no

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1 reprogramming requirement, if you will, in the Act itself.
2 It's the Appropriations Act that says that we have to notify
3 the appropriate folks upon the Hill before we can go ahead.

4 CHAIR BATTLE: How does that play into -- for
5 example, if that provision were in effect today, how would
6 that play into our responsibility before we send out for
7 public comment those regulations?

8 MS. PERLE: Before it's final. It's before final
9 publication.

10 CHAIR BATTLE: Does it say "final"?

11 MS. PERLE: Yes. It says "at least 15 days before
12 final publication of the rules, regulations, guidelines." So
13 it doesn't affect what we have done so far.

14 What it would do -- well --

15 MR. FORTUNO: Rather than notifying Congress that
16 we intend to make some changes without having specifics in
17 mind, it is only when we -- that is the Corporation, the
18 Board -- has settled on specific changes that Congress is
19 notified. Congress will be given notice of the specific
20 changes and be given an opportunity to comment on those.

21 MS. PERLE: It's similar to what we did for the
22 draft regulation with the entire Board. We sent it to the

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1 entire Board and said, please let us know if you have any
2 objections within 10 days we publish for comment.

3 Well, this would be to say to send it to the
4 committees is if we intend to publish this in the Federal
5 Register on such-and-such a date, which will be at least 15
6 days later. And please let us know if you have any objection
7 to publication. That's basically the same kind of
8 requirement.

9 MR. McCALPIN: I guess my question is, is that
10 language, "rules, regulations, guidelines," whatever it is
11 that you read out of the new Act, is that the same iteration
12 that's in the Appropriations rider?

13 MR. FORTUNO: No. It's a little bit -- the
14 language in the Appropriations rider is, "None of the funds
15 appropriated in this Act for the Corporation shall be used
16 directly or indirectly by the Corporation to promulgate new
17 regulations or to enforce, implement or operate in accordance
18 with the regulations effective" -- and then it goes on --
19 "unless Appropriations Committees of both houses of Congress
20 have been notified 15 days prior to such use of funds."

21 MR. McCALPIN: So that the new bill does extend the
22 reprogramming obligation beyond what it is currently?

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1 MR. FORTUNO: Yes.

2 MS. PERLE: Yes, it does. But it extend it only to
3 those things that would have to be published in the Federal
4 Register. So it does extend it. But it doesn't --

5 There is some language, I think, in the House
6 report for the bill that was addressed last time, which I
7 think contains the same provision, which explains what kinds
8 of things have to be published for notice and comment. And
9 that there are certain kinds of things that you don't have to
10 publish for notice and comment.

11 So I think you could read that kind of limitation
12 into this language as well.

13 CHAIR BATTLE: I guess two things. One, I know
14 Suzanne wanted to be able to comment, and we will give her a
15 chance to. But I am wondering on what basis this extension,
16 what reasoning Congress has for wanting this extension.

17 And, two, what implications the extension will have
18 for how we conduct our business in all those specific areas
19 that they talked about: rules, regulations and -- what are
20 those areas, just real quickly?

21 MS. PERLE: In the past there are a number of
22 places where the Corporation used guidelines or instructions,

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1 rather than regulations, to avoid the process of having to
2 publish for notice and comment. I think that that was what
3 the Congress wanted to make sure that anything that really
4 should be treated as a regulation is treated in the same way
5 that a regulation would be treated. So now --

6 CHAIR BATTLE: So it says, "rules, regulations,
7 guidelines and instructions"?

8 MS. PERLE: Right.

9 CHAIR BATTLE: Okay.

10 MS. PERLE: But that does not include, I don't
11 think, for example, specific grant conditions that are placed
12 on particular grantees to deal with specific problems that
13 have come up in the context of those grantees.

14 I think that it is intended to cover those things
15 that are generally applicable to all programs that Congress
16 feels should be done in regulation form. And so it is just
17 saying regardless of what you call it, if it looks like a
18 regulation, it walks like a regulation, it sounds like a
19 regulation, it's a regulation, and we want you to treat it
20 like a regulation.

21 MR. FORTUNO: What happens is the LSC Act treats
22 instructions a little differently from the way it does

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1 regulations and guidelines. Instructions are published 30
2 days, at least 30 days prior to their effective date, as are
3 the other two. But the other two also have to be published
4 for comment whereas instructions don't.

5 We have seen the language that we have in our
6 current Appropriations Act, the one we were talking about
7 just a moment ago, has been in there since '85, I believe.
8 And the reason why was, Congress was concerned about the way
9 the Corporation was going about revising its rules.

10 The reason why we suggested that no action be taken
11 on the bylaws until we sent the reprogramming notice up to
12 Congress was that in checking the legislative history, which
13 corresponds to that provision, we went all the way back to
14 legislative history to the FY '85 appropriation because it's
15 the same language.

16 And we found that although everyone agrees that
17 bylaws are internal rules of operation or procedure,
18 organization or procedure, and treat it differently, in fact
19 the legislative history said we intend to extend this
20 requirement that you notify Congress even to the bylaws.
21 Specifically said that. And in the face of that it seemed to
22 us that we should not act on the bylaws until a notice was

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1 sent out.

2 What we have seen, in looking at the legislative
3 history, is that Congress was concerned about how the
4 Corporation was handling rule-making, and wanted to ensure
5 that it had prior notice before any of these went into
6 effect.

7 CHAIR BATTLE: Suzanne, did you have something?

8 MS. GLASOW: I think Victor already touched on it.
9 The reprogramming notice has always used the word "prior to
10 promulgations a new regulation." Promulgation in terms of
11 rule-making law. Basically the publication is final. So
12 it's after the Board adopts a rule as final, that's when we
13 send it in for notice to the appropriate committees upon the
14 Hill.

15 And again it's just notice to the committees. They
16 can state their approval or whatever, but the Corporation
17 could choose to go forward with it or take it back and
18 reconsider the comments. And they have that choice.

19 CHAIR BATTLE: Since we have published, and I may
20 be jumping ahead, the bylaws, the changes that we made to the
21 bylaws in the Federal Register, do we have a reprogramming
22 responsibility with respect to it before we finalize what we

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1 are doing with the bylaws?

2 MR. FORTUNO: Yes. That's what we have done.

3 MR. McCALPIN: We didn't act on them yesterday.

4 CHAIR BATTLE: Yes, okay. I am just clarifying
5 that.

6 MR. FORTUNO: Because until they have --

7 CHAIR BATTLE: I didn't suspect we did. But I
8 wanted to make sure the Committee was fully aware of that.

9 MS. PERLE: So what it would mean in the future, if
10 this were in place, as is stated in the reauthorization, is
11 that you would just do what we do now, which is to have the
12 Committee and the Board consider everything, make its
13 decision on what -- and have the Board make its decision on
14 what it wishes the final rule to look like.

15 But before it's actually sent to the Federal
16 Register for publication, this final rule to take effect 30
17 days after publication, it's sent to these appropriate
18 committees, and then they can state their --

19 MR. McCALPIN: Let me ask one other question.
20 Historically, have guidelines and instructions, as compared
21 with regulations, been adopted by the Board or the staff?

22 MR. FORTUNO: The regulations, certainly the Board.

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1 Guidelines, I believe early on it was the Board. But I
2 believe of late, when it came to the grant conditions --
3 well, no, guidelines would be by the Board also.

4 MR. McCALPIN: And the instructions?

5 MR. FORTUNO: And instructions were acted on at the
6 Board level; were they not?

7 MS. PERLE: Yes.

8 MR. FORTUNO: You are going back sometime now.

9 MS. PERLE: Grant conditions were --

10 MS. GLASOW: It's been mixed with instructions
11 historically.

12 MS. PERLE: Right. I think to the extent, perhaps
13 -- I am not sure. This was during a period that I wasn't
14 around. The instructions were used more in the '80s than
15 earlier on, I think. And then more recently --

16 MR. FORTUNO: Early '80s.

17 MS. PERLE: Early '80s. More than recently. I
18 think there was some mixed dealings on how they were done.

19 To the extent that they were intended to change
20 regulations that were there before, I think that this was in
21 consultation with some, if not all programs. I am not sure
22 that they formalized --

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1 CHAIR BATTLE: The concern, I think, that I have
2 about understanding the distinction between the court's
3 ruling, rules and rule-making, which we do, and how our own
4 internal procedure operates with regard to guidelines and
5 instructions.

6 And then, secondly, whether if we have this change,
7 we are talking about guidelines and instructions that have in
8 some instances been adopted by the Board, but not in all
9 instances, going up for reprogramming to Congress.

10 It seems to me that we have to make a determination
11 as to whether or not the Board, then, is going to make
12 decisions regarding guidelines and instructions prior to
13 reprogramming.

14 MS. PERLE: I think what you probably need to do is
15 to give some consideration as to what kinds of issues are
16 appropriate to be handled through regulations, and what are
17 appropriate to be handled through something other than
18 regulation, and the appropriate process.

19 I think that probably there are certain things that
20 are appropriately handled by the staff, certain matters of
21 interpretation -- interpretive guidelines or --

22 CHAIR BATTLE: The concern that I have got, even if

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1 interpretive guidelines have to go to Congress, then I don't
2 see that happening without the Board having had an
3 opportunity to review to see if it's consistent with our
4 policy determination with regard to whatever those guidelines
5 are.

6 MS. PERLE: I think that's correct. And I don't
7 think that that discussion has ever happened.

8 MR. McCALPIN: Let me say this: My own feeling is
9 that anything has to go to Congress for reprogramming ought
10 to be run by the Board before it goes to the Congress. So
11 the Board will be held responsible for it. We have an
12 obligation -- we have an opportunity to see it.

13 MR. FORTUNO: That is broad language. And it's
14 broadened in other ways, too. I don't know that it is
15 terribly significant, but I think the language in the
16 Appropriations Act essentially says give notice to the
17 Appropriations Committees.

18 I think this goes beyond that. And it's not just
19 the Appropriations Committees, but others. So it broadens
20 the number of committees to which we have to give notice.

21 CHAIR BATTLE: It seems to me, as an entire
22 operational issue, that this Board is going to have to decide

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1 and distinguish and define what guidelines are, what
2 instructions are, and how those things are distinguished from
3 regulations, and at what point the staff would need to
4 apprise us so that we review them before reprogramming
5 happened.

6 What I am hearing from Linda is that this
7 particular provision has grown out of a history where
8 guidelines and instructions were used to circumvent rule-
9 making.

10 MS. PERLE: Correct.

11 CHAIR BATTLE: And in order to assure that Congress
12 is aware of the precise implementation of policy that we are
13 doing, they want to know about guidelines and instructions as
14 well. And that was historically a staff function, and not a
15 Board function --

16 MS. PERLE: Correct.

17 CHAIR BATTLE: -- putting those things together.

18 MR. FORTUNO: I don't know that the government
19 agency, for example, need to go through this kind of
20 procedure the way we do.

21 I think that this language may have been inserted
22 in all appropriations because of concerns about the

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1 Corporation's actions in the early to mid '80s, especially.
2 That's why it's been in there since '85.

3 So bottom line is I think that you are living with
4 something that's little more constraining than others are,
5 and it's because you are paying for the sins of your
6 predecessors, if you will.

7 CHAIR BATTLE: But also, Vic, it seems to me that
8 this particular language goes even further than the
9 appropriation. So it's even -- and I am wondering whether if
10 we are today and not yesterday, why we need to, in the
11 present legislation, go beyond what the appropriation rider
12 has already provided.

13 MR. FORTUNO: It may be because the document that
14 we are looking at started yesterday. Once it's in there,
15 unless somebody moves affirmatively to remove it, it's in
16 there, so --

17 CHAIR BATTLE: I tell you what I would like to see.
18 And that is just some research as to whether there are any
19 other governmental agencies that have the restriction going
20 beyond, that has the same kind of rule-making responsibility
21 in issues, guidelines and instructions, and just how they are
22 treated with regard to that.

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1 Maria.

2 MS. MERCADO: I think that ultimately one of the
3 things that I think, from my discussions, from the Board, or
4 at least on particular questioning from me, is that in the
5 regulations that we are going to be looking at and sending up
6 to Congress, we don't necessarily want to be tied, I suppose,
7 to the same fears that they may have been tied before, to be
8 able to let flexibility of the Corporation do its business,
9 and this Board; that there has to be some level of trust
10 within this Board that it can get the work done.

11 And in that spirit looking at the different
12 regulations, the guidelines that impede the ability to do
13 that. So I think that is part of where we are coming from in
14 trying to take away some of the more restrictive language
15 that we don't need.

16 CHAIR BATTLE: Or, I guess what I am also getting
17 at is that if Congress has been able to live with the
18 appropriation rider where it was, then as we roll whatever
19 considerations there have been in the past into the new
20 legislation, roll it in, not to be more restrictive, but to
21 at least give Congress the same comfort level that they have
22 had in the past with how they dealt with this.

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1 MS. PERLE: I think that's right, and I agree with
2 you on that. I think what we have to kind of keep in mind
3 is that also the Congress will be legislating, not just to
4 deal with the past, and not just to deal with the present,
5 but also to deal with the future.

6 So, I think we have to bear in mind what you said
7 that we are living now, and now there is a lot more trust,
8 and where hopefully there is a lot more collaboration amongst
9 all the players and the stake holders, and that we will not
10 be dealing with a set of rules and restrictions that are
11 going to be as onerous or as difficult to comply with as
12 those that were promulgated in the past, and where Congress
13 may not have as much of an interest in stepping in.

14 We want to build in the document for the next five
15 years, which is what this reauthorization is intended to deal
16 with, that we will be able to protect the program of the
17 Corporation into the future.

18 So I think it's a balance that we have to -- that
19 Congress is trying to strike, and us -- and I include all of
20 us -- in shaping our responses to that document that we need
21 to bear that balance.

22 I am not saying that with respect to this

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1 particular provision, that it needs to stay the way it is. I
2 am just saying that we need to kind of keep all of those
3 things in mind as we go forward.

4 CHAIR BATTLE: Are there any other considerations
5 in reauthorization or in the legislation as it passed in the
6 subcommittee markup that any of the Board members have?

7 MS. PERLE: I just wanted to add one thing about
8 what you said about the amendments, that Mr. Gekas raised.
9 I think that with respect to one of them, it was defeated. I
10 think the other two were basically deferred.

11 CHAIR BATTLE: That's true.

12 MS. PERLE: I think that we are likely to see all
13 of those issues go up again at full committee in addition to
14 a number of others.

15 CHAIR BATTLE: That's true. I think that the sense
16 was that when Gekas noted that he did not have a vote for the
17 one amendment that was put to a vote, he at that point folded
18 and decided not to tender any of the others.

19 MS. PERLE: I think that's probably right.

20 MR. FORTUNO: While preserving his right to do so
21 later on.

22 CHAIR BATTLE: Yes.

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1 Anything else on reauthorization?

2 (No response.)

3 CHAIR BATTLE: We have next on our agenda Possible
4 Consideration of and Action on Publication of Proposed
5 Revisions to Part 1607 of the Corporation's Regulations in
6 the Federal Register for Public Comment.

7 I think all of the members of this committee and
8 members of the Board should have received a copy of 1607 --
9 I am sorry, 1608.

10 MR. McCALPIN: 1607 is the one that's gone and
11 published. And I don't think there is anything more we can
12 do at this point.

13 CHAIR BATTLE: Yes. Why is that on our agenda?

14 MS. GLASOW: That was basically put in with an
15 abundance of caution because the rule, as the Committee
16 adopted it, was sent out to the Board members. And there was
17 a possibility that it might not have gone forward for
18 publication.

19 MR. FORTUNO: In short, we had to publish the
20 agenda in the Federal Register before the deadline --

21 CHAIR BATTLE: I see.

22 MR. FORTUNO: -- to receive objections.

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1 CHAIR BATTLE: I did not receive any objections
2 from any of the Board member, personally. And I think that I
3 was the point person on that. So we are going to assume that
4 that's been taken care of.

5 MR. McCALPIN: Why wasn't it published?

6 MR. FORTUNO: It in fact has been published.

7 MS. PERLE: And we have copies right here.

8 CHAIR BATTLE: Good. So we will --

9 MR. McCALPIN: What was the publication date?

10 MR. FORTUNO: That was published --

11 MS. PERLE: The 16th.

12 MR. McCALPIN: 16th of June?

13 MR. FORTUNO: Yes.

14 MS. PERLE: June 16th.

15 MR. McCALPIN: So basically we have until about the
16 14th, 15th of August --

17 MS. PERLE: The 15th of August, I believe.

18 MR. McCALPIN: -- to receive comment?

19 MS. PERLE: Yes.

20 MR. McCALPIN: So I would assume, Madam Chairman,
21 that the 1607 will be back before this committee at the
22 September meeting for consideration of any comments that may

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1 have been received, and possible transmission to the Board
2 for final action.

3 CHAIR BATTLE: That sounds like the proper
4 timetable for 1607.

5 We do feel a real sense of accomplishment at having
6 gotten through this one. At the time that we received 1607,
7 we also received 1608. And 1611 and 1621 came at the next
8 board meeting. We quickly learned that we were not going to
9 be able to get through four regulations in the two or three
10 hours that had been designated on our agenda to cover them.

11 Bear in mind the reason for our wanting to have a
12 separate meeting, as we have today, to be able to get as much
13 done as we could on the regulations that we have before us.

14 The first one that we have up is 1608. I believe
15 that in addition to the people that we have at the table
16 today, that the American Bar Association has requested Howard
17 Dana to be with us today.

18 And I wanted to recognize Mr. Dana at this time and
19 have him to come forward and give us a few words of wisdom
20 from the ABA, and tell him how much we appreciate his
21 presence with us this morning.

22 MR. DANA: Madam Chairman, members of the Board,

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1 it's a real honor to be here. I haven't been on this side of
2 the bench or the table in a while, so you'll have to bear
3 with me. But I hope I won't be bothering you much. But I
4 just want you to know it's wonderful to see you all up there,
5 and also to congratulate you on what for me would have been
6 the shortest executive session I ever experienced.

7 MR. MCCALPIN: Welcome home.

8 MR. DANA: Thank you.

9 CHAIR BATTLE: Everyone should have received, as I
10 said earlier, a blue-covered packet from Vic Fortuno,
11 including the comments and the proposed regulation draft that
12 has come to us as a result of the Working Group review and
13 staff review.

14 We will get started on the front page of that.
15 What our procedure has been is to go line by line, and to
16 discuss each line, to discuss the comments that pertain to
17 each line, and to get a certain comfort level with each line
18 as we go through it. And as well to raise concerns and
19 issues so that the staff, as well as the Working Group, can
20 take those concerns back and make any appropriate changes to
21 conform to the concerns that are raised by the Board.

22 We will start with -- is there anything

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1 preliminarily that we need to address before we get started
2 with 1608?

3 MS. PERLE: I would just like to let you know that
4 the drafts that you have in front of you are dated -- have
5 more recent dates on them than the ones that you saw the
6 first time. The reason is that the staff -- we worked
7 closely together to try to resolve many more of the
8 outstanding issues.

9 There are changes in the text as a result of the
10 staff's concerns. There are a number of changes in the
11 footnotes. And I think we are much closer to resolution on
12 the issues in this version than we were in the original
13 version that you saw.

14 I think in many respects these drafts are much more
15 -- even though I think that the version of 1607 that you saw
16 was also a joint collaborative effort, I think these versions
17 reflect more of a collaborative effort than the earlier
18 versions of these rules.

19 MR. BROOKS: You are referring to the June 9 --

20 MS. PERLE: Yes. The ones that you have in this
21 book, this is what we are dealing with.

22 MR. BROOKS: I just wanted to get the record

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1 straight on --

2 MS. PERLE: Right. But you originally saw these in
3 April, I believe.

4 CHAIR BATTLE: Right.

5 MR. MCCALPIN: March 10 draft.

6 CHAIR BATTLE: Slightly different.

7 MS. PERLE: So these are slightly different. And
8 we have resolved many of the issues that were unresolved in
9 the footnotes. You will see that throughout. There are some
10 changes in the text.

11 MS. SZYBALA: That's what I wanted to speak to. I
12 just wanted to say we worked very hard to make sure that
13 anything that -- that all the disagreement is in the
14 footnote. So to the extent there is nothing in the footnote
15 that names the Working Group or the staff or the IG, then
16 there is no disagreement. And all you are going to see in
17 the footnote is the reason it is agreed to that the reg
18 should be changed.

19 CHAIR BATTLE: Okay. Thank you, Renee.

20 We are going to start with 1608.1, which is the
21 purpose: "This part is designed to insure that the
22 Corporation's resources will be used to provide high-quality

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1 legal assistance and not to support or promote political
2 activities or interests. The part should be construed and
3 applied so as to further this purpose without infringing upon
4 the constitutional rights of employees or the professional
5 responsibilities of attorneys to their clients."

6 MS. PERLE: That's the statement of purpose that's
7 in the current rule. There is no change. We didn't think
8 there was any point in changing it because it perfectly well
9 stated the purpose of the rule.

10 MS. GLASOW: I would like to note up in the
11 Authority, which is actually above the Purpose, we made a
12 revision. The cite to the authority was incorrect. And that
13 is noted in Footnote 1. And we have put in the proper
14 citation to the statutory authority.

15 MS. PERLE: This was done a very long time ago, and
16 so I am not sure that I remember this correctly. But I
17 believe that when the rule was originally adopted in 1976 it
18 was correct. And then when the 1977 amendments were made,
19 there were a lot of renumbering within the statute. And so
20 there are a lot of places throughout these rules where nobody
21 bothered to go back and make those changes. And I think this
22 is probably one of them.

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1 CHAIR BATTLE: Okay. All right.

2 One real minor question. When you use the term
3 "attorneys," that's inclusive of staff attorneys, any
4 attorneys?

5 MS. PERLE: It's not inclusive of -- oh, the word
6 "attorney," yes.

7 CHAIR BATTLE: When we use it in this context, we
8 talk about "professional responsibilities of attorneys."

9 MS. PERLE: Yes.

10 CHAIR BATTLE: In this context it's any attorney
11 that --

12 MS. PERLE: Any attorney.

13 CHAIR BATTLE: -- that has anything to do with the
14 program?

15 MS. PERLE: That's correct. "Staff attorney" is
16 defined more narrowly. There are different issues in the
17 next section on attorneys and staff attorneys.

18 CHAIR BATTLE: Okay. All right.

19 "1608.2 Attorney-client relationship.

20 "Nothing in this part is intended to prohibit an
21 attorney or staff attorney from providing any form of legal
22 assistance to an eligible client, or to interfere with the

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1 fulfillment of any attorney's professional responsibilities
2 to a client."

3 Now, as I understand it, this provision was moved
4 to here --

5 MS. PERLE: Right. That is correct.

6 CHAIR BATTLE: -- from another place; is that
7 right?

8 MS. PERLE: Yes.

9 CHAIR BATTLE: But it is exactly the same language
10 as --

11 MS. PERLE: Correct.

12 CHAIR BATTLE: -- was contained elsewhere?

13 MS. PERLE: Elsewhere in the same regulation.

14 CHAIR BATTLE: Okay.

15 MS. PERLE: It was only moved for emphasis because
16 we thought it was important to ensure that people understood
17 that this didn't prevent any Legal Services attorney or
18 recipient from providing legal assistance.

19 The way it was written originally, it was buried.
20 You kind of have had to go all the way through the regulation
21 to find it.

22 I think it helps -- in a lot of places throughout

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1 these regulations there are provisions that affect the way
2 you interpret the entire regulation. But they are buried
3 some place in the back or in the middle of the regulation.

4 And so oftentimes people read through and get to
5 the section that is relevant to the issue, and then interpret
6 that without looking at the whole picture of what they need
7 to look at.

8 So that's why we felt it was important to move this
9 up to the front. But it's identical.

10 CHAIR BATTLE: Do you think it needs to come before
11 "Definitions" is the only question I have got. You have got
12 "Purpose," and then you have got this statement. And then
13 you follow it with "Definitions." And just logically --

14 MS. PERLE: We certainly could change that.

15 CHAIR BATTLE: "Definitions" may clear up the one
16 little minor question that I have.

17 MS. PERLE: I think that could be easily be -- it
18 was arbitrary as to where we would put it. We certainly
19 could move it to after "Definitions" if that's --

20 MS. MERCADO: So it would become 1608.3 then, and
21 vice versa --

22 MS. PERLE: If that's the Committee's preference,

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1 we have no problem with that.

2 CHAIR BATTLE: "Definitions." We first deleted the
3 "Legal assistance activities" definition. And we have in its
4 stead a definition of "attorney" and "political." And "staff
5 attorney."

6 MS. GLASOW: Not exactly. We have deleted the
7 definition, "Legal assistance activities." And what we have
8 done is incorporated the meaning of that definition elsewhere
9 in the rule where it is applicable.

10 It was a problematic definition. We weren't quite
11 sure what it meant, or to what it applied. And so we moved
12 it, basically. We revised it somewhat, but incorporated into
13 the one provision where it was applicable.

14 MS. GLASOW: It was only intended to be applicable
15 to that one provision of this rule.

16 There are situations in the past where, in
17 interpreting another rule, for example, the Corporation would
18 look to this rule for guidance in interpreting another rule.
19 And that became problematic. It was problematic in terms of
20 the way it was used, or at least suggestions that were made
21 how it could be used with respect to this rule.

22 So it was felt -- and there is no definition of

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1 "legal assistance activities" in the Act. There is nothing
2 that requires us to define it in any particular way. So we
3 felt that it was more appropriate to explain within the
4 prescriptions that it applied to, what it meant and what the
5 reference was. So that's why the definition was deleted.

6 But the substance, in terms of the restrictive
7 language that was in this definition, is incorporated into
8 the rule itself later.

9 CHAIR BATTLE: And it now is in 1608.7?

10 MS. PERLE: Yes, correct, which is at the top of
11 page 5.

12 CHAIR BATTLE: We will address that when we get to
13 1608.7.

14 We move on to "As used in this part," the
15 definitions of "attorney" and "political," and "staff
16 attorney."

17 As far as (a), "'attorney' means a person who
18 provides legal assistance to eligible clients and who is
19 authorized to practice law in the jurisdiction where
20 assistance is provided."

21 That's broad; right?

22 MS. PERLE: Yes.

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1 CHAIR BATTLE: That's like the general and
2 universal attorney?

3 MS. GLASOW: Yes. And this has been moved from
4 Part 1600, which is a regulation dealing with definitions.
5 And we moved it to this rule to facilitate the use of this
6 rule by recipients and to make clear that it applies to
7 specific provisions in this rule.

8 CHAIR BATTLE: Bill.

9 MR. McCALPIN: Let me hypothesize for you a project
10 director who runs a program but who does not himself or
11 herself provide legal assistance to a client.

12 Is such a person an attorney who is covered by this
13 regulation?

14 MS. PERLE: I think the answer is yes. Because
15 even though the person doesn't directly provide legal
16 assistance, if that person is an attorney, authorized to
17 practice law, and manages a program, a recipient, I think
18 that that person, although not directly providing legal
19 assistance, for the purposes of this rule would be considered
20 to be providing legal assistance.

21 MR. McCALPIN: I believe there have also been such
22 persons who are not licensed in the jurisdiction in which the

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1 program operates.

2 MS. PERLE: And there have also been such persons
3 who are not attorneys.

4 CHAIR BATTLE: Yes, that's right.

5 MS. PERLE: The Hatch Act provisions deal -- well,
6 actually, that's not true. The Hatch Act provisions only
7 deal with staff attorneys.

8 MS. GLASOW: This rule implements a variety of
9 statutory prohibitions on different types of electoral
10 political activities. And each statutory provision is
11 specific to whom it applies.

12 The Hatch Act prohibition applies to the
13 Corporation employees and to staff attorneys.

14 Other provisions deals only with attorneys, or they
15 deal with the recipient in the Corporation.

16 MS. PERLE: Or they deal with employees generally.

17 MS. GLASOW: That's why you will see different
18 sections of this rule applying to different persons or
19 groups. Because it's basically implementing statutory
20 provisions that are very specific.

21 CHAIR BATTLE: Given what Bill has raised as an
22 issue, though, then what we are saying is that in some

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1 instances if that person who is the project director, is an
2 attorney, then it's your interpretation they are covered by
3 the rule. If they are not, then they are not covered by the
4 rule? If they are not an attorney.

5 MS. PERLE: Correct.

6 CHAIR BATTLE: Maria.

7 MS. MERCADO: But even further, though, you do have
8 attorneys, who may be assisting clients, who may not be
9 practicing attorneys, for whatever reason. You've got
10 attorneys that do solely research or do different kinds of
11 whether it's statistical work, whether it's personnel
12 matters.

13 They may not necessarily be authorized to practice
14 law because they haven't kept up with their license. Then,
15 is that attorney a person who is covered under this format,
16 although they would be representing a client? For example --

17 CHAIR BATTLE: It says "who is authorized to
18 practice." If you are not authorized to practice, I don't
19 think you are covered.

20 MS. PERLE: You are covered as an attorney. There
21 are many of these provisions that deal with all employees
22 programs or deal generally with the recipient. the

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1 provisions that deal with attorneys are fairly specific.

2 MS. MERCADO: I know. But I mean you can be an
3 attorney that's not authorized to practice law, but can
4 represent a client in a situation when he is not required to
5 necessarily have a licensed attorney.

6 For example, I am thinking of representing a client
7 group for Farmers Home Administration in a housing issue.
8 That anyone, not necessarily a licensed attorney, can
9 represent in that proceeding, or a food stamp hearing, or
10 anything else that may not necessarily require a licensed
11 attorney to represent them.

12 And so in that category you have someone, an
13 attorney who was not licensed for whatever reason, either
14 because they just moved into the jurisdiction, and they
15 haven't yet taken the bar for that area; or maybe they just
16 don't practice in that sense, they only do administrative
17 hearings that do not require licensed attorneys to do them.
18 Then this regulation affects them.

19 MS. GLASOW: Maybe it would help if I clarify that
20 the Corporation is only authorized to fund legal assistance
21 provided by attorneys acting as attorneys, or paralegals, or
22 whatever, as long as they are being supervised by an

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1 attorney.

2 So I don't think we get into the issue of lay
3 representation, even in mediation cases. We are trying to
4 fund only mediation that's done by attorneys or something
5 that's supervised by an attorney. So I don't know that we
6 get into that.

7 And I know that ---

8 MS. MERCADO: So you would say that by the agency
9 relationship, that you would have between a supervising
10 attorney and that paralegal or unlicensed attorney, then
11 indirectly the person would be covered because they are being
12 supervised by an attorney?

13 MS. GLASOW: Yes, because that attorney is
14 ultimately responsible for that services that being given.

15 MS. SZYBALA; I think the problem here -- maybe I
16 should start by saying the OID grappled with this problem of
17 what about people who are acting as attorneys, and aren't
18 really attorneys.

19 But the problem is the way the statute lays this
20 out. The statute binds different people differently. And we
21 didn't want to increase, without any reason, these kinds of
22 restrictions on people. So this pretty much just follows the

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1 statute.

2 The only place where it was clear was that nobody
3 should be able to make people engage in political activities
4 under duress. And we broadened that beyond what the statute
5 says, with agreement from everybody. And therefore this
6 section -- this whole part of the statute is one section
7 shorter than it used to be because we have combined two and
8 made them more broadly applicable.

9 But beyond that we kept attorneys now as it is
10 because that's the way the statute is. We didn't want to
11 make other people applicable to those particular
12 restrictions.

13 CHAIR BATTLE: And I was going to suggest, if you
14 could cite where that provision is in the statute, I think
15 that would enlighten us with respect to that.

16 MS. GLASOW: For instance, in Section 1007(a)
17 Corporations shall ensure that all attorneys engaged in legal
18 assistance activities, supported in whole or part, shall not
19 engage in political activity." It goes on and lists the
20 types of activities.

21 Basically, "attorneys engaged in legal assistance
22 activities" means our attorneys that are funded by us, that

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1 are acting as attorneys in providing legal assistance. So it
2 would have to be legal assistance activities.

3 And we feel that this definition is in accord with
4 that because it's a person who provides legal assistance to
5 eligible clients.

6 MS. PERLE: Let me tell you, I thought -- the
7 definition that's included in 1608.3 now is the definition
8 that currently appears in Part 1600 of attorney.

9 I looked back just now in the Act and realized that
10 there is no definition of "attorney" in the Act.

11 CHAIR BATTLE: That's right. Only staff --

12 MS. PERLE: So we are not bound to use the same
13 definition that is here. We could change it as long as we
14 keep it clear that what we are dealing with is an attorney.

15 If there is some language that comports more
16 clearly with what we have always considered to be an attorney
17 in Legal Services we could change that. We are not bound --

18 CHAIR BATTLE: For example, just following the
19 question that Maria raised. For example, you could have an
20 attorney who is licensed in Indiana, but who is in practice
21 in Alabama, and who is licensed of course, and can practice
22 in federal courts in Alabama, can appear before

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1 administrative tribunals in Alabama.

2 So with regard to whether or not they are
3 authorized to practice in the jurisdiction where the
4 assistance is provided, which is, i.e., before an
5 administrative tribunal or in federal court, that attorney is
6 licensed to do so. Though they are not licensed generally in
7 that state.

8 MS. PERLE: What I understood, at least the
9 original objection was, the first part of the definition
10 dealing with a person who provides legal assistance to
11 eligible clients.

12 In the section of the Act, 1007(a)(6), it talks
13 about all attorneys engaged in legal assistance activities
14 supported in whole or in part.

15 It may be that what we really wish to do is to
16 change the "providing legal assistance" to "engaging in legal
17 assistance" or --

18 CHAIR BATTLE: I think that's consistent with the
19 Act.

20 MS. MERCADO: And just a further question to that:
21 Does that include attorneys who render services to eligible
22 clients who are either PAI attorneys, pro bono attorneys,

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1 that are providing services to eligible clients? Does this
2 restriction go to them, too? Because attorneys is an
3 attorney. They are providing the eligibility.

4 So is that going to put some infringement on the
5 private bar that we are trying to get into partnerships with?
6 Because they are providing assistance to eligible clients.
7 The PAI context is a little bit different and didn't provide
8 referral.

9 MS. PERLE: I think that we certainly intended to
10 cover PAI attorneys only while they were doing legal
11 assistance activities supported with LSC funds.

12 CHAIR BATTLE: And that question comes up a little
13 bit later, I think, in one of the regulations as to how that
14 coverage begins to affect PAI attorneys. So I think we can
15 put a period at that, and when we get to the section really
16 address that --

17 MS. PERLE: Make sure that it doesn't broaden that
18 applicability beyond where we intended it.

19 CHAIR BATTLE: That's what I was concerned about.

20 We can actually, in our definition of "attorney"
21 track the language in the Act and say "attorney" means a
22 person engaged in legal assistance activities.

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1 MR. McCALPIN: I don't think -- as I understand,
2 the Act does not define an attorney. Only staff --

3 MS. PERLE: No, it doesn't. But in terms of
4 applying the definition -- in terms of talking about the
5 attorneys who are engaged -- who are covered by the
6 restrictions on attorneys, it deals with people who are
7 engaged in legal assistance activities rather than providing
8 legal assistance to eligible clients.

9 So, what would happen would be that -- if we were
10 to say that it did not apply to those attorneys, who now we
11 define are not engaged in legal assistance activities, for
12 instance, an attorney who did only program management -- I
13 think that you could read the definition more broadly.

14 But if you are concerned about that, then to say,
15 as it does in the restriction, "attorneys engaged in legal
16 assistance activities" doesn't help because the person, by
17 definition, who is an attorney, and not engaged in legal
18 assistance activities, isn't covered by the restriction to
19 begin with.

20 CHAIR BATTLE: Yes, they are not, because the
21 language of the Act does not cover them.

22 MS. PERLE: Right.

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1 MS. GLASOW: That is correct.

2 CHAIR BATTLE: So I think if we are completely
3 consistent with what the Act says, that's what we need to try
4 to accomplish by what we do with this particular regulation.

5 Okay. Okay. I am sorry, did you have anything
6 else on (a)?

7 MS. PERLE: No.

8 CHAIR BATTLE: Let's go on to (b). (b) is
9 "'political' means associated with a political party or the
10 campaign of any candidate for public or party office, or
11 engendering support for or opposition to any such political
12 party or candidate."

13 MS. PERLE: There is no definition currently of
14 "political" in this regulation. The definition of
15 "political" that's found in Part 1600, that definition was
16 added to Part 1600 in the early 1980s. It's quite a broad
17 definition --

18 CHAIR BATTLE: Are we getting rid of this language,
19 "publicity or propaganda"?

20 MS. PERLE: Yes.

21 CHAIR BATTLE: Okay.

22 MS. PERLE: We are getting rid of the language,

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1 "publicity and propaganda" because it's been interpreted very
2 broadly by the Corporation in the past.

3 We also took out the language with respect to
4 "ballot measures" because there's a separate restriction in
5 this regulation on ballot measures, and it wasn't necessary
6 to include it within the definition of political activity.

7 When I went back to try to craft a new definition
8 for the "political," I called the Office of Personnel
9 Management Office of Special Counsel, which interprets the
10 Hatch Act, and I asked them if they could -- I couldn't find
11 the definition in the Hatch Act of "political." So I asked
12 them if they could point me in the direction of one.

13 And they said, no, they couldn't because it didn't
14 exist. Curiously there is no definition in the legislation
15 in the Hatch Act, which is in part the basis for this set of
16 regulations.

17 MS. MERCADO: But isn't the historical legislative
18 basis for the Hatch Act bills with partisan --

19 MS. PERLE: Partisan --

20 MS. MERCADO: -- and that's in campaign --

21 CHAIR BATTLE: Electoral college --

22 MS. PERLE: Exactly.

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1 MS. MERCADO: A lot of what could possibly be,
2 whether it's --

3 MS. PERLE: Again, we are dealing with history over
4 the last ten years. There have been attempts often to treat
5 anything that Legal Services programs do as controversial,
6 where there are two sides. It has been treated as political.
7 We felt that that treatment was substantially too broad. And
8 that the broad language of the current definitions sort of
9 lent itself to that kind of a broad reach. And we didn't
10 think that was appropriate.

11 So that the definition that you see here in (b) is
12 what we think Congress meant when it passed the Hatch Act or
13 "political" in our Act. That it really was dealing with
14 partisan politics.

15 CHAIR BATTLE: Well, it might be helpful in the
16 comments, it seems to me, to go back to something that you
17 said a little bit earlier, that the Hatch Act does not define
18 "publicity or propaganda."

19 MS. PERLE: No, no. Doesn't define "political."
20 "Publicity and propaganda" is not a phrase that comes out of
21 the Hatch Act. It's a phrase that comes out of the rider --

22 CHAIR BATTLE: Well, make that point to say that if

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WASHINGTON, D.C. 20006

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1 it's not in the Hatch Act, that we thought that that language
2 went beyond what was required by the Hatch Act. And that
3 what we have done here is to try to parallel the specific
4 requirements that flow through to LSC with regard to the
5 Hatch Act.

6 MS. PERLE: That's also the requirements within the
7 LSC Act. There are additional requirements -- restrictions
8 beyond those in the Hatch Act.

9 MS. GLASOW: Part 1612 really deals with publicity
10 and propaganda issues. That's the regulation on lobbying.
11 And publicity and propaganda in essence is grassroots
12 lobbying. So it really was inappropriate to have it in this
13 definition, especially for this rule.

14 CHAIR BATTLE: Anything else? Any other --

15 MR. McCALPIN: Yes. I noticed it several times in
16 the Act -- at least once in 1006(e)(1) -- they talk about
17 political party or association.

18 Is there any meaning ascribed to "association" that
19 you think different from "party," which would suggest to us
20 that we ought to include the word "association" in (b)?

21 MS. PERLE: (b) says "'political' means associated
22 with a political party or the campaign of any candidate for

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1 public or party office, or engendering support for or
2 opposition to any such" --

3 MR. McCALPIN: But "associated with a political
4 party" may be different than "associated with a political
5 association." In other words, is an association something
6 different from a party?

7 MS. PERLE: Oh, I see.

8 CHAIR BATTLE: You are just saying that this
9 particular section should track what the Act says about
10 political party --

11 MR. McCALPIN: Well, I am just raising -- I am
12 asking why it doesn't.

13 MS. MERCADO: Then you can have, like, for example,
14 let's say a Democratic Women's Caucus --

15 CHAIR BATTLE: That's an association but not a
16 political party.

17 MS. GLASOW: Yes. It wouldn't hurt to have it in
18 the rule.

19 CHAIR BATTLE: That particular section deals with
20 employees of the Corporation.

21 This is a definition of what "political" means. It
22 seems to me maybe what we need to do is when we address the

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1 issue, as it pertains to employees of the Corporation, that
2 we include "political party" and "association" there.

3 Do we have "political association" anywhere else in
4 our Act?

5 MS. GLASOW: I don't think so.

6 Renee has something she wants to say. And maybe
7 she has thought about this issue.

8 But what I was going to simply suggest is that when
9 we go back through and make whatever technical changes, give
10 us a little bit of time to think about this and research this
11 and --

12 CHAIR BATTLE: Fine.

13 MS. GLASOW: -- then we will do it. Unless there is
14 something that Renee knows specifically.

15 MS. SZYBALA: There is something else that needs
16 research here, I think. And this is something the OIG
17 suggested the first time we saw this reg.

18 The Hatch Act was amended recently.

19 MR. McCALPIN: What did you say?

20 MS. GLASOW: The Hatch Act was liberalized. And at
21 this point, without having done extensive research, I think
22 the LSC Act is potentially -- did you look at it?

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1 MS. GLASOW: I looked at the revisions, and there
2 no revisions to Chapter 15 which is the chapter that --

3 MS. SZYBALA: That this is based on?

4 MS. GLASOW: The revisions were made to Chapter 73,
5 which is the chapter that applies to federal employees.

6 MS. PERLE: The revisions were made --

7 MS. SZYBALA: To 73, yes.

8 MS. PERLE: -- with respect to dealing with federal
9 employees. Not the section dealing with state employees that
10 applies to the Corporation and to staff attorneys.

11 MS. SZYBALA: Correct.

12 MS. PERLE: What they did, was, in essence, was to
13 liberalize the rules with respect to federal employees, make
14 them more like the rules with respect to state and local
15 employees.

16 MS. GLASOW: That is correct.

17 MS. SZYBALA: So there is nothing -- they talk
18 about associations. I thought something was made more
19 liberal about --

20 MS. PERLE: Yes, but only with respect to --

21 MS. SZYBALA: Federal employees.

22 MS. PERLE: -- federal employees.

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1 MS. GLASOW: That's correct.

2 MS. PERLE: Not with respect to state and local
3 employees.

4 CHAIR BATTLE: Right. And it seems to me that
5 employees of the Corporation is a different subset group that
6 we are interested in than attorneys who are in the field
7 practicing law.

8 And if this provision in the Act only addresses the
9 responsibilities that the employees have with regard to
10 political parties or associations, then I think we ought to
11 handle it in the same way.

12 MS. MERCADO: I guess I am a little concerned. I
13 am trying to figure out, are we saying that an attorney
14 cannot participate in any association --

15 CHAIR BATTLE: You can participate, but you can't
16 give an intentional identification: "I am an LSC attorney,
17 and I am designated by LSC to participate in this
18 association." For example, "I am the delegate from LSC
19 to --

20 MS. PERLE: I think what we really need to do is
21 look at the more substantive restrictions. As we said
22 before, some apply to attorneys, some apply to employees,

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1 some to staff attorneys, some apply to Corporation employees.
2 You have to kind of go through them and see exactly where
3 each applies. There are some subtle distinctions.

4 CHAIR BATTLE: Right.

5 MS. MERCADO: Again, I wouldn't want to be more
6 restrictive than what the original intent --

7 MS. PERLE: That's not going to be.

8 CHAIR BATTLE: That's my point in going back to
9 where do we get that language from, and making sure we are
10 consistent in terms of where we put it in the regulations.

11 MS. PERLE: I think that when we go through we will
12 see that there are mentions of political -- at least one
13 mention of political association later that I think is key to
14 the language of our Act.

15 MS. GLASOW: I imagine there are some opinions by
16 the Merit System Protection Board that deal with
17 associations, perhaps, and we can see how they define it or
18 what they consider it to be. That would be easy to look
19 into.

20 CHAIR BATTLE: That would be good. So, really,
21 what we will do is get some more background research and
22 parallel --

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1 MR. McCALPIN: We do use "association" in
2 1608.4(b)(1).

3 MS. PERLE: Right. And in that category you could
4 see that that is appropriate.

5 CHAIR BATTLE: Yes. We need to go back and make
6 sure we are tracking --

7 MS. PERLE: And that one is exactly as it is in the
8 current reg. There is no change in there.

9 MS. WATLINGTON: And this is only referring to
10 attorneys.

11 MS. PERLE: Well, it's used in different ways in
12 different places in the rule. Which is one of the reasons we
13 want to be careful. You don't want to define it more broadly
14 than we need to, because we can broaden the application
15 through the rule where we need to. But we want to define
16 "political" as narrowly as possible.

17 CHAIR BATTLE: As narrowly as necessary.

18 We move on to (c). Definition of "'staff attorney'
19 means an attorney who is employed by the recipient and more
20 than one half of whose annual professional salary is derived
21 from the proceeds of a grant from or contract with the Legal
22 Services Corporation or is received from a recipient,

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1 subrecipient, grantee or contractor that limits its
2 activities to providing legal assistance to clients eligible
3 for assistance under the Act."

4 MS. WATLINGTON: And this is still just referring
5 to, now, staff attorneys?

6 MS. PERLE: This is staff attorneys. There's
7 only --

8 CHAIR BATTLE: Does this definition appear
9 somewhere else, or is this --

10 MS. GLASOW: There is a definition in the LSC Act,
11 and there is a definition in Part 1600 that we are moving
12 basically to here. And the only revision we have made to the
13 definition in 1600 is to change the word "income" to
14 "salary."

15 CHAIR BATTLE: I am sorry, I broke in on Ernestine.
16 Did she answer your --

17 MS. WATLINGTON: Yes, I just wanted clarification
18 still talking about attorneys. Now it's staff attorneys.

19 CHAIR BATTLE: Right. Which is distinguishable,
20 because there are attorneys who are engaged in providing
21 legal services that are not staff attorneys. You've got PAI
22 attorneys --

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1 MS. WATLINGTON: Right. That's what it says, if
2 more than half of their salaries is paid --

3 MS. PERLE: In candor, we want to point to point
4 out that the definition that's in the LSC Act of staff
5 attorney is narrower than this definition.

6 The definition of staff attorney in the Act says
7 "means an attorney who receives more than half of his or her
8 annual professional income from a recipient organized solely
9 for the provision of legal assistance to eligible clients
10 under this title."

11 That definition was adopted when the Act was
12 adopted in 1974. It dealt with the situation in legal
13 Services that existed at a very different time in history
14 when Legal Services programs, the vast majority of the
15 programs received all of their funding -- those that existed
16 received all of their funding from OEO.

17 And in the early years of the Corporation most
18 Legal Services programs that are funded by the Corporation
19 continued to receive all of their funding from the
20 Corporation because many of them were new programs that were
21 funded with the grants from the Corporation that came into
22 existence. They didn't exist before.

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1 The situation this time has changed substantially.
2 So most, not all, but most Legal Services programs were
3 organized solely for the provision of legal assistance. And
4 so most attorneys that worked for those programs were staff
5 attorneys.

6 As time went on that became less and less true
7 because programs received money from other sources. And
8 oftentimes their sources provided funds for them that did
9 not require them to provide legal assistance only to eligible
10 clients or to only provide legal assistance to clients.

11 And so it became clear, as time went on, that fewer
12 and fewer attorneys who worked for the programs were staff
13 attorneys.

14 And in 1983, I believe, the Corporation adopted a
15 new definition of "staff attorney" which was substantially
16 broader than the statutory definition.

17 CHAIR BATTLE: And that's what this stuff initially
18 was --

19 MS. PERLE: That's what this stuff initially was
20 based on with a few small changes.

21 The Regs Working Group went through a long process
22 of trying to decide whether we wished to change the

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1 definition of "staff attorney" because we felt that this one,
2 in a certain sense, was too broad, and that it had been
3 interpreted even more broadly by the Corporation on occasion.

4 And we struggled with a different definition. But
5 the only thing that we were able to kind of agree on was that
6 we wanted to make it clear that staff attorneys were only
7 attorneys who were employed by programs.

8 The Corporation on occasion tried to use the staff
9 attorney definition to reach to PAI attorneys, and --

10 CHAIR BATTLE: But this is pretty clear. It says,
11 "who is employed by the recipient" --

12 MS. PERLE: I think that that language, "who is
13 employed by the recipient," is also new. And I apologize
14 it's not in the footnote.

15 And we changed the word "income" to "salary" to
16 make it clear that these were only LSC -- these were only
17 employees of recipients who received more than half of their
18 income from recipients.

19 CHAIR BATTLE: Bill.

20 MR. McCALPIN: I would like to raise the question
21 of the necessity or even the desirability of including this
22 definition at all.

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1 As nearly as I can tell -- I may have missed
2 something -- the only place that the term "staff attorney"
3 appears is in 1608.6. And it says, "no Corporation employee
4 and no staff attorney."

5 But the definition says -- are we saying in effect
6 that an employee of a grantee, who is not an attorney, may be
7 a candidate for partisan elective political office?

8 MS. PERLE: Yes.

9 MS. GLASOW: The LSC Act only applies, Chapter 15
10 in the Hatch Act, to employees of the Corporation and staff
11 attorneys.

12 MS. PERLE: And there is a separate restriction in
13 the Act, that applies to staff attorneys, that says staff
14 attorneys may not be candidates for partisan political
15 office.

16 Originally in the Act, when the Act was passed in
17 1974, that applied to partisan and nonpartisan. But that was
18 changed in 1977.

19 MR. McCALPIN: Well, it seems to me that -- do we
20 really want non-attorneys -- I appreciate it goes beyond the
21 Act, but do we really want non-attorney employees of grantees
22 running for partisan political office?

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1 MS. PERLE: Well, Congress has stated --

2 MR. McCALPIN: Well, Congress simply hasn't
3 prohibited --

4 MS. PERLE: Hasn't prohibited. And it's been
5 historical -- you know, it's been since the Corporation was
6 first passed, and there are countless General Counsel's
7 opinions that make it clear that the restriction on --
8 clearly, the restrictions on political activities go beyond
9 that.

10 And people cannot campaign during working hours,
11 they can't use resources from programs, they can't associated
12 the recipient with their candidacy. But they have always been
13 able to run.

14 And at least since 1977 staff attorneys have also
15 been permitted to run for nonpartisan office. So there are
16 many secretaries that serve on school boards, elected to
17 school boards; some elected to town councils where those are
18 nonpartisan offices.

19 I think that -- there is obviously two sides to
20 this issue. But I think that there is a sense amongst many
21 people that it's beneficial to have Legal Services employees
22 who really understand the problems of poor people serving on

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1 some of these entities, these nonpartisan entities, which
2 often do have a substantial impact on the lives of the client
3 community to give that view of what the problems of t he
4 client community are, and to ensure that they are
5 incorporated into the deliberations of those bodies.

6 CHAIR BATTLE: 1606(b)(2) is very specific as to
7 who could run for partisan political office. And it really
8 only includes employees of the Corporation and staff
9 attorneys.

10 MS. PERLE: I think the point that that bill was
11 originally making was that we don't need the definition of
12 staff attorney because we could incorporate the provisions of
13 the staff attorney restriction into 1608.6. And I think we
14 could do that much the same way that we incorporated the
15 definition of legal assistance activities.

16 CHAIR BATTLE: Is that the only place -- I know you
17 are reading. That's the only place --

18 MR. McCALPIN: That's the only place it appears, I
19 think. It seems to me -- I appreciate that you have wrestled
20 with this problem a long time, but I wonder if this
21 concentration on the income of the individual is the way to
22 do it.

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1 As you pointed out, originally the entire income of
2 the program, and therefore the entire income, the salaries of
3 the employees of the program, came from Corporation funds.

4 MS. PERLE: Most. Not all.

5 MR. McCALPIN: Yes, well --

6 MS. PERLE: Many programs, older programs.

7 MR. McCALPIN: Now, we indeed have some very few
8 programs who receive less than half of their funds from the
9 Corporation.

10 Then when you get into the question of, well, you
11 may in effect take an attorney off one payroll while engaged
12 in activity which could not be engaged in with Corporation
13 funds, so you switch them over, and you get into this arcane
14 accounting business about how you figure one half of this
15 individual's income has come from Corporation funds or non-
16 Corporation funds, or whatever.

17 Why can't we simply say no employee -- no attorney
18 employed by a grantee?

19 CHAIR BATTLE: That's basically what we said.

20 MR. McCALPIN: Then we get into all this business
21 about half the salary.

22 CHAIR BATTLE: Because half the salary comes out of

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1 the Act. The Act says --

2 MS. SZYBALA: That's not talking about employees
3 when it says that.

4 CHAIR BATTLE: It talks about staffing and
5 attorney.

6 MR. McCALPIN: Why can't we say "no attorney
7 employed by"?

8 MS. PERLE: Well, I think that would be broadening
9 it well beyond what Congress intended.

10 CHAIR BATTLE: Congress only talks about an
11 attorney who receives one half of their annual professional
12 income from the recipient. And actually Congress went
13 further to say "solely organized for the purpose of delivery
14 of legal services under this Act."

15 So we are only broadening it by saying "any
16 recipient." And we are not putting that "solely" language in
17 there.

18 MS. GLASOW: As a matter of fact, if we don't have
19 some definition in here, we would fall back on the definition
20 of the Act, and we may not find a recipient who is solely
21 organized, and therefore find out that this provision doesn't
22 apply to anything anymore.

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1 MS. PERLE: I think probably a few because there
2 are some that get other funds, but they have the same
3 eligibility restriction. So they are still solely organized
4 for the delivery of legal services.

5 MS. GLASOW: Any program that gets, for example --

6 CHAIR BATTLE: Have we lost a quorum?

7 MR. McCALPIN: No. You never --

8 CHAIR BATTLE: I am just wondering if we need to
9 take a break at some point, if people need five minutes.
10 Let's finish this one and then let's take five minutes.

11 MR. McCALPIN: I appreciate that what I am
12 suggesting goes beyond the definition contained in the Act.
13 I am also mindful of some of the kinds of difficulties we
14 have run into in this very delicate political arena in the
15 past. And I would just as soon avoid some of those things if
16 we could.

17 I would hate to have a program that by shifting an
18 attorney's duties back and forth between certain kinds of
19 representations, to then take the position that that attorney
20 only got 49 percent of annual compensation from Corporation
21 funds and therefore could be a candidate for partisan
22 political office.

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1 MS. PERLE: Certainly that could happen. I think
2 that what you find, if you look back through the history of
3 the letters that have been sent in asking for opinions, the
4 programs have been substantially more careful than that.

5 Where a person wanted to run for office, programs
6 have insisted that that person, if they were a staff
7 attorney, resign from the program.

8 There have been situations where people who were
9 employed by programs, but whose salaries were funded 100
10 percent from IOLTA funds or some other source of funds are
11 the only ones the programs have allowed to run for partisan
12 political office.

13 So I think that, clearly, in every situation there
14 are opportunities for abuse. But I don't think that we have
15 really run into any of those.

16 We have, on the other hand, run into lots of
17 situations where the Corporation has gone to great lengths to
18 sort of torture definitions. Torture definitions in order to
19 apply restrictions to people for whom Congress never intended
20 those definitions to be applied.

21 MR. McCALPIN: I think -- I don't want to get into
22 an original intent argument, but you can talk about what

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1 Congress wrote into the Act in 1974, and you can talk about
2 the way Congress thinks and reacts in 1994 --

3 MS. PERLE: But there are proposals in the House
4 bill that redefine staff attorney, and take into account some
5 of the more current reality. If that were to become law, I
6 think that we would have to go back and revisit this
7 definition.

8 MR. McCALPIN: In which Act?

9 MS. PERLE: I meant the Reauthorization Bill, and
10 the House and the Senate versions of the bill.

11 MR. McCALPIN: Well, you know --

12 CHAIR BATTLE: I understand the concern that you
13 have raised, Bill. And it is a practical consideration of
14 when you draw these very narrow distinctions you leave a wide
15 gap for people who are employed, do Legal Services work, who
16 could be deemed to do 30, 40 percent for some reason, to
17 escape all the provisions that we've got to make sure that
18 Legal Services doesn't get identified as an organization
19 directly involved in partisan politics.

20 MS. PERLE: But there are many other provisions in
21 this rule which guard against those kinds of problems. There
22 are a lot of restrictions against identifying programs --

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1 CHAIR BATTLE: A part of what I was going to say
2 is, however, I think that the wisest, given the fact that
3 Congress is looking in reauthorization of this issue and we
4 will have a chance to do something about it.

5 Probably the wisest thing we can do is to track
6 where we are, and how we draft these provisions. Let us keep
7 an eye to the concern that you have got and to the other
8 provisions to see if they give you a better comfort level.
9 And if not, we can come back and revisit this.

10 MS. GLASOW: This definition I think more closely
11 tracks the reality of where we are today with our programs.
12 It's a little bit closer to the language that would be in the
13 Reauthorization Bill.

14 And these issues probably will come up when the
15 comments come in from the public. And at that point this
16 committee may be able to get a feel as to whether there is
17 any problem with this in the field.

18 CHAIR BATTLE: Because I think it's a legitimate
19 concern, Bill, that you are raising about identification.

20 MS. PERLE: And we will get comments, not only from
21 staff attorneys who would like to apply to as few of them --
22 attorneys working in Legal Services programs who would like

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1 this to apply to as few of them as possible, we will also get
2 comments from project directors who have to enforce this.

3 We will get comments from bar associations
4 representing lawyers in the community.

5 And my guess is that we will get comments on this
6 and other rules from members of the public who have a
7 concern.

8 MR. McCALPIN: I can tell you, my preference is I
9 would rather see no attorney, who is an employee of a
10 grantee, running for partisan political office. And I would
11 skip all this business about half of the income and that sort
12 of thing.

13 It seems to me we can't live in ignorance of
14 everything that's happened in the last 20 years.

15 MS. PERLE: I just think that you will find that
16 this has not been as much of a source of controversy as you
17 think. Because we have had this rule -- most of the
18 controversy has been on whether or not the attorneys for
19 Legal Services had a right to say anything about any
20 legislation that affected their client community or any kind
21 of coalition building with other groups who also represent
22 poor people.

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1 That's where the key rub' has been in the ability of
2 Legal Services attorneys and their staff to represent poor
3 people in the most effective way. And it hasn't been whether
4 they run for office or didn't run for office.

5 MS. GLASOW: I think that's right.

6 MS. PERLE: Most of them don't because they don't
7 even want to get into that position anyway.

8 MS GLASOW: This committee could expand the way Mr.
9 McCalpin has suggested the application of that prohibition.
10 It's not precluded from doing that. And that would be
11 basically a policy decision that they feel is in the best
12 interest. But they certainly are not required to do that by
13 the restriction --

14 MR. McCALPIN: Maybe the answer has been suggested.
15 We ought to see what the comments are. But my own feeling is
16 that we have got to understand that the Congress has been
17 very sensitive to political involvement of the Corporation in
18 its grantees over the past, and probably has unarticulated in
19 legislation a different perception than it did in 1974.

20 MS. PERLE: You may be right. We haven't heard
21 that.

22 I will just ask whether the sense of the Committee

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1 is that we should try to do what we talked about before,
2 which is to take this out of the definition and apply the
3 specifics to just in the section in 1608.6. We can do that
4 probably easily and --

5 MR. McCALPIN: The only reason I think that might
6 be useful is if we are going to have one definition of staff
7 attorney in 1600, and have another definition in 1608, it
8 seems to me you will run into the difficulty of the
9 contention that there are different definitions, as
10 definitions in the Act --

11 CHAIR BATTLE: I thought we moved it. We would
12 keep it in 1600, too?

13 MS. PERLE: I think that that's something we need
14 to decide whether we want to do. I think one of the things
15 that we are going to need to do at some point, and maybe
16 several times during this process, is to go back to this
17 definition section and revise it consistent with what we have
18 done in this --

19 MR. McCALPIN: Offhand, do you know whether there
20 are any other sections of the regulation that defines the
21 term "staff attorney"?

22 MS. PERLE: I think it's only the PAI section. Is

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1 that correct?

2 MS. GLASOW: I believe so. And that's really sort
3 of an operational definition sort of -- private attorneys are
4 not staff attorneys.

5 CHAIR BATTLE: Is that definition different from
6 this one?

7 MS. GLASOW: They just use the term "staff
8 attorney."

9 MS. PERLE: They don't define it. It would refer
10 back --

11 CHAIR BATTLE: The definition would be the broader
12 definition that Bill is talking about, it seems to me, in
13 that context when you speak of a staff attorney --

14 MS. PERLE: The only difference between this
15 definition and the one in 1600 is that this makes it clear
16 that it refers only to people who are employed by the
17 program.

18 In the PAI reg it's not that if you are a PAI
19 attorney or a non staff attorney. I stand corrected. I
20 think that it's only the section dealing with who may be a
21 PAI attorney. In the current regulation it says only people
22 who haven't been staff attorneys for the past two years. So

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1 it's sort of tangential.

2 And I think it's an issue that we will deal with
3 when we deal with --

4 CHAIR BATTLE: I see three issues that we need to
5 address. One, whether if this definition only has
6 application to one section in this particular part, whether
7 it's better moved to that part.

8 Two, if there is another definition in our
9 regulations of staff attorney, if there is a distinction, and
10 how that's read, then it seems to me that gives greater
11 argument for this being moved out of the definition section
12 to just the particular section where staff attorney is
13 applied within this part.

14 And, three, the issue of whether this same
15 definition appears at 1600, or whether there is a reason to
16 have a different definition of staff attorney.

17 Why don't we just look at those three things, and
18 then we will get another draft, and take a look at it.

19 MS. PERLE: Okay.

20 CHAIR BATTLE: See where we are.

21 "1608.4. Prohibitions applicable to the
22 Corporation and to recipients."

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1 Subsection "(a) Neither the Corporation nor any
2 recipient shall use nay political test or qualification in
3 making any decision, taking any action, or performing any
4 function under the Act.

5 "(b) Neither the Corporation nor any recipient
6 shall contribute or make available Corporation funds, or any
7 personnel or equipment."

8 Subsection (1) to (b): "To any political party or
9 association.

10 "(2) To the campaign of any candidate for public
11 or party office; or

12 "(3) For use in advocating or opposing any ballot
13 measure, initiative, or referendum."

14 Now, this appears to be the same as it was.

15 MS. PERLE: It is.

16 CHAIR BATTLE: Then there are no changes?

17 MS. PERLE: No. It's basically taken directly from
18 the sections of the Act that apply the restrictions to
19 Corporation and to recipients.

20 CHAIR BATTLE: Are there any questions from the
21 Board members about that?

22 MS. WATLINGTON: "Recipient," you are talking about

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1 all the other programs?

2 CHAIR BATTLE: All programs that are --

3 MS. PERLE: All programs that receive funds on
4 their 1006(a)(1).

5 MR. McCALPIN: In some instances we specifically
6 referred to subrecipients.

7 MS. PERLE: That's included in the definition in
8 1600. We left it there because that definition applies to so
9 many rules. "Recipient" means any grantee or contractor
10 providing financial assistance --

11 MS. GLASOW: Receiving financial assistance from
12 the Corporation under Section 1006(a)(1)(a)(b)(i).

13 MS. PERLE: I apologize. I thought that it
14 included subrecipients in that definition.

15 MR. McCALPIN: I thought that I saw somewhere here
16 in 1608 the use of the word. Yes, in the definition of
17 "staff attorney": "or is received from a recipient,
18 subrecipient, grantee or contractor."

19 MS. GLASOW: And "subrecipient" is defined in our
20 subrecipient rule.

21 MR. McCALPIN: If recipient is 1608.4(a), referring
22 back to 1600, and including subrecipient, then who do we need

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1 to have subrecipient in the definition of "staff attorney"?

2 CHAIR BATTLE: By that you mean "subrecipient,
3 grantee or contractor," all of that?

4 MS. GLASOW: Because we are talking about -- staff
5 attorney is not reached by this provision in section (4) that
6 we are dealing with now.

7 MS. PERLE: This is the entities.

8 MS. GLASOW: yes.

9 MS. PERLE: It's not the individual --

10 MS. GLASOW: Attorney, right.

11 MR. MCCALPIN: But if "recipient" by definition of
12 1600 includes subrecipient, why do we have to use
13 subrecipient --

14 MS. GLASOW: I misspoke. I was mistaken on that.
15 I apologize.

16 MR. BROOKS; We are not going to make a distinction
17 in (c), the definition of "staff attorney," between the
18 attorney who was employed by a recipient and an attorney who
19 was employed by a subrecipient; are we?

20 MS. GLASOW: In which section?

21 MR. BROOKS: (c) on the top of page 3. That could
22 be read, taken by itself, that a staff attorney means an

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1 attorney who was empowered by the recipient, just the
2 recipient. And more than half of the annual salary is
3 derived or received from a recipient, subrecipient, grantee
4 or contractor.

5 MS. PERLE: That's a good point.

6 MS. GLASOW; That is a good point, yes.

7 MR. BROOKS: There is a distinction within that
8 paragraph. Does it mean anything?

9 MS. GLASOW: It could be interpreted as such, and
10 it wasn't intended to be different. But I think that's a
11 good point. We should probably pull that language out of all
12 sections of this definition.

13 CHAIR BATTLE: Right. And define recipient to be
14 inclusive of subrecipient. And that way anytime you use
15 "recipient," it will include "subrecipient."

16 MS. PERLE: In the House bill there was an effort
17 to do that as well. If you look at that bill there is an
18 effort throughout to ensure that --

19 CHAIR BATTLE: The language is consistent.

20 MS. PERLE: It includes subrecipient where it's
21 appropriate to. There are certain restrictions that it's not
22 appropriate to include.

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1 MR. BROOKS: Grantee or contractor, is that still
2 different, or is that --

3 MS. GLASOW: We should probably pull that whole
4 phrase up into the other section as definition. We can look
5 at that --

6 CHAIR BATTLE: Okay.

7 MS. GLASOW: -- and fix it.

8 MS. MERCADO: Just real quickly, and you may have
9 already discussed this when I was out, but when you look at
10 grantee or contractor, again is it contractor in all
11 likelihood that it can mean someone that isn't a PAI program,
12 that they would be covered by this definition?

13 MS. GLASOW: No, because they wouldn't be limiting
14 their activities to legal assistance to clients eligible for
15 assistance under the OIC Act.

16 MS. MERCADO: Is this the way it originally is with
17 no changes?

18 MS. GLASOW: From the Act?

19 MS. MERCADO: Yes.

20 MS. GLASOW: No. This definition has changed from
21 the definition in the Act.

22 MS. PERLE: But it's close to the definition that's

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1 now in 1600 that applies to the regulations.

2 CHAIR BATTLE: Can we go back and look at those
3 things that we have done so far for purposes of subsection
4 (c), and the use of the word "recipient" in 1608.4 to make
5 sure that we are covering that net as broadly or as limitedly
6 as we intend to.

7 CHAIR BATTLE: 1608.4 -- I am sorry, 5.

8 MS. GLASOW: The cross-out in the "4" is hidden,
9 actually, on the line --

10 MS. PERLE: It's hard to see. We tried to fix it
11 but it just --

12 CHAIR BATTLE: "Prohibitions applicable to all
13 employees." The (a) section is stricken because this is
14 going to be the head; right?

15 MS. GLASOW: Right.

16 CHAIR BATTLE: "No employee of the Corporation or
17 of any recipient shall" -- and "intentionally" is mis-
18 spelled. "Shall intentionally identify the Corporation or a
19 recipient with any partisan or nonpartisan political
20 activity, or with the campaign of any candidate for public or
21 party office.

22 "(b) use any Corporation funds for activities

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1 prohibited to attorneys under Sections 1608.6." And then we
2 have added 1608.7 or 1608.8.

3 MS. GLASOW: Actually, this is a technical mistake
4 here. It should be 1608.6 or 1608.7. As we merged sections
5 of this Act, 1608 no longer applies --

6 MS. PERLE: Doesn't exist.

7 MS. GLASOW: -- or doesn't exist anymore.

8 CHAIR BATTLE: "Nor shall an employee intentionally
9 identify or encourage others to identify the Corporation or a
10 recipient with such activities."

11 Bill, does this get to the broader -- well, this
12 isn't running for office. But it is intentional
13 identification of the Corporation or recipient with partisan
14 political activity.

15 MS. WATLINGTON: 1608.6 is where it deals with it.

16 MS. PERLE: You need to read (c) and (d).

17 CHAIR BATTLE: Okay. You want me to continue to
18 read?

19 MS. PERLE: Yes.

20 CHAIR BATTLE: That's right, because we really took
21 the 1608 out.

22 "(c) Use official authority or influence for the

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1 election or nomination for" -- and I add "public office" --
2 "whether partisan or nonpartisan; or

3 "(d) directly or indirectly coerce, attempt to
4 coerce, command or advise any employee of the Corporation or
5 of any recipient to pay, lend, or contribute anything of
6 value to a political party, or committee, organization,
7 agency or person for political purposes."

8 MS. PERLE: This is the only place in this rule
9 where we really made a substantive change in the reach of the
10 provision.

11 I believe it was first raised by the IG's office,
12 although they can correct me if I am wrong, that the
13 restrictions that are in 1608.5, even though the Act doesn't
14 require that they be applied beyond the Corporation employees
15 and attorneys working for programs, that this is something
16 that nobody should be able to be permitted to do, the use of
17 official authority for interfering with the results of an
18 election and the coercion.

19 CHAIR BATTLE: Let me see if I understand what you
20 have done.

21 MS. PERLE: Okay.

22 CHAIR BATTLE: 1608.5, probably tracking the Act,

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1 only applied previously to Corporation employees and to staff
2 attorneys. By taking that heading out and using "employee of
3 the Corporation or the recipient," you are broadening the
4 application to every employee of a Corporation or recipient
5 whether you are talking about attorneys, staff attorneys, or
6 whatever.

7 MS. PERLE: Correct.

8 CHAIR BATTLE: Okay.

9 MS. PERLE: There wasn't going to be any argument
10 that those things should be permitted to any employee. We
11 didn't want to have a situation where people were going to
12 find distinctions between one kind of employee and another
13 kind of employee, the kind that we were discussing earlier,
14 because we just thought it was inappropriate for anybody that
15 was receiving support from Legal Services Corporation to do
16 those kinds of things. Those are the kinds of things that
17 reflected badly on the program as a whole, regardless of
18 whether they were performed by a staff attorney or by a
19 financial person or by a support person.

20 CHAIR BATTLE: Sure.

21 MS. PERLE: It just wasn't something that should
22 have been done.

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1 CHAIR BATTLE: What do you think about my
2 suggestion in (c) where it says "nomination of office" to add
3 "public office"? When we start talking about prohibitions
4 later, we are talking about partisan elected public office.
5 This really applies to elections to public office, right?

6 MR. MCCALPIN: Well, party office.

7 MS. PERLE: I think it could apply to party offices
8 as well.

9 CHAIR BATTLE: Okay.

10 MR. MCCALPIN: I think office, whether partisan or
11 nonpartisan, probably covers everything.

12 MS. MERCADO: Yes, it does, but I think it goes
13 back to the fundamental principle of Legal Services was
14 supposed to be an independent corporation of attorneys being
15 able to advocate on behalf of their clients without any kind
16 of political restriction or agendas by anyone.

17 MR. MCCALPIN: Let me ask this. Referring to
18 history again, how does this affect the right of a program or
19 employees of a program to intercede in the nomination of a
20 candidate for a judicial position?

21 MS. GLASOW: Basically, the Hatch Act
22 restriction --

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1 MR. McCALPIN: I am talking about the Bork issue.

2 MS. GLASOW: The Bork issue. Largely, these types
3 of prohibitions have been applied to judgeships. I know the
4 Hatch Act has consistently.

5 MR. McCALPIN: I am not talking about an election
6 now. I am talking about somebody who is nominated by the
7 President for a Federal judicial position and the program or
8 employees of the program taking positions with respect to
9 that nomination.

10 MS. GLASOW: I will have to go back and check, but
11 I do believe that we have applied some of these restrictions
12 to that situation in the past. I think it came up once, and
13 I think, maybe, it was the Bork nomination, but I will have
14 to go back and check.

15 MR. McCALPIN: It seems to me, it takes kind of a
16 strain of the actual words that are used here to apply it to
17 that kind of a situation.

18 MS. PERLE: I think, actually, the restrictions in
19 Part 1612, which are the lobbying restrictions, are the ones
20 that were applied in the Bork situation because the
21 confirmation process is considered a legislative process.

22 Victor, maybe you remember.

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1 MS. GLASOW: I think we looked at all of the
2 prohibitions on political activity, including the lobbying
3 and these, and I think we have looked at it thoroughly, but I
4 will have to go back and refresh my memory.

5 MR. McCALPIN: I am certain that there are those
6 who regarded the activities of the Bork thing as political.

7 MS. PERLE: Yes.

8 MR. BROOKS: Well, this language adds the word
9 "nomination" to the words that came from the Act.

10 CHAIR BATTLE: What page?

11 MR. McCALPIN: What are you looking at?

12 MR. BROOKS: Well, I am looking at the Act,
13 107(a)(6). It talks about "attorneys shall refrain." This
14 applies to attorneys, "any activity in connection with an
15 election."

16 Now, we have had it as "election or nomination,"
17 which I think the nomination would take care of the Bork
18 situation, it seems to me, at least after the nomination, and
19 I guess there was no public fracas until the nomination had
20 been made in that situation. So that, we cover it in this
21 language by saying "interfering with or affecting the result
22 of an election or nomination for public or party office."

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1 MR. McCALPIN: Was it the intent that that would
2 reach a Bork-type situation?

3 MS. PERLE: I don't think so.

4 MR. BROOKS: Why not?

5 MS. PERLE: I think this was intended to be an
6 election or nomination to an elective office. In other
7 words, a nomination for someone whose name would appear on a
8 ballot.

9 MR. McCALPIN: Let's go back and look at it. What
10 do we think about allowing or permitting recipients, their
11 employees, or the Corporation and its employees to become
12 involved in the question of the nomination of a person for a
13 Federal judicial position? What do we think about it? Then
14 we can talk about how we handle it in words.

15 My own feeling about this is we ought to stay out
16 and leave it to others.

17 I was involved with NLADA in a very significant
18 effort with respect to a nominee for the Fifth Circuit, and
19 maybe we are best off to leave that sort of thing to NLADA
20 and others and not involve the Corporation or its recipients.

21 CHAIR BATTLE: But isn't NLADA a political
22 association?

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1 MR. McCALPIN: No.

2 CHAIR BATTLE: I guess what I am beginning to
3 wonder is -- let's, for example, take in what you have said.
4 You are a staff attorney. You hold an office with the NLADA,
5 and you are involved with NLADA's effort with regard to that
6 nomination. Do you have to do that off hours?

7 MS. PERLE: This doesn't apply to NLADA.

8 CHAIR BATTLE: I know it doesn't, but the staff
9 attorney indirectly, then, is getting involved.

10 MR. McCALPIN: She is talking about a staff
11 attorney who is a director of NLADA.

12 CHAIR BATTLE: Yes.

13 MS. MERCADO: But NLADA is not a political
14 association.

15 CHAIR BATTLE: I know that, but, ultimately, your
16 involvement through NLADA is to effect the nomination process
17 for a judge.

18 MS. PERLE: You mean someone who serves on the
19 board at the NLADA.

20 CHAIR BATTLE: Yes.

21 MR. McCALPIN: We have, as a matter of fact, a
22 project director on the NLADA board right now, a Jerry Lane.

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1 MS. GLASOW: I think this is intended to reach the
2 specific category of employee that we happen to be talking
3 about within the function of their job in the Legal Services
4 program. I don't know that it would be that attenuated to go
5 out and say if this person is also sitting on another group
6 out here, can he get involved there.

7 MR. McCALPIN: I think another way of saying that
8 is are we attempting to reach what a person does in their own
9 capacity as a private individual.

10 MS. PERLE: I think the answer to that is
11 absolutely not.

12 MS. GLASOW: No.

13 MS. PERLE: Not in this section.

14 MR. McCALPIN: I think if you say not in a capacity
15 as a private individual, and as an individual, they are part
16 of another organization, it is pretty much the same, but I
17 still think that my own preference would be to somehow or
18 another have this provision restrict the Corporation, its
19 employees, recipients and their employees from becoming
20 involved in the nomination or confirmation of nominees for
21 Federal judicial office and maybe State judicial office, the
22 same.

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1 MR. BROOKS: As distinct from an elective office.

2 If it is permissible in their own time to --

3 MR. McCALPIN: I think this covers elective office.

4 MR. BROOKS: I think it is saying thou shall not
5 use your official capacity for official connection, not
6 involve the Corporation or a recipient.

7 MS. MERCADO: Yes, but what that person does on
8 their own time is their own time because then you start
9 infringing on First Amendment rights, and that is totally
10 different.

11 CHAIR BATTLE: I am wondering with this particular
12 issue, though I agree with what Bill is saying, whether
13 either the Act or the Hatch Act or any other law actually
14 points out judicial elections and gives any special treatment
15 thereto --

16 MS. PERLE: Elections.

17 CHAIR BATTLE: -- or nomination.

18 What he is saying is Federal judges, and it may be
19 that in some States, judges are appointed.

20 MR. McCALPIN: Sure.

21 CHAIR BATTLE: It is a little bit different than an
22 election process.

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1 Appointed processes, as I see it, are not really
2 covered by either of these Acts, and the question becomes
3 whether we want to extend the coverage for the electoral
4 process to the appointed process.

5 MR. McCALPIN: I guess all I am really saying is
6 that I certainly want to look to the Act for what we are
7 doing, but I also want to look at what has happened in the
8 last 20 or 25 years and not live in a vacuum.

9 MS. PERLE: I think that the concern about the Bork
10 nomination was that there were allegations that programs were
11 using resources to do grassroots lobbying with respect to the
12 Bork nomination, and to the extent that that was addressed by
13 the Corporation, I think -- and my recollection could be
14 wrong -- there may have been some attempts to use these
15 restrictions and provisions, but I think the provisions, when
16 push came to shove, that was used to apply to it were those
17 that dealt with lobbying, the restrictions on lobbying, which
18 I think is a much more appropriate place.

19 CHAIR BATTLE: I also see a danger, and it could
20 come just from interpretation. It just so happens that in
21 Alabama, there is an attorney who has worked a lifetime with
22 Legal Services who has been considered for appointment to a

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1 judicial position in family court, and her issue with Legal
2 Services has been working with family issues.

3 I don't want a person's ability to seek that
4 because they do have a specialized knowledge and expertise to
5 at all be hampered by the language that we put in here,
6 particularly because that language goes beyond what either
7 the Act or the law or the Hatch Act would require, and so I
8 just have some concern because we don't want to restrict an
9 attorney's ability to ascend to the bench through an
10 appointed process.

11 MS. PERLE: Right now there are many, many openings
12 in the Federal judiciary, and I, for one, would assume that
13 we would love to see some of the services lawyers or former
14 Legal Services lawyers find themselves as nominees for a
15 Federal District and Court of Appeals decisions, and I don't
16 think that we want to circle through this role --

17 CHAIR BATTLE: You would have to resign in order to
18 be considered.

19 MR. McCALPIN: We are requiring the program
20 director on the Eighth Circuit right now.

21 MS. PERLE: I also don't think that we want to
22 suggest that Legal Services program writes a letter to the

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1 Judicial Nominations Commission on behalf of a current or
2 former staff attorney, encouraging them to consider the
3 nomination of this person. That should be considered a
4 violation of 1608.4.

5 CHAIR BATTLE: That would be an awfully big -- if
6 you spent 15 years in one place --

7 MS. PERLE: Absolutely.

8 CHAIR BATTLE: -- and you can't get a letter from
9 them to the nominating committee.

10 MR. McCALPIN: It is a question of whether it is
11 the Corporation or the recipient identified that is doing it
12 or whether it is the people doing it in the individual
13 capacity.

14 MS. PERLE: If there is a letter from a project
15 director on behalf of one of its staff attorneys writing to
16 Judicial Nominations Commission and saying, "I am the
17 director of ABC Legal Services. I have been the director for
18 15 years, and Joe Smith or Mary Jones has been on my staff
19 for all of that time. They are a fantastic advocate. They
20 know the law," blah, blah, blah, blah, "and I would like to
21 encourage the Judicial Nominations Commission to consider to
22 putting this person's name and nomination for the opening of

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1 the Federal District Court Judge."

2 If we accept that this rule should be read as
3 broadly as you are suggesting, it strikes me that that would
4 be a violation of the provision that says no employee of any
5 recipient should use official authority or influence for the
6 purpose of interfering with or affecting the result of an
7 election or nomination for office, and I don't think that is
8 what Congress intended.

9 CHAIR BATTLE: No.

10 Congress' concern was the elective process, it
11 seems to me, and it speaks directly to the electoral process.
12 In the Act, in the Hatch Act, I don't think that there are
13 any provisions to the extent that we are talking about that
14 either by State governmental employees or local governmental
15 employees in the same way.

16 MS. PERLE: Suzanne can correct me, but I believe
17 that there are opinions from the Merit Systems Protection
18 Board when they were asked specifically whether it was
19 appropriate for a State or local employee or a Legal Services
20 program employee to write a letter on behalf of a nominee for
21 a judicial nomination, not an elective office, but an
22 appointment, whether that was appropriate, and they have

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1 consistently said yes.

2 Am I correct on that?

3 MS. GLASOW: It is my recollection that the Hatch
4 Act only applies to elective offices, but I probably will
5 need to go back and confirm that and also to look at the
6 legislative history of that.

7 CHAIR BATTLE: Let's go back and let's look at this
8 history. This is a legitimate concern that Bill is raising,
9 but let's see if anyone else has addressed that by expanding
10 the coverage. If not, then we need to go back and examine
11 whether there is a real compelling reason for us to do so as
12 well.

13 MS. PERLE: I think that we always have to bear in
14 mind that, in any of these rules, there may be situations,
15 extreme situations which we all agree are difficult and
16 should be addressed, but we don't want to write a rule to
17 deal with those situations which could be used so broadly
18 that it would affect activities that all of us would agree
19 are appropriate.

20 MS. GLASOW: I think (a) and (b) deal with the
21 issue of any political activity in the sense that, if you are
22 going to use the recipient's funds or you are going to

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1 identify the recipient with it, I think that reaches those
2 few situations where a recipient could just get bogged down
3 and involved in a Bork nomination or something like that.
4 Whereas, (c) and (d) would allow at this point, if we
5 consider a nomination to be dealing with an electoral
6 process, those letters to be written for someone who was
7 nominated for a judgeship somewhere or something like that.

8 MR. BROOKS: That has happened in Boston where a
9 project director was under consideration for a judgeship, and
10 he missed it the first time, and he kept on as the project
11 director and finally got the judgeship. I don't know what
12 letters were written from the other deputy director or
13 anybody in the program, but it seems to me you could take it
14 to the point where the Judicial Nominating Commission could
15 not ask for references from within the program of deputy
16 director, for instance, and the deputy director would be
17 violating the rules if he or she responded. That doesn't
18 make sense. So I think we want to be sure we don't get into
19 that kind of a bind.

20 CHAIR BATTLE: Let's carefully look at that
21 question. I think it is a legitimate one that needs
22 additional research.

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1 Does anybody need a break? I know we have worked
2 doggedly, and we are staggering through these regulations.
3 We can take a five-minute break or we can wait and take a
4 lunch break at 12:00.

5 It looks like we are about to finish.

6 MR. McCALPIN: We don't have much left. Let's go
7 on to the end.

8 CHAIR BATTLE: We can go ahead and try to finish
9 this and then take a lunch break and pick up with 1621 after
10 lunch.

11 We are at 1608.6. "Prohibition applicable to
12 Corporation employees and to staff attorneys. While employed
13 under the Act, no Corporation employee and no staff attorney
14 shall at any time be a candidate for partisan elective public
15 office."

16 MS. PERLE: Originally, the LSC Act, as I said
17 earlier, applied this restriction to partisan and nonpartisan
18 elective office, and that was changed in 1977 to apply it
19 only to partisan elective office, which is consistent with
20 the Hatch Act provisions that apply to the State and local
21 government officials. So, in fact, now the provision in our
22 Act which says that staff attorneys shouldn't run for

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1 partisan political office is going to be redundant.

2 MS. GLASOW: Yes. Actually, what happened was
3 there was a consideration of revising the Hatch Act during
4 this same time, and there was a fear that they were going to
5 take out the prohibition against running for partisan
6 elective office. So they put that specific language in our
7 Act when they revised it because they, very clearly, didn't
8 want our staff attorneys in partisan elective offices. So
9 that is why it is really redundant because the Hatch Act
10 retained that language.

11 CHAIR BATTLE: What about the safe harbor notion?
12 I understand that there is some concern about whether that
13 was appropriate.

14 MS. PERLE: There was a lot of discussion about
15 that. In fact, Mr. Dana was one of the persons who was
16 involved in that discussion.

17 CHAIR BATTLE: Mr. Dana, feel free to come to the
18 table at any point in time that you have some observations
19 that you want to share with us.

20 MS. PERLE: The Corporation --

21 CHAIR BATTLE: Judge.

22 MS. PERLE: Yes. Excuse me, Judge.

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1 MR. McCALPIN: He says here he is just "Howard."

2 MR. DANA: "Howard" is fine.

3 MS. PERLE: The Corporation -- I think this is true
4 -- has consistently taken a position that an employee covered
5 by this restriction on candidacy for partisan elective public
6 office must resign from the program once they have taken any
7 sort of concrete affirmative steps in furtherance of
8 candidacy.

9 There have been a lot of situations where programs
10 have requested an opinion saying, "Can't my person just take
11 an unpaid leave of absence?," and the Corporations
12 consistently said no, that they couldn't.

13 I am not sure how clearly the footnote conveys the
14 discussion went on. There were some folks that felt that
15 there should be an opportunity for a staff attorney to have
16 what was called a safe harbor, meaning that they didn't have
17 to resign; that as long as they were not taking any salary
18 from a program, they could continue to be an unpaid employee.
19 They could continue to receive benefits, for example. Health
20 insurance, not vacation and leave, but that they continue to
21 receive health benefits. I think that was the primary
22 concern that the people had that they really shouldn't be

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1 forced to give up their health care benefits.

2 I don't think we resolved that issue in the regs
3 working group, and I don't think you necessarily need to
4 resolve it here. I think it is one that could be left to
5 continued interpretation by the Corporation, unless you had
6 some specific feeling about it one way or the other.

7 MS. GLASOW: I will point out that the statutory
8 language says that we are subject to Chapter 15 of the Hatch
9 Act. Chapter 15 of the Hatch Act, starting with Section
10 1504, basically, says this will be implemented by the Special
11 Counsel of the Merit Systems Protection Board, and it goes on
12 and talks about how that will be done.

13 The Merit Systems Protection Board has consistently
14 said that persons subject to this prohibition cannot take an
15 unpaid leave of absence, and they have found violations when
16 people have attempted to do that.

17 There are provisions in this Chapter 15 that says
18 when an agency or grantee of Federal funds violates this,
19 they literally step in and begin an investigation. So we,
20 with an abundance of caution, have been very careful about
21 not going against how they are interpreting this statute
22 because they appear to have some authority to step in, and

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1 they could interfere with our funding.

2 If we don't take the appropriate steps, then they
3 might. So we have been very careful to be consistent with
4 their opinions.

5 CHAIR BATTLE: This language consistent with where
6 we are at present, just mirroring the Act's language, not
7 expanding its application.

8 MS. PERLE: Right.

9 What I just wanted to make clear, we wanted to put
10 this in, so you could be aware of the discussion that went
11 on.

12 CHAIR BATTLE: Yes.

13 MS. PERLE: We didn't propose anything that would
14 change what has been the current interpretation, and I think
15 the majority of people felt that it was not worth the
16 potential backlash to make any changes, certainly, within the
17 language of the regulation.

18 Some people wished to have the Corporation think
19 about the issue and, maybe, even talk to the Merit Systems
20 Protection Board about their interpretation.

21 CHAIR BATTLE: I think that would be helpful, too,
22 and I guess that is what Suzanne says she has done in part,

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1 to just make sure that however we track what it is that we
2 would have an obligation to monitor here that it be
3 consistent with what Merit Systems Protection Board has done
4 under implementation of the same provisions as it relates to
5 being a candidate for a partisan-elected public office.

6 I notice that this applies to Corporation employees
7 and staff attorneys, but it does not apply anywhere else. Is
8 this where we would enter this definition of staff attorneys?

9 MS. PERLE: Yes.

10 CHAIR BATTLE: Okay.

11 MR. McCALPIN: I notice that in the current
12 regulation, this provision is 1608.5(c).

13 CHAIR BATTLE: Right.

14 MR. McCALPIN: I see. We have put prohibition
15 applicable to all employees.

16 MS. PERLE: If you recall earlier in the
17 discussion, we felt that what were (a) and (b) of 1608.5(b),
18 use official authority for interfering with an election or
19 nomination and the anti-coercion provisions, we felt there
20 was sort of a general unanimity of opinion that those things
21 nobody should be permitted to do. So we felt pretty
22 comfortable that we could, without causing a major

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1 controversy, apply those two restrictions to all employees of
2 the Corporation or recipient, but I think everybody felt that
3 it would be much more problematic. I don't think anybody
4 even suggested that we apply this restriction on candidacy
5 for a partisan elective public office to beyond those people
6 to whom it applied currently. So we split that section, what
7 was 1608.5.

8 MR. McCALPIN: Let me go back a minute to
9 1608.5(c). When you say "no employee of the Corporation or
10 any recipient use authority or influence for the purpose of
11 interfering," does that sufficiently isolate or guarantee the
12 ability of the individual to act as a private citizen other
13 than in the capacity as an employee?

14 MS. PERLE: Do you mean does this impinge on
15 their --

16 MR. McCALPIN: You can look at it and when it says
17 "no employee of a recipient shall use influence for the
18 purpose of interfering with election or nomination," does
19 that sufficiently make clear that it is only prohibited when
20 acting as an employee and is not prohibited when acting as a
21 private individual?

22 MS. GLASOW: That is right, and the way that has

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1 been interpreted is, for instance, if someone were making a
2 speech on an issue, they might identify where they work on a
3 résumé or something, and if that is as far as it goes, that
4 is fine, but they get up and they say, "I am the director of
5 this program, and on behalf of the program, I want to make
6 clear that I am in favor of this legislation," that is where
7 they are using their influence and identification.

8 MS. PERLE: I think that this really was intended
9 more against a project director.

10 CHAIR BATTLE: Well, it used to read at any time,
11 which seems to me -- Bill? -- that it covered both public and
12 private time. The way that this language is now stricken, it
13 seems to me subsection (c) would have applied to one's time
14 off duty as well.

15 MS. PERLE: I think that is correct.

16 CHAIR BATTLE: Isn't that overreaching?

17 MS. PERLE: No. The very essence of the Hatch Act
18 is it reaches a person's ability to do something that would
19 otherwise be private. To run for an elective office is
20 something they would do privately, not as a director. I am
21 not running as director of Legal Services program for this
22 office; I am running at Bill Jones.

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1 The Hatch Act restricts that, and it has been found
2 to be constitutional, just because of the problem they see
3 with the effect that would have on the political process.

4 CHAIR BATTLE: These are non-public employees,
5 though, it seems to me. Is that the intent here that staff
6 attorneys of recipients or non-public employees be bound not
7 to be able to --

8 MS. PERLE: Congress, for these purposes, wanted to
9 treat staff attorneys as public employees.

10 CHAIR BATTLE: As public employees, yes.

11 MS. PERLE: Don't forget, this is the use of
12 official authority or influence. In other words, if a person
13 is a staff attorney, it is using that position in some way to
14 interfere or using their position either over another
15 employee or over a client to coerce that low-level employee
16 or client on whose behalf they are representing in some other
17 matter, attempting to coerce them to vote for a particular
18 candidate or give money.

19 I don't think anybody cared whether they did that
20 on program time or they camped at the person's house after
21 program hours; that everybody felt that that was
22 inappropriate.

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1 We are not talking about saying to my friend or
2 neighbor, "Hey, you really ought to give money to John Jones'
3 campaign." It is a situation where the person was acting as
4 a Legal Services employee and, with respect to people or
5 situations, have some influence because of their --

6 CHAIR BATTLE: Because a neighbor is also an LSC
7 employee.

8 MS. PERLE: I think that is probably a close
9 question. If what you do outside, if a bunch of LSC
10 employees and program employees get together.

11 MR. McCALPIN: I apologize for the jumping around,
12 but I guess what I was really raising was the question of
13 whether the limitations of 1608.7 about private activity can
14 be read as applicable to 1608.5 as well.

15 MS. PERLE: 7(d) is what you are talking about. I
16 think it was intended to apply to the activities in
17 1608.7(a).

18 MS. GLASOW: Something in this section which would
19 just be 7.

20 MS. PERLE: Right.

21 Maybe what we need to do is to change that language
22 from "engaging in the activities in Section (a) above."

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1 CHAIR BATTLE: Are there any questions? We have
2 kind of covered now 1608.5, .6, and .7. Let's see if we can
3 clear out .6. Are there any questions about it?

4 Howard?

5 MR. DANA: For the record, I am Howard Dana, and I
6 am speaking in my individual capacity and not as a
7 representative of SCLAID or the American Bar Association.

8 I forget what my position was at the last meeting,
9 but it seems to me that focussing on 1608.6, I have some
10 concerns about the meaning of "under the Act," what that
11 adds. I understand it is historical.

12 I also suspect that because of the definition of a
13 staff attorney, if you were a staff attorney at a local
14 recipient and you wanted to run for partisan political public
15 office, you could ask your boss to go slightly less than half
16 time, especially if the recipient was, like many of our
17 recipients, not limited to activities for providing legal
18 assistance.

19 Now most recipients do some things other than
20 providing legal assistance to clients eligible for assistance
21 under the Act. So that the second half of the definition of
22 staff attorney may not provide any restriction at all.

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1 So you might well have staff attorneys at local
2 programs running for partisan political office with a fairly
3 modest accommodation for the election period, and I think I
4 question whether you want that.

5 MR. McCALPIN: I would simply say "no attorney
6 employed by a program," recognizing it to that extent.

7 CHAIR BATTLE: We need to, I think, go back and
8 examine these concerns. I had not thought until Howard
9 mentioned it about the prospect that someone could go on less
10 than half their salary for that period and, therefore, escape
11 all these regulations.

12 MS. PERLE: I think it is half of their salary
13 coming from an LSC source. So I don't think it would be they
14 would just go on half time, then they could escape it, but if
15 all the money that they got from the program still came from
16 an LSC source, it would be that half of what they got from
17 the recipient --

18 MR. McCALPIN: They stay on full compensation.
19 They are paid out of IOLTA funds.

20 MS. PERLE: Right.

21 That is, in fact, what does happen, and that has,
22 historically, happened, and with a few exceptions, the

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1 Corporation has always said that that is --

2 CHAIR BATTLE: What I see is if these regulations,
3 which are Hatch Act regulations, apply to State government
4 kind of employment as well and if State government employees
5 have the same out, then I am comfortable that we aren't
6 giving or getting anything, more or less, than anybody else
7 that is similarly situated.

8 I think what we are trying to get at is an
9 understanding of the intent of the law and whether or not in
10 reconstructing these regulations we can carry out that
11 intent, and I am not sure exactly where these prohibitions
12 come from. Do they come from Hatch Act provisions? Do they
13 come from our Act as it relates to 1608.6?

14 MS. PERLE: The restrictions come from the Hatch
15 Act.

16 CHAIR BATTLE: Yes.

17 MS. PERLE: But the definition of what is a staff
18 attorney comes from our Act.

19 MS. GLASOW: Most public employees are, pretty
20 much, full time, I think.

21 CHAIR BATTLE: Let's look at it, anyway.

22 MS. GLASOW: Okay.

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1 CHAIR BATTLE: Let's see if there are any, and if
2 there are and if our uniquely drawn group, then, would fit
3 into that same kind of category, then I would have a better
4 comfort level than I do.

5 MS. GLASOW: Another possibility is to change the
6 second half of this definition, a staff attorney to talk
7 about a recipient, et cetera, primarily engage in legal
8 assistance to clients, which might mirror --

9 MS. PERLE: I think it goes so far beyond what the
10 congressional restriction is. I think you have to think very
11 carefully about whether you want to do that. You will get
12 tremendous reaction.

13 MS. WATLINGTON: My concerns are that I don't want
14 us, in trying to change it, put more limitations on it
15 because of getting some of these attorneys in is going to
16 help the client community.

17 MS. PERLE: I think that is right.

18 MS. WATLINGTON: So what I am saying, when you look
19 at it, I don't want you to look at it as staying within, but
20 also not putting more restriction than what isn't already
21 there.

22 MS. PERLE: I think this is one area where we

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1 should listen to Congress, and if Congress says they want to
2 restrict Legal Services or Legal Services attorneys, then we
3 have to go along with that, but they haven't said that. I
4 certainly don't think that we should --

5 MS. WATLINGTON: Well, that is what I am saying in
6 changing it. Don't put more on it than what is already
7 there.

8 MS. PERLE: Right. I agree with you exactly.

9 MS. WATLINGTON: That is what I am saying as you
10 look at it.

11 CHAIR BATTLE: I also made a note that after I read
12 these particular regs, it appeared that there was no
13 restriction placed on private funds used based on the way
14 that this is being read.

15 In other words, to the extent that you got a
16 program where more than 50 percent of the funds are not LSC
17 funds or to the extent that you have attorneys where more
18 than 50 percent of their work is not with LSC funds, that
19 these restrictions seem to travel with the LSC money.

20 MS. GLASOW: We currently have a rule, Part 1610,
21 that deals with private funds, and these restrictions are
22 listed there. So, basically, a recipient cannot use their

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1 private funds to engage in any of these that are prohibited
2 under the LSC Act.

3 MS. PERLE: It does not apply to IOLTA funds or
4 other sources of public funds.

5 MS. GLASOW: Public funds, right. Have an
6 exception from that.

7 CHAIR BATTLE: We will get to that.

8 All right. Anything else with 1608.7?

9 MR. McCALPIN: Let me just ask one question in view
10 of what you have just said. I know that there are programs
11 who have, in effect, chairs, if you will, a staff position
12 fully funded outside of public funds.

13 MS. PERLE: Outside of LSC funds, you mean.

14 MR. McCALPIN: Well, outside of public funds.

15 MS. PERLE: Public funds? Okay.

16 CHAIR BATTLE: Right.

17 MR. McCALPIN: Now, do these restrictions apply to
18 a section attorney?

19 MS. GLASOW: It depends on which definition of
20 staff attorney we use.

21 MR. McCALPIN: Legal Services in eastern Missouri
22 has one position which is staffed by the Catholic Archdiocese

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1 of St. Louis, another by the Jewish Women's Federation, and
2 another by a group of Protestant churches. Now, these are
3 three positions which are staffed. They are employees, I
4 believe, for all other purposes, except that they are funded
5 by these religious organizations.

6 Are they employed under the Act, and are they staff
7 attorneys? They don't draw half their pay.

8 MS. GLASOW: They are not staff attorneys. They,
9 maybe, fall under some of the provisions dealing with the
10 employees. I would have go to back and look at this a little
11 more carefully.

12 Sometimes the prohibitions in the Act deal with
13 funds, and sometimes they deal with the activity. So you
14 can't engage in a certain activity regardless of what funds
15 are used. Some of them deal with no funds shall be used, and
16 then it applies to LSC or private funds, but, generally, not
17 to public funds.

18 We would have to look at each of these and see
19 whether it applies to all the employees or a staff attorney
20 and then what funds would apply, but that is a good question.
21 We should probably go back and look at that.

22 CHAIR BATTLE: We are now on Section 7. Are there

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1 any questions about Section 7?

2 I have read Section 7, right?

3 MS. PERLE: Just so it is clear, the provisions in
4 Section (a) that are underlined, those are the provisions
5 from the definition of "legal assistants," activities that
6 were pulled out of the definition and incorporated into this,
7 and then (1), (2), and (3) are the same restrictions that
8 were there, that have always been in this section. (b) and
9 (c) are new, and they are intended to clarify the
10 applicability of these provisions, and I think that they are
11 both consistent with General Counsel's interpretations, at
12 least (c) is my understanding of the way this section has
13 been interpreted.

14 I think there are some General Counsel's opinions
15 that say when they were asked, when a program asked if it was
16 okay to have voter registration materials just sitting in
17 their waiting room, that there have been a couple of General
18 Counsel's opinions that said that was okay. I think there
19 may have been one that said it wasn't okay, but they were
20 inconsistent with one another. There may have been a split
21 in the circuits on that issue.

22 MS. GLASOW: All we can say is that, currently, we

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1 agree with these provisions as we propose them to the
2 committee.

3 CHAIR BATTLE: Before we say nothing in this
4 section, we are really talking about Subsection 7, and that
5 does not leap back over into the other section. So the
6 prohibitions go to private time as well as public time if you
7 are using LSC influence during those time periods, right?

8 MS. GLASOW: Right.

9 MS. PERLE: Right, and what we need to do is we may
10 need to clarify what that means.

11 CHAIR BATTLE: Yes. Either in the notes or by the
12 wording, it needs to be clear that this does not spill over.

13 MS. PERLE: Right.

14 CHAIR BATTLE: Any questions from any of the other
15 board members about 1608.7?

16 (No response.)

17 CHAIR BATTLE: 1608.7, the section on
18 attorney-client relationship has been stricken, and 1608.8
19 was moved. The enforcement section is deleted, and I notice
20 that the notes were that there are general enforcements
21 somewhere else. So that, you felt that there wasn't a need
22 to.

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1 MS. PERLE: There is a general enforcement section
2 in 1618, and also, we felt that there wasn't any particular
3 reason that this should be enforced through a provision that
4 deals with legislative and administrative advocacy. That
5 just reinforces, I think, the attempt by the Corporation in
6 the past to treat everything that is controversial and all
7 legislative and administrative advocacies to treat those as
8 political activity, which we didn't think was appropriate.

9 It didn't make sense to use one regulation's
10 enforcement procedures which were intended to deal with a
11 certain set of circumstances, to apply those to another
12 section which really was, in most instances, unrelated.

13 Also, the Corporation is going through a whole new
14 effort to revise and revisit all the questions around modern
15 reenforcement, and I thought it was not appropriate to --

16 CHAIR BATTLE: But you are saying enforcement goes
17 to 1618. Do you think that it would be clear to programs if
18 we identified where the enforcement provision is?

19 MS. PERLE: We don't do that anyplace else.

20 CHAIR BATTLE: We don't anywhere else in the Act?

21 MS. PERLE: No.

22 MR. McCALPIN: We are talking about .7, talking

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1 about prohibitions applicable to attorneys. Then you have
2 subsection (c) which strikes me as rather more general, and I
3 went back and looked at 1608.4 and wondered if (c) might more
4 appropriately be included. Although, of course, (c) is
5 intended to refer back to the (a)(1), (2), and (3).

6 MS. PERLE: Right. Particularly, (3).

7 MR. McCALPIN: It seemed to me that in the section
8 dealing only with attorneys, you were now talking about,
9 basically, everybody in the program and not just attorneys.

10 MS. PERLE: What we wanted to make clear is that
11 the prohibitions only dealt with attorneys, and it didn't
12 deal more broadly with certain noncontroversial activities of
13 the recipient, and I just wanted to make clear that nobody
14 should read this as restricting those general
15 noncontroversial activities of the recipients.

16 I think it would be confusing to put it in the
17 recipient section because it wouldn't be clear what it was
18 referring to. I guess you could take (c) and put it in the
19 recipient thing and then say nothing in Section 1608.7 should
20 prohibit a recipient from doing this, but I think it is a
21 little bit clearer if we leave it the way it is.

22 MS. GLASOW: Because it is dealing with voter

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1 registration activity, which we have talked about above, and
2 therefore, we are just clarifying that restriction would not
3 prohibit a recipient from making available general
4 nonpartisan information.

5 MS. PERLE: Renee just made a point which I think
6 is well taken. She suggested that we should say instead of
7 in this section on (c) nothing on this part shall prohibit a
8 recipient, to make it clear that there is nothing else in
9 here that does it either.

10 MR. BROOKS: Which case should that be? A
11 subparagraph of Section 7 or should there be an independently
12 numbered section?

13 MS. PERLE: I think it could be. It was put in
14 there, simply, because we wanted to make it clear that
15 Section 1608.7(a)(3) was not read more broadly than the
16 language was intended, than the clear language.

17 I certainly think if you wanted to be a purist
18 about these things, you could put it in a separate section.

19 CHAIR BATTLE: I see a conflict in that, on the one
20 hand, you are saying that you are prohibited during your work
21 hours from engaging in any voter registration activity. Then
22 we come back and say but you can make available nonpartisan

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1 information on voter registration procedures.

2 MS. PERLE: I think the voter registration activity
3 was intended to deal with those situations, and I think,
4 probably, at least in the OEO days, this did happen where
5 people who work for Legal Services programs went around to
6 the client community to register people.

7 CHAIR BATTLE: But if you make nonpartisan
8 information available on voter registration procedures --

9 MS. PERLE: Right. It is just procedures. It is
10 part of giving someone legal assistance, if someone comes in
11 and says how can I register to vote.

12 CHAIR BATTLE: You also cannot actually do any
13 registration.

14 MS. PERLE: Right. Originally, we had it in a
15 broader provision which suggested that that was okay; that
16 they could do registration.

17 They could have a voter registration table set up
18 in their office, and I think that there was a long discussion
19 about that at the regs working group, and people felt that it
20 was not worth raising a red flag by explicitly stating that
21 that was permissible; that that was not a wise change, but
22 everybody felt that oftentimes around election times, since

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1 the waiting room of a Legal Services office is a place where
2 people who often are not registered to vote congregate, much
3 as shopping malls, and a lot of other places where voter
4 registration materials are displayed.

5 CHAIR BATTLE: The way to clarify that is to give
6 examples in the notes and to explicitly show what the
7 distinction is, so that people will understand what is
8 permissible and what is not.

9 MS. MERCADO: I think it is not unusual to see,
10 especially, in State agencies, whether it is food stamp
11 office or AFDC office or even Social Security office, to have
12 boxes of voter registration cards and general voter
13 information or people.

14 No one is doing anything to help them or explain
15 anything. They just pick up the information and leave.

16 MS. PERLE: Actually, to the extent that you
17 consider it to be legal assistance, if someone picks one up
18 and then goes to the receptions and say how do I fill this
19 out, I don't think there is a problem, particularly, with
20 someone explaining how you fill it out.

21 I think it would be a problem if you had somebody
22 there saying "You need to fill these things out because we

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1 have to get more minorities," or "We need Hispanics elected
2 to office and we need voters, and if you're eligible, we need
3 to do this." I think that would be inappropriate. People
4 would consider that to be inappropriate, and no one is
5 suggesting that that is what we can do, but I think that we
6 can easily take care of those kinds of things by putting
7 examples in the notes of what we think are the kinds of
8 appropriate activities.

9 CHAIR BATTLE: Any other questions about striking
10 and moving the last two sections that we discussed in 7 and
11 8?

12 (No response.)

13 CHAIR BATTLE: If there are none, it is now 11:50,
14 and my guess is that it is an appropriate time to break for
15 lunch, rather than starting up with 1621 right now.

16 Why don't we recess for now and start back up at 1
17 o'clock.

18 (Whereupon, a luncheon recess was taken at 11:50
19 a.m., to reconvene at 1:16 p.m. this same day, Sunday, June
20 18, 1994.)

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

(1:16 p.m.)

1
2
3 CHAIR BATTLE: This afternoon, we are going to
4 start our review of Part 1621, which has to do with client
5 grievance procedures.

6 Is there anything preliminarily that we need to
7 address?

8 MS. PERLE: Just to note that Suzanne and I were
9 both thinking the exact same thing that we want to make sure
10 that the committee understood that there is nothing specific
11 in the LSC Act that requires client grievance procedures.
12 There is, of course, language that talks about maintaining
13 the highest quality of service and professional standards and
14 the preservation of attorney-client relations and integrity
15 of the adversary process in 1007(a), and then, generally, in
16 1006(b), references to professional responsibilities, but
17 this provision was created in the 1970's in response to, I
18 think, a perceived need, but not in response to any specific
19 requirement in the Act.

20 CHAIR BATTLE: So, even if we have all of these
21 sections for authority, what you are telling us is --

22 MS. PERLE: Right. I think they provide ample

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1 authority --

2 CHAIR BATTLE: Right.

3 MS. PERLE: -- but they don't give a lot of
4 guidance as to the particular parameters of this specific
5 rule.

6 CHAIR BATTLE: Okay. Anything else, Suzanne?

7 MS. GLASOW: No.

8 CHAIR BATTLE: Okay.

9 "1621.1 Purpose. By providing an effective
10 complaint mechanism for an applicant for service who believes
11 that legal assistance has been denied improperly, or for a
12 client who is dissatisfied with the quality or manner of
13 services provided, this part seeks to insure that recipients
14 treat every client and applicant for service fairly and with
15 dignity and respect and provide its clients with high quality
16 legal services."

17 MS. PERLE: The changes that are in this Purpose
18 section were really intended to make a little bit clearer
19 what this rule was intended to accomplish and what it really
20 realistically can accomplish; that there wasn't necessarily a
21 remedy for every client who was denied service. Even if the
22 person was financially eligible, we all know that every

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1 program has many, many more applicants for service than they
2 can hope to serve; that there is no entitlement to legal
3 services; and that we didn't want to create that.

4 We wanted to make it clear that what we wanted to
5 do is make sure that everybody had an opportunity to complain
6 about what it was. We wanted to make sure that everybody
7 understood why they weren't served. We wanted to make sure
8 that if a person was served, but got service that they were
9 unhappy about, that they had an opportunity to be treated
10 fairly and decently, and that when a program could do
11 something about it, they would know what it was that they
12 should be doing. So that is really the reason we changed
13 this.

14 CHAIR BATTLE: I have one question which is, from
15 my reading of it, I tried to determine if a PAI attorney
16 handles a matter and a client is upset about it, whether this
17 complaint mechanism would provide for a way to have that
18 addressed, and it may be that it is addressed.

19 MS. PERLE: It is not addressed explicitly.

20 CHAIR BATTLE: Explicitly anywhere else.

21 MS. PERLE: We did raise the issue. If you look on
22 page 2 at footnote 6 -- actually, it is raised explicitly.

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1 We did specifically say that the complaint procedure for
2 quality or manner of providing service would apply to PAI
3 attorneys.

4 CHAIR BATTLE: Okay.

5 MS. PERLE: But it is clearly a policy decision of
6 the committee and the board to decide whether this should
7 apply to PAI attorneys or whether this should be separate
8 procedure for PAI attorneys, and whether we should deal with
9 it in 1614 or whether we should deal with it separately
10 within this rule. It is up to you.

11 CHAIR BATTLE: Okay.

12 Any other questions on the Purpose?

13 MR. McCALPIN: Can I be grammatically picky?

14 CHAIR BATTLE: Absolutely.

15 MS. PERLE: Yes.

16 MR. McCALPIN: When you changed "recipients" to the
17 plural, you did not change the plural noun in the next line
18 from the singular to the plural, "its" to "their."

19 CHAIR BATTLE: Thank you.

20 MS. PERLE: Thank you.

21 CHAIR BATTLE: Anything else?

22 MS. MERCADO: I guess if we are going to deal with

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1 it on the PAI stuff, I will just wait until then.

2 CHAIR BATTLE: Okay.

3 "1621.2 Grievance Committee. The governing body of
4 a recipient shall establish a grievance committee or
5 committees, composed of lawyer and client members of the
6 governing body. One third or more of the members of each
7 grievance committee shall be client members of the governing
8 body."

9 MS. PERLE: We felt since this was a committee that
10 was intended to hear client complaints that there wasn't
11 anything from, certainly, our Act that would require it to be
12 in the same proportion as the board, and we felt that, in the
13 event that it was considered appropriate, we should be able
14 to have more than one. We should be able to have at least
15 two client members.

16 As I understand -- and Howard may be able to
17 correct me if I am wrong -- the ABA opinions say that when
18 you are dealing with complaints raised by clients, it doesn't
19 have to be a majority of attorneys who are hearing them. I
20 think that was specifically addressed at some point. I just
21 realized that yesterday when I was preparing for this. I did
22 some reading about it. So I don't think there is any ethical

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1 constraint on having a client grievance committee that is
2 composed of a majority of clients.

3 CHAIR BATTLE: Okay.

4 Any questions about that one?

5 MS. PERLE: It doesn't require it. You still have
6 two-thirds attorneys and one-third client, if that is what
7 the board decided that they wanted to do, but this way, it
8 could be two and one.

9 CHAIR BATTLE: It allows them to have one.

10 MR. MCCALPIN: Could I ask an off-the-wall
11 question?

12 MS. PERLE: Anytime.

13 MR. MCCALPIN: I don't recall whether there is
14 anything in the regulations or not which would require
15 recipients to have internal grievance procedures.

16 MS. PERLE: For what?

17 MR. MCCALPIN: For the personnel within the
18 recipient.

19 MS. PERLE: No. There is nothing. We don't have
20 any regulations that deal specifically with personnel. Some
21 of them, obviously, have an impact on personnel matters.

22 MS. MERCADO: Just on internal policy manuals.

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1 MS. PERLE: Yes, or their collective bargaining
2 agreement if they are a unionized program or State law may
3 have some provision. I don't know.

4 CHAIR BATTLE: I'm sorry. The only question I have
5 is when we talk about the grievance committee and how it is
6 composed, then the issue to be addressed by the grievance
7 committee is one of a quality or manner of providing legal
8 services which may get into principally legal issues.

9 Do you file a motion for summary judgment in a case
10 or how do you respond to it? To have an appreciation for
11 whether or not someone has done an adequate quality job of
12 handling a particular case, it seems to me some of those
13 issues may be the kind that an attorney can address.

14 On the other hand, there are issues that a client
15 can address about how they were treated, how they were
16 treated with regard to qualifications, whether or not the
17 intake technician listened to all of the information they had
18 to provide, whether there were problems with attitudes, and a
19 lot of other things.

20 You put all of that to the very same committee.
21 I've just got some concerns about it.

22 MS. PERLE: First of all, this says "committee or

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1 committees." So that, there could be more than one
2 committee, and I think, probably, in larger programs, there
3 are more than one committee, and the jurisdiction of various
4 committees may be divided up geographically.

5 You can have some committees that are intended to
6 address the kinds of issues that you are talking about,
7 whether it was bad lawyering, and some are bad treatment, and
8 I think that really would be up to the local committee.

9 Now, the way this is written, I think that each
10 committee must have at least one lawyer because it is
11 composed of lawyer and client members of the governing body.
12 So it is question of whether you have a committee that is
13 composed of two clients and one lawyer, say, or one lawyer or
14 one client and two lawyers. You could have larger committees
15 as well.

16 CHAIR BATTLE: Each committee, one-third or more of
17 the members have to be client.

18 MS. PERLE: Right, and it is composed of lawyer and
19 client members. So I think that I would read it to require
20 at least one lawyer on each committee.

21 MS. MERCADO: It is not an either/or. It is an
22 and.

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1 MS. PERLE: Right, right.

2 CHAIR BATTLE: Lawyer and client.

3 MS. PERLE: Right.

4 CHAIR BATTLE: All right.

5 MR. McCALPIN: I gather there is no implication in
6 this that the grievance committee, committees, have to be
7 standing and cannot be ad hoc.

8 MS. PERLE: I think that is right. Ernestine might
9 know better than any of us, since she sat on a local board,
10 what the practice is, and my guess is they probably are
11 standing committees.

12 MS. WATLINGTON: They are standing committees. In
13 fact, I was chair of a backup law center. We usually put the
14 two together, and our statement is our personnel and
15 grievance committee is, last year the same committee, to deal
16 with both of those issues.

17 MS. PERLE: I think that there could be a standing
18 committee in a particular situation where there is a
19 particular grave complaint. There could be a special
20 committee appointed.

21 MS. WATLINGTON: But, then, the committee usually
22 has -- it is the procedure that you set up on how a grievance

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1 comes in and where it goes. It is a policy that, first, it
2 has to go to the committee to see if it is enough before it
3 goes to the board. So there is a process.

4 Each local program has their own procedure of how a
5 complaint is handled.

6 MS. PERLE: This is supposed to set certain minimum
7 requirements for these procedures, and local programs are
8 free to use them and to embellish on them, and these are sort
9 of minimum requirements.

10 CHAIR BATTLE: Anything else on that one?

11 MR. BROOKS: On the first item on page 2, we talk
12 about one of the members of a the grievance committee shall
13 be client members. We use the defined term "eligible client
14 member" in 1607.2. It seems to me those should be
15 consistent.

16 CHAIR BATTLE: Yes. That is a good point.

17 MS. PERLE: That is a good point.

18 This was done before we added to the definition.

19 MR. MCCALPIN: I am jumping ahead a little bit, but
20 is there any suggestion of a right of appeal from the
21 grievance committee, for instance, to the full board?

22 MS. WATLINGTON: That is their procedure.

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1 MS. PERLE: No. I don't think there has to be a
2 provision for appeal.

3 MR. McCALPIN: I am not suggesting there has to be.
4 I am just asking where we are.

5 MS. PERLE: I don't think it forecloses it. I
6 don't think it forecloses a particular program from putting
7 in an appeal procedure.

8 MR. McCALPIN: Do you think this forecloses?

9 MS. PERLE: No, I do not.

10 MR. McCALPIN: So that, a recipient could establish
11 the kind of grievance committee you are talking about here
12 and still authorize an appeal from that to the full board of
13 the recipient.

14 MS. PERLE: Yes. There is certainly nothing in
15 here that is intended to foreclose that.

16 MR. McCALPIN: It does not require it.

17 MS. PERLE: Right.

18 MR. BROOKS: I think we ought to just give at least
19 passing thought to whether we should provide such a
20 requirement.

21 MR. McCALPIN: Or, at least say nothing herein
22 prohibits.

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1 MS. PERLE: We think that that is, again, one of
2 those things we could deal with easily in the commentary.

3 MR. MCCALPIN: Probably.

4 CHAIR BATTLE: Yes, and we might want to make a
5 note of that.

6 "1621.3 Complaints about the quality or manner of
7 providing services. (a)" --

8 MR. MCCALPIN: Why did we take out "legal"?

9 MS. PERLE: Some programs may have funds that
10 provide services that are not strictly legal, and what we
11 really wanted to do was make it clear that we are dealing not
12 just with the legal assistance, but we are dealing with the
13 treatment that people receive by the programs, and we didn't
14 want to have a program say, "Well, I don't care. You can't
15 complain about my intake worker being rude to clients or to
16 applicants for service." That doesn't go through our system,
17 and we felt that it really should.

18 CHAIR BATTLE: This is a broader definition. It
19 says anything that you get at Legal Services, you can
20 complaint about, if you don't like the quality or the manner
21 of the provision.

22 MS. PERLE: If you don't like the way you were

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1 treated by the program --

2 CHAIR BATTLE: Yes.

3 MS. PERLE: -- that is really what was intended.

4 CHAIR BATTLE: Yes. I think that is a fair
5 assessment.

6 Subsection (a), "A recipient shall establish
7 procedures for determining the validity of a complaint by a
8 client about the manner or quality of services that have been
9 provided to the client by members of the recipient's staff or
10 private attorneys under Part 1614 of these regulations."

11 Therein lies the private attorney, the ability to
12 complain about how private attorneys have provided services.

13 MS. PERLE: Right, and that is really your decision
14 as to whether you want to leave that language in, whether you
15 want to deal with it separately, whether you want to be
16 silent on it, whatever.

17 The only other thing that was really a substantive
18 change is we want to make it clear that an opposing party,
19 for example, or somebody outside of the program wouldn't have
20 access to this procedure in order to complaint.

21 It wouldn't preclude a program from setting up a
22 separate mechanism or using this mechanism if they wanted to,

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1 to deal with other complaints, but they wouldn't be obligated
2 to have a client grievance procedure, have these committees
3 deal with complaints by outside persons or entities.

4 CHAIR BATTLE: Are we going to draft some examples
5 of procedures for the recipients as to what will comport with
6 what it is that we are suggesting be developed or do we have
7 something to give them guidance?

8 MS. PERLE: I think that is really something that
9 John Tull's shop might want to consider doing, to give
10 guidance to programs. I don't think it is appropriate,
11 necessarily, to put it in there.

12 We could give some examples of some things if we
13 wanted to.

14 MS. MERCADO: I don't think you want it in the
15 regulations.

16 CHAIR BATTLE: We may not want it in the
17 regulations, but I think it is important, so that at least
18 the field has some guidance as to what we are talking about
19 in putting together a client grievance procedure.

20 MS. PERLE: I think that in the process of
21 developing the standards, the program standards that they
22 will be developing from some standards by which a client

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1 grievance procedure will be measured, I don't think that is
2 necessarily an appropriate thing for us to do as part of the
3 regulatory process.

4 MS. GLASOW: We do that occasionally as technical
5 assistants. For instances, we send out a boiler plate
6 retainer agreement that we worked on for a period of time.
7 We said here are the types of provisions you might like to
8 have in your retainer agreement.

9 MS. PERLE: As an example. It is not intended to
10 say you must have this.

11 MS. GLASOW: Right.

12 MS. PERLE: It is intended to say if you did this,
13 this would certainly comply, we think this is good practice.
14 When I say "we," I think the Corporation, certainly, could do
15 the same kind of thing with respect to a client grievance
16 procedure and maybe, in fact, has done so in the past. I
17 don't know.

18 CHAIR BATTLE: Let's go through some of the things
19 that the procedures should provide.

20 "The procedures shall provide at least: (a)
21 Information to a client at the time of the initial visit
22 about how to make a complaint; and (2) Prompt consideration

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1 of each complaint by the director of the recipient or the
2 director's designee; (3) If the director of the recipient is
3 unable to resolve the matter to the complainant's" --

4 MS. PERLE: Or, the director's designee. I just
5 want to make that clear.

6 CHAIR BATTLE: Oh, I'm sorry. That was included.

7 "If the director of the recipient or the director's
8 designee is unable to resolve the matter to the complainant's
9 satisfaction, the procedures shall provide an opportunity for
10 a complainant to submit a written complaint to a grievance
11 committee established by the governing body pursuant to
12 1612.2. Upon request, the recipient shall transcribe a brief
13 statement of the complaint, dictated by the complainant for
14 submission to the grievance committee. Each written
15 complaint shall include a signed statement by the complainant
16 giving limited written consent to disclose client
17 confidences, secrets or other information relating to the
18 representation of the complainant necessary to investigate
19 the matters and issues raised by the complaint."

20 MS. PERLE: The purpose of that consent was just to
21 make it clear that there is no attorney-client relationship
22 between client and the board. That was understood, perhaps,

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1 and implicit, but that we want to make that clear.

2 MR. McCALPIN: Isn't it generally understood that
3 when a client makes a complaint against an attorney that as
4 in the case of medical malpractice, you waive the privilege
5 to the extent necessary to resolve the complaint?

6 MS. PERLE: It may be. First of all, these aren't
7 necessarily against a particular attorney. It may be against
8 an internal worker or some other member of staff. We just
9 wanted to make it clear that if there was an issue raised
10 that the client understood that others were going to find
11 out. They were going to have access to information. Clients
12 sometimes are not always clear that if you raise this issue,
13 others are going to have access to this information. So we
14 just felt that it was better to be explicit about that and
15 not to sort of leave to some vague understanding of what
16 waived and what is not waived.

17 CHAIR BATTLE: I had a question about subsection
18 (1). Are we saying that each time a client comes in during
19 intake that we tell them at that time about the complaint
20 procedure, or are we saying when someone comes in and says
21 I've got a complaint, at that point, we have got an
22 obligation to tell them about the complaint procedure?

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1 MS. PERLE: I think there has to be information
2 available. It could be a sign on the wall in large letters.

3 MS. MERCADO: In fact, I know in our own State Bar,
4 in this last session, it was made mandatory that all
5 attorneys have a notice in their law office, in the general
6 intake office when people come in, about how they can make a
7 complaint to an attorney about services.

8 Obviously, that also applies to Legal Services, but
9 that is only in Texas. I don't know what it is like in other
10 States. It is sort of like how to file an EEO complaint or
11 there has been an injury on workers' comp or whatever. You
12 have an office of who to contact and what you should get
13 down, and without necessarily having a staffperson at a desk
14 for you, it is just posted there, and it is posted, depending
15 on what community you are in, bilingually, depending on what
16 your client population happens to be.

17 MS. PERLE: I think there are different ways that
18 that information can be conveyed. Sometimes it could be
19 included in the retainer agreement or it could be a boiler
20 plate letter that is handed to everybody or at the bottom of
21 your intake sheet where you sign, there could be a paragraph
22 that explains. I think every program could address the issue

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1 in a different way.

2 CHAIR BATTLE: But what you are saying is that at
3 the initial intake, the very first reading, that each client
4 has access to what the grievance procedure is.

5 MS. PERLE: This has always been the rule. This is
6 not a change.

7 CHAIR BATTLE: I think that the notes that we do
8 along with this reg need to just give that interpretation, so
9 that it is clear. We are talking about the first visit that
10 there is some information available. It does not have to be
11 real detailed information, but some information about the
12 fact that there is a method for clients to grieve complaints.

13 Did I see a hand on this end?

14 MR. BROOKS: Well, I had one nit-pick on paragraph
15 (a), the next-to-the-last line, "private attorneys under Part
16 1614." As I read it first, it was unclear to me whether
17 recipients staff under 1614 or just private attorneys under
18 1614. Clearly, Part 1614 does not apply to recipients staff.

19 MR. McCALPIN: It is the PAI.

20 MR. BROOKS: It is the PAI. So I just suggest we
21 put the word "by" after the word "or."

22 MR. McCALPIN: "Or by private attorneys."

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1 MR. BROOKS: Yes.

2 Then, just as a matter of style -- this is jumping
3 ahead by a paragraph or two -- it seems to me that it is not
4 wholly artistic to have under paragraph (b), an item (1) and
5 item (2) follow along, and then we start (3) with a new
6 sentence.

7 MS. PERLE: We struggled a little bit with this
8 because we were changing the way it was sort of put together.

9 MR. BROOKS: I think it could be kept on the same
10 pattern by just striking out the words "The procedures shall
11 provide." Going back to the preamble, "The procedures shall
12 provide at least" -- one, two, three -- "if a director of the
13 recipient or the director's designee is unable to resolve the
14 matter to the complainant's satisfaction, an opportunity for
15 a complainant to submit," et cetera. It would follow the
16 same grammatical.

17 Then, on the top of page 3, to start that new
18 sentence as a new paragraph (4) and change (4) to (5).

19 MS. PERLE: I'm sorry. I am a little confused.
20 Where are you talking about?

21 MR. BROOKS: I am talking about the top of page 3.
22 Then we start that with a new sentence, and it is a slightly

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1 new idea. I suggest that would be more gracefully put
2 together if that were paragraph (4) and then change the
3 numbering.

4 MS. PERLE: You mean starting with "Upon"?

5 MR. BROOKS: Yes.

6 I was ahead of you on the nit-pick that time.

7 CHAIR BATTLE: That is okay.

8 MS. PERLE: I think when we go back through this,
9 we will sort of parse out this diagram under something, so
10 that it is grammatically consistent.

11 MR. McCALPIN: Are we down to (b) (3)?

12 CHAIR BATTLE: Yes.

13 MR. McCALPIN: It seems to me this offers the
14 opportunity to begin a discussion about an issue which was
15 raised earlier, and that is the handling of a complaint which
16 in a real sense suggests professional malpractice.

17 As I look at this, I, for the most part, don't have
18 any difficulty with the director addressing that in the first
19 instance because it is almost inevitable the director will be
20 a lawyer. So it is a lawyer-to-lawyer consideration of a
21 complaint of sounding in professional malpractice.

22 Then we say that if he is unable to do it, you

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1 submit it to a grievance committee. We have already
2 suggested that that could be significant, maybe even a
3 majority of non-lawyers.

4 Thinking about the broad picture of PAI
5 participation, the staff attorneys are one thing, and the
6 director ought to be able to handle that, but when you get
7 into the PAI end of it and the private attorneys and the sad
8 fact, I think it is, that there are still some programs
9 around the country who have tenuous relations with the
10 private bar, and we have an overriding concern to try to
11 increase the involvement of the private bar.

12 I am not suggesting any resolution. I am just
13 trying to examine the parameters of the issue. If we have a
14 complainant who comes to the director, and the director
15 doesn't satisfy the complainant, either because the
16 complainant won't be satisfied or because the director is not
17 in complete sync with the attorneys and the PAI, and it then
18 goes to a grievance committee, which may be lacking
19 understanding of the issues involved. What kinds of
20 situations do we find ourselves in?

21 MS. PERLE: Under the current regulation, it is
22 sort of left hanging. There is nothing that the grievance

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1 committee does. They hear the complaint.

2 What we tried to do is address what happens to the
3 complaint after it is heard by adding the provision at the
4 top of page 4 which says the grievance committee may
5 recommend that the director of the recipient take appropriate
6 action consistent with the applicable rules of professional
7 responsibility to correct any problems that it finds as a
8 result of reviewing the complaint.

9 So it was clear, we thought, that the authority of
10 the grievance committee was to make recommendations back to
11 the director and that the director, the lawyer, presumably,
12 was the one that was going to take any action that was
13 appropriate as a result of those recommendations. It might
14 reject the recommendations if it felt that it was
15 inconsistent the lawyer's obligations.

16 MR. McCALPIN: The other element in this picture
17 that I didn't get to is the fact that under the law, a
18 majority of the board of the recipient must be appointed by
19 the bar representing the majority of the lawyers in the
20 jurisdiction, and it seems to me that, at a minimum, in a
21 situation like this, we need to have the director of the
22 recipient confer either with his board or with the bar or

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1 something.

2 I am not suggesting that we ought to go to the
3 formal grievance procedure in the jurisdiction for complaints
4 against attorneys, but I think we need to be sensitive to the
5 fact that this is going to involve a private attorney
6 involving 16 or 14 people; that there are some tenuous
7 relationships around; that we want to encourage the
8 participation of the private bar, and we need to be sensitive
9 how complaints against PAI attorneys are going to be handled
10 within the programs.

11 I am not trying to suggest a solution, but I would
12 like to hear more on what people think about the problem.

13 MS. WATLINGTON: Bill, the only thing is you are
14 making an assumption that we have different programs, but in
15 a lot of programs out there, the directors aren't attorneys.

16 MR. McCALPIN: I said I thought almost inevitably,
17 but maybe I am underestimating the number of programs that
18 have not attorney directors.

19 MS. WATLINGTON: So there are different ones. You
20 just have to give it a general thing, and then when they do,
21 they have legal counsel, but we can't make the rule based on
22 the fact on the assumption that all project directors are

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1 attorneys. We have more of that now than we did before.

2 CHAIR BATTLE: As I understand the underlying
3 concern that Bill is raising, it is partly the concern that I
4 raised when we first looked at this particular regulation and
5 its application to PAI attorneys. I guess we need to give
6 some thought to whether we are opening up someone who is
7 volunteering to participate in our process and hear cases to
8 a procedure that could grow into a complaint or being
9 appealed to some local county bar association as a grievance
10 against a particular lawyer in a way that we don't intend in
11 putting this regulation together.

12 In a sense, what we are trying to do is create a
13 way to vent that right there at the recipient, but by putting
14 this procedure together and not having any direct appeal to
15 anything, are we providing the ground work for someone to
16 take that complaint and lodge it against the attorney in a
17 grievance procedure?

18 MS. PERLE: I don't have the answer to that.

19 There is nothing that we can write into this rule
20 that is going to prevent someone from complaining to the bar.

21 Maybe we need to be more explicit about what kinds
22 of actions the director or the recipient might take, but I

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1 was thinking with respect to PAI attorneys that the kind of
2 action that they would take would be if there were complaints
3 that seemed to be valid against the PAI attorney and remove
4 them from the panel or talk to them and say, "We are having a
5 little trouble. We have three or four complaints from
6 people, and they asked you don't return phone calls. If you
7 feel you can't give these cases the attention that you give
8 your paying clients, we would prefer that you not handle
9 them." That is the kind of thing that we thought of, but
10 maybe we need to be more explicit or maybe we have to deal
11 with it in the commentary. I don't know. I think it is a
12 valid concern.

13 MR. MCCALPIN: What I don't want to do is have a
14 bad example and cause the whole PAI program to falter or
15 collapse in an area because one attorney is mishandled.

16 MS. WATLINGTON: You have already had those kind of
17 complaints that have already been handled. That is what I am
18 trying to say, and it has been handled and it hasn't caused
19 that. What I am trying to say is you are trying to be all
20 things to everything and you can't do it. These complaints
21 have already happened.

22 MS. PERLE: I think that we are trying to do two

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1 things. We are trying to give people who do receive
2 assistance from PAI attorneys a real place that they can go
3 and talk about their concerns and complaints, on the one
4 hand. On the other hand, we are trying to diffuse some of
5 those complaints before they blow up.

6 I hope that by incorporating the PAI attorneys into
7 the same process or some version of the process that we can
8 accomplish those two things.

9 MS. GLASOW: The alternative is, really, to give
10 the clients of PAI attorneys no resource.

11 MS. PERLE: Specific recourse.

12 MS. GLASOW: Yes.

13 MS. PERLE: Although I don't think there is
14 anything now that says it would preclude a program from
15 setting up a grievance procedure.

16 MS. GLASOW: It has been an issue, and since we
17 have been asked can we do this --

18 CHAIR BATTLE: If you don't do anything, clients
19 always have the already-existing bar grievance procedure.

20 MS. PERLE: Right.

21 MS. GLASOW: That is correct.

22 MS. PERLE: What we are hoping to do is to give the

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1 programs an opportunity to deal with it, to the client's
2 satisfaction first before it gets to the level of the bar.

3 I guess what Bill is talking about is the situation
4 where a client comes to a grievance committee with some
5 evidence of some real serious malpractice, and when that kind
6 of puts the program between a rock and a hard place in terms
7 of what it wants to do.

8 MS. MERCADO: That is the point I want to talk to
9 you about. At least in most of the programs that I have seen
10 in Texas -- and I don't know whether this is across the
11 country or not -- is that PAI attorneys are automatically
12 covered under the malpractice insurance of the Legal Services
13 program.

14 So, to some extent, there is an incentive on behalf
15 of the Legal Services programs to make sure that when they do
16 PAI contracts with attorneys, they are going to be doing PAI
17 contracts with attorneys who are going to be responsible to
18 represent their clients well. While there may be complaints
19 about the manner in which someone did something or whatever,
20 if it rises to a level of malpractice, obviously that person
21 is off the panel, but that person is also provided for by the
22 malpractice insurance. That was part of the protection, at

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1 least within the State Bar of Texas.

2 Again, I don't know what it is around the other
3 States, and there may be some of you that are from the other
4 States that can say or maybe the national office might be
5 able to tell us, Victor, as to whether that is a requirement
6 that you have in all PAI contracts. I don't know.

7 MR. McCALPIN: Let me say that I think every
8 grantee of the corporation is a member of NLADA. I know that
9 NLADA provides malpractice insurance for all its members and
10 an endorsement of the policy covers PAI participation.

11 MS. PERLE: It covers people who are doing it pro
12 bono, isn't it? Does it cover people who are doing it --

13 MR. McCALPIN: I don't know if they're compensating
14 that much but in any event, if the attorney has his own
15 regular malpractice insurance policy, in almost every
16 instance I believe that's the primary coverage. And anything
17 that the program provides is secondary coverage.

18 MS. PERLE: I think that's right.

19 MR. BROOKS: It seems to me what we're trying to do
20 is provide minimum requirement standards here. We could get
21 into a lot of detail if we wanted to, which I believe we do
22 not.

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1 On the other hand -- I think this question has been
2 raised -- it is a little thorny as to what happens next, and
3 I suggest that you do your best to get some good commentary,
4 not too complicated but at least illustrative.

5 MS. PERLE: To alert people to the fact that there
6 might be some concerns about dealing with private attorneys,
7 that may be different from those dealing with complaints
8 against --

9 MS. MERCADO: But I think that fundamentally,
10 though, we want to provide clients, whether they're PAI
11 clients or clients for a regular grantee program, an
12 opportunity to lodge a complaint, whether it's on procedure,
13 whether it's on the quality of the representation, whatever
14 it might be, that they have an initial step that they go to
15 somebody to say, you know, this isn't working, for whatever
16 reason.

17 And it may be, you know, whatever the end result,
18 whether they're American or not, the fact is the clients have
19 some due process in that manner, and that's the key to it
20 all, without necessarily having to overly regulate anybody or
21 frighten anyone from participating with us, because, you
22 know, whatever parade of horrors are out there.

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1 MS. PERLE: Exactly. If you look at the footnote
2 on page 3, footnote number 7, there was some discussion in
3 the regs working group about having some sort of a threshold
4 of seriousness about the complaint before it could be
5 reviewed by the board grievance committee. And there was
6 relatively substantial discussion on that, but I think that
7 the consensus at the end of that discussion was clearly that
8 no, we don't want to set any artificial thresholds.

9 If this is something that a client is upset enough
10 about to want to be heard by the grievance committee,
11 regardless of whether people think it's, you know, ridiculous
12 or not, that they should be permitted to be heard by the
13 grievance committee because if it was important enough to the
14 client, someone should listen.

15 MS. BATTLE: I agree. Subsection 4. And this one
16 basically goes to if it's not informally resolved, that the
17 complainant has an opportunity to appear. "If the grievance
18 committee is unable to resolve the matter to the
19 complainant's satisfaction based on the written complaint,
20 the procedures shall provide an opportunity for the
21 complainant to appear before the grievance committee, either
22 in person or by teleconference. The complainant may be

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1 accompanied by another person."

2 Let me raise the question of whether the word
3 "accompanied" is really sufficiently empowering. It doesn't
4 say "can be represented by another person." It doesn't say
5 that the person accompanying the client can speak." And I
6 just think that the word "accompanied" is not broad enough to
7 include what we are contemplating.

8 MS. MERCADO: And Bill, all we have to do is just
9 look at Administrative Procedure Act because that generally
10 has the language about someone having a person act as their
11 representative on their behalf. So that would be pretty
12 simple to take care of.

13 MS. PERLE: We just picked up the language that was
14 in the current rule but we certainly could expand on it.

15 MS. BATTLE: You could simply say the complainant
16 may be represented by another person.

17 MS. PERLE: I guess I'd rather not say "be
18 represented by another person" because that suggests they
19 need to bring a lawyer, to me. But you could say "to act as
20 their representative" or something.

21 MR. FORTUNO: How about "assisted"?

22 MS. PERLE: "Assisted" would probably be all right.

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MR. McCALPIN: "Assisted," all by itself.

MS. MERCADO: The gallery is awakening back there.

MR. FORTUNO: You think so?

MS. BATTLE: The grievance committee may recommend that the director of the recipient take appropriate action, consistent with the applicable rules of professional responsibility, to correct any problems that it finds as a result of a review of a complaint made under this section.

The only question I have is we broadened the grievance scope to just services, and then we talk about the director taking action consistent with professional responsibility. The grievance itself may have nothing to do with the lawyer.

MS. PERLE: Well, then, there's no problem. I'm just saying to the extent that there is a problem.

MR. McCALPIN: I have the same comment. It seems to focus, this provision, this section, on professional malpractice, whereas, as LaVeeda correctly pointed out, there are a lot of other things we want to take into consideration.

I just wonder, is it necessary, consistent with applicable rules of professional responsibility?

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1 MS. MERCADO: I think that may we could language
2 that if applicable, because if the complaint is only that
3 some intake worker didn't treat them properly or whatever,
4 versus the actual legal work, representation that an attorney
5 or paralegal, under this provision, an attorney, they're
6 totally different animals.

7 And the ethics may not apply to the intake worker for the
8 ethics would apply to the paralegal or to the attorney.

9 MS. PERLE: The purpose of -- I'm not saying that
10 we all -- the purpose of it was to make it clear that the
11 grievance committee shouldn't recommend something that would,
12 A, be inconsistent, or shouldn't recommend something that
13 would really amount to interference with professional
14 judgment of a particular attorney. I mean, those are the
15 notions that we wanted to build into this provision.

16 MS. MERCADO: And I think that we need to keep that
17 reasoning behind it but that we also ought to let it be known
18 that it's not necessarily something that happens in all the
19 cases, with every client.

20 MS. GLASOW: We could do a separate sentence that
21 such action shall not, in appropriate cases --

22 MS. BATTLE: Yes, that's a good way to do it, just

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1 spin that out and put a sentence in to make sure that that
2 professional responsibility is not infringed upon by any
3 corrective action that's recommended.

4 MR. BROOKS: This is only a recommendation anyway.
5 The directors decide what to do.

6 MS. BATTLE: It is, right. D, "The recipient shall
7 maintain a file containing either a copy or, if appropriate,
8 a complete and accurate summary of every written complaint
9 made pursuant to this section and a statement of its
10 disposition.

11 "The recipient shall not disclose the contents of
12 this file to the Corporation or to any other third party in a
13 manner that would reveal directly or indirectly the identify
14 of the client or, with respect to a previously identified
15 client, that would reveal client confidences, secrets or
16 other information relating to representation of the client,
17 without the expressed written consent of the client."

18 Now, tell me, and this is just so that I'll
19 understand procedurally, right now clients' files during a
20 monitoring visit are not open for review by LSC for purposes
21 of monitoring, or are they?

22 MS. PERLE: Now?

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1 MS. BATTLE: At this time, that's accurate.

2 MR. McCALPIN: I can't hear you.

3 MS. PERLE: Yes, that's an accurate statement. I
4 won't say that was always true in the past.

5 MS. BATTLE: They're not now. So, is this section
6 consistent with the rights that LSC would have during
7 monitoring? If a client consents to allow a file to be made
8 available, certainly LSC would have access to it.

9 I'm just wondering, does this go further than what
10 ordinarily is available to LSC?

11 MS. PERLE: I think, first of all, that this is a
12 separate file, about client complaint file. This is not in
13 the client's file. This is a file of client complaints. And
14 you know, there have been situations in the past where under
15 the current language, the Corporation has claimed the ability
16 to look at those files, without redaction or -- you know,
17 just routinely, not as a result of a complaint to the
18 Corporation by a client, but they said, "Let me see your
19 client files."

20 And there's been arguments about whether the
21 Corporation could have access to all of the information in
22 that file or if there's some agreement that some information

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1 could be redacted, how much information could be redacted.

2 This is one of those areas where we've had
3 substantial discussion over the last several weeks between --
4 within the Corporation, where the IG has had views, and other
5 members of the staff have had views and we've had views. And
6 I think that the language that's here is one that we've all
7 agreed is language that we think is appropriate and can live
8 with, that provides adequate protection for the client
9 population -- the population of clients make complaints
10 generally, and yet also allows an individual client who
11 wishes to complain to the Corporation to have the files
12 reviewed.

13 I don't know whether Renee wants to say anything.

14 MR. McCALPIN: You've made a statement that
15 contains an assumption that I'm not sure is warranted, and
16 that is that this is a separate file. I can easily see the
17 complaint getting in the client's file if there is a file on
18 a client and everything relating to that client gets in that
19 file.

20 MS. PERLE: Well, I think that we could certainly
21 say, "Shall maintain a file separate from a client's case
22 file."

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1 MR. McCALPIN: But that's not in the rule now.

2 MS. PERLE: You're right. I think that -- correct
3 me if I'm wrong, but I think the understanding under the rule
4 has always been that this is a separate file. But if we need
5 to make that more explicit --

6 MS. MERCADO: We need to clarify that because I
7 think you're right, Bill. They just put the letter in the
8 file.

9 MS. PERLE: I don't think they do that.

10 MS. MERCADO: If you don't want to open that door,
11 the confidentiality of client.

12 MR. McCALPIN: Let me ask you one other question.
13 Am I not right in thinking that the law varies from
14 jurisdiction to jurisdiction as to whether the identity of a
15 client is, in fact, privileged?

16 MS. PERLE: Yes, it does, but with respect to legal
17 services clients, clients of legal services programs, the ABA
18 has issued general opinions under the model code and they
19 continue to apply the same reasoning under now the model
20 rules, that the identity of the legal services clients are
21 protected.

22 Individual jurisdictions are free to vary from that

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1 interpretation, but most have carried the same -- in most
2 instances where they have been asked, state bar -- the
3 opinions that are issued by state bars have said that the
4 identity of a legal services attorney is a secret. It's not
5 necessarily the same for the fact of representation
6 generally, for all clients. It's not necessarily the same
7 standard.

8 MS. SZYBALA: I just want to clarify something,
9 just background but if you lose sight of it, at some point
10 these kinds of discussions go off the mark. And that is
11 there's one thing that is attorney-client privileged
12 information, and there's another thing that is ethically
13 protected information, and they are very much two different
14 things.

15 A client's identity is almost never attorney-client
16 privileged information unless the identity is going to lead
17 to self-incrimination, unless knowing your client is going to
18 identify the murderer because they know you're representing
19 the murderer. But the identity of the client is almost
20 always -- can almost always be seen as a client -- as client
21 information that was obtained in the course of
22 representation, and therefore under many -- I don't want to

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1 say most -- local rules, it would be ethnically protected.

2 The difference between ethically protected and
3 attorney-client privilege is that information that is
4 ethnically protected can be required by subpoena, can be
5 required by law, without violating the attorney's
6 responsibility. He has to comply with that law or subpoena,
7 if it's a legal subpoena; whereas attorney-client privileged
8 information, nobody should ever be able to obtain from you at
9 any time and you should go to jail to protect.

10 MS. BATTLE: Yes, there are certain specific things
11 that are identified as protected, it seems to me, in this
12 particular write-up. Not everything is protected. The
13 identity of the client is protected, client confidences and
14 secrets are protected, but beyond that, it seems that the
15 information is something that could be provided.

16 MS. PERLE: Well, if the Corporation, in the course
17 of monitoring, wished to review the nature of the complaints
18 that the program had received on their client privilege
19 procedure program, would take this file that it maintains,
20 remove clearly the clients' names, it would remove any other
21 information that if you read it could identify the client.

22 But it should leave in enough information so that

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1 the Corporation has a sense of what the complaints are about.
2 If the Corporation comes to the program and says, "I
3 understand that you have a complaint that was filed by Mrs.
4 Ernestine Watlington and I want to see that complaint," it
5 doesn't do any good to take out Ernestine Watlington's name
6 because it's already been revealed.

7 But, under this, what the program would do would be
8 to take out that file and then remove anything that was,
9 because you already knew the name of the client, that would
10 relate to the representation that would be a client secret.

11 So there would be a lot more deleted in that
12 instance than there would be if the Corporation was simply
13 looking generally at the nature of the complaint.

14 MS. SZYBALA: In that instance you'd need really a
15 consent or you'd get a blank piece of paper.

16 MS. PERLE: Well, I don't know that you'd
17 necessarily get a blank piece of paper. I mean, if the
18 complaint was I came into the office and everybody on the
19 staff was rude to me and nobody returned my phone calls, and
20 that's the nature of the complaint, I don't think there would
21 be much that would be redacted.

22 MS. SZYBALA: Well, it's going to be up to the

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1 program to decide, under its own local ethical rules. This
2 really speaks more to the ethnically protected information.
3 The attorney-client privileged information being in the
4 statute as off-limits, and that has to be read into every
5 regulation here. Attorney-client privileged information is
6 privileged.

7 So I think this is meant to talk more to your local
8 rules and how the program is going to read what a secret is
9 or whatever.

10 MS. BATTLE: There's clearly a distinction that I
11 think we need, is raising in a footnote so that we're clear
12 about what --

13 MS. MERCADO: Attorney-client privilege.

14 MS. BATTLE: Right.

15 MS. GLASOW: One's an evidentiary privilege and the
16 other is basically a question of responsibility and
17 obligations.

18 MS. BATTLE: I wanted to clarify it.

19 MS. WATLINGTON: The only thing that I'm looking at
20 is through the years, how it was used against the
21 Corporation, so even though we're part of the Corporation,
22 but I'm just one person, and I still don't want to give the

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1 government body, still that kind of power over the local or
2 the complainants. I want it to be still protecting both.

3 MS. PERLE: I mean, there's a lot of history.
4 There's a great deal of history, recent history and history
5 from the far distant past, around this set of issues, and
6 we're going to come back to them tomorrow in our discussions
7 of 1611, as well.

8 You know, the Corporation has, at various times,
9 taken the position that the rules of professional
10 responsibility that protect clients' secrets don't apply to
11 the Corporation, and that -- thank you, Howard. That's one
12 errand we've asked Howard specifically to make, to kind of be
13 around for.

14 MS. GLASOW: I think what's important here is this
15 is a client's complaint, and if the client feels that for
16 some reason, the Corporation needs to look at this, they can
17 give consent for the Corporation to look at anything there.
18 So it's really up to the client, for this particular rule, to
19 kind of determine.

20 MS. BATTLE: That's true, but as I see it, and
21 that's why I keep getting back to this, the way that this is
22 written, there are certain specific things that are

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1 privileged, but not the entire complaint.

2 MS. GLASOW: The difference is if we don't know who
3 the client is, then we could give information that we
4 couldn't give if we knew the identity because that
5 information will not identify the client. So it could be
6 anybody. You might know that this is a family law case and
7 that the client was upset about the way their motion was
8 filed in court or something, but you wouldn't be able to
9 identify the client. The client's confidences and secrets
10 wouldn't be letting out by giving certain information.

11 But once a client's identified, that very same
12 information now takes on a whole different scope in terms of
13 what it would make known publicly about the client. And
14 therefore, the client now has an interest in keeping that
15 information secret.

16 MS. PERLE: When this was originally written, it
17 was somewhat more broadly written. It basically said you
18 couldn't reveal identity or client secrets, confidences,
19 secrets and other information. And Renee raised the point
20 that then you're going to get blank forms because it would
21 say that okay, anything that, regardless of whether you knew
22 the client or didn't know the client, could be construed as a

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1 client's confidence or secret, you could take out. And we
2 said no, we didn't think that that was really what was
3 intended.

4 So we worked -- and I will tell you that the three
5 of us have sat in a room and no the phone and struggled
6 mightily with this language, and John Tull was also involved
7 in this. And John has said, by the way, that he's available
8 by phone tomorrow. John, probably more than any of us in
9 this room, understands this issue. He'll be available by
10 phone if there was anything that we can't resolve. Not today
11 but tomorrow.

12 But Howard wanted to make some comment.

13 MR. DANA: I don't know whether the committee,
14 whether the ladies here have focussed on the problem that a
15 member of the grievance committee might have learning of some
16 malpractice or unethical conduct on the part of a legal
17 services lawyer.

18 In my state, that attorney would have a duty to
19 reveal that to actually the oversees of the bar. And we seem
20 to be saying that this seems to be restricting the
21 committee's ability to disclose facts learned in this
22 undertaking, as though the members of the committee were the

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1 partners and associates of the malpractice person.

2 For instance, if one of my former partners when I
3 was working with him committed malpractice, I probably
4 wouldn't have the duty to turn him in because I'd be turning
5 myself in. But a grievance that -- a member of the grievance
6 committee is not, strictly speaking -- is a third party, and
7 they have a duty to reveal malpractice and unethical conduct
8 on the part of the legal services or PAI attorney.

9 And we seem to be setting up a proscription there,
10 and I'm not sure that we have focussed on that problem.

11 MS. PERLE: I don't think we have focussed on that
12 problem. I think, you know, we have Section 106(b)(3) of the
13 act, which says that the Corporation shall not aggregate as
14 to attorneys in programs, assisted under this title, the
15 authority of a state or other jurisdictions to enforce
16 standards, a responsibility generally applicable to attorneys
17 in such jurisdiction.

18 I'm not sure that with respect to attorney members,
19 and you're talking about attorney members, it didn't say
20 attorneys employed by programs. It says in programs. And I
21 guess one could -- this is kind of off the top of my head but
22 --

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1 MS. BATTLE: I think what I'm hearing Howard say is
2 that we may need to give some thought to the implications,
3 particularly since the attorneys are going to be Board
4 members and not other staff attorneys on this grievance
5 committee.

6 MS. PERLE: The point I was trying to make is that
7 I think that this wouldn't override, you know, an external
8 ethical obligation of an attorney Board member, but it may be
9 that we want to either add a discussion of that in the
10 commentary or, I guess --

11 MS. MERCADO: We're just referring to that section
12 you just talked about. As long as it's not inconsistent with
13 that particular part of the statute.

14 MS. PERLE: Right. I'm just not certain that it
15 necessarily covers a Board member. I think it could be read
16 to cover a Board member. I'm not sure that it absolutely
17 does. But I think we may want to say of course nothing in
18 this is intended to override an ethical obligation of a Board
19 member.

20 MS. BATTLE: You know, I'd like to just get back to
21 something that I think Bill said earlier because giving the
22 example that we talked about, not returning telephone calls,

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1 I have seen sanctioned in our bar journal lawyers who just
2 take a retainer from somebody and then that person starts to
3 call their office to see what's going on and they don't get
4 any returned telephone calls. And then they file a grievance
5 with the committee. The committee doesn't get any return
6 telephone calls, and so that person ends up getting
7 sanctioned for that.

8 And you know, just from pro bono work that
9 attorneys do in my jurisdiction, as well, as counsel on the
10 other side, sometimes I don't get returned telephone calls.

11 So when you start to talk about attorneys who
12 engage in matters for which they have some responsibility
13 under the professional responsibility guidelines, that kind
14 of behavior can, it seems to me, violate the canons of
15 ethics for that jurisdiction very easily, and the attorney
16 members on that grievance committee could be placed in a
17 situation where they're reading their bar journal, which says
18 this person's inability -- this client's inability to get in
19 contact with this person to find out what's going, once
20 they're been assigned the matter as a PAI attorney, is no
21 different than a client who's paid a retainer and can't get a
22 returned telephone call.

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1 And so I see some pull between those two things,
2 and our interest in wanting to encourage attorneys to
3 participate in PAI, as well.

4 So there are some competing interests that I think
5 we're going to have to struggle with so that we can come up
6 with the cleanest way to get those grievances heard without
7 necessarily putting our attorneys at risk.

8 MR. DANA: If I may, if you conclude that that is
9 going to present a problem for the members of the grievance
10 committee, you may want to think about that, as to whether or
11 not you do want the grievance committee monitoring PAI
12 because then the PAI lawyer is not just complained against by
13 a grievance committee, but he's turned in by the program.

14 It may be better, rather than have the -- I'm
15 thinking of the consequences for the PAI program, and if a
16 person is volunteering his time and he is then turned in to
17 the board of oversees of the bar for malpractice, it may be
18 politically better to advise the client of their right to
19 report the attorney, rather than actually investigating the
20 PAI. I think this has to be with politics of the issue, and
21 I'm not sure there's a right answer.

22 MS. BATTLE: I guess one way to address it is to

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1 inform the attorney, the PAI attorney, that a grievance has
2 been lodged, if we get one, and if that attorney is not able
3 to resolve it with the client, to then inform the client of
4 the procedure that's already in place for going forward,
5 rather than attempting to resolve it themselves.

6 I don't know. What I'm saying is that I think we
7 need to very carefully think through the implications of how
8 this procedure is going to affect particularly those lawyers
9 that are in private --

10 MR. McCALPIN: And I can tell you how serious it
11 can be. Within the last year or two, the Supreme Court of
12 Illinois just barred a lawyer for failing to report a
13 grievance of another lawyer. Disbarred him.

14 MS. PERLE: Well, I think that maybe one of the
15 things that we might want to do is when we send this out for
16 notice and comment, if we decide -- I mean, I think we've all
17 decided that we want there to be some mechanism for clients
18 to complain about PAI attorneys. We also recognize that
19 there's a host of issues that sort of surfaces, and what we
20 may want to do is ask specifically for commentary on that.

21 And you know, by issuing something as a draft
22 regulation, proposed regulation for notice and comment,

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1 that's exactly what we're doing. We're sending out a
2 proposal and we're saying we would like you, the public, to
3 comment on these issues. And you know, but we can make it
4 very clear in the commentary that this is an area where we're
5 particularly concerned about the implications, and we want
6 public comment. And then we're free to consider all that
7 public comment and change. We're not wedded to what's in the
8 draft proposal.

9 We could do it two ways. We could either leave it
10 in, the reference to PAI, and ask for comments, or we can
11 take it out and say we considered this; we'd like to have the
12 mechanism in place, but we understand that there are all
13 these issues; what do you think?

14 I think my preference would be to leave it in and
15 ask for comment. But that's obviously up to you.

16 MS. BATTLE: I think certainly we need some
17 additional guidance and thought, which comments would bring
18 to this particular area. And when we revisit it, we'll have
19 to really make some decisions about what it is that we want
20 to do.

21 My preference is to give -- I want PAI attorneys to
22 be good attorneys and to do good work and to service their

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1 clients. But at the same time, I don't want any procedure
2 that we put in place to be something that could be utilized
3 to put those attorneys who are volunteering their services at
4 risk with us.

5 MS. PERLE: Unnecessarily at risk. I think that
6 any attorney that provides services is at risk if they
7 provide terrible services, and should be at risk. But I
8 guess the point is where's the balance, and draw the line.

9 Let me just make sure that we understand what
10 you're -- you would like to leave it the way it is but ask --
11 but provide a lot of discussion about what these issues are
12 and --

13 MS. BATTLE: Absolutely, and elicit comments on
14 this discussion.

15 MS. SZYBALA: I wanted to make one last comment
16 about this language on secrets, harking back to that for a
17 minute, because I don't want you to think that you're
18 experiencing some kind of deja vu tomorrow. I mean, I think
19 one of the things we attempted to achieve here was language
20 that appropriately balanced all relevant interests here and
21 use it throughout the regs. So you will see that same
22 formulation in 1611 tomorrow.

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1 MS. PERLE: Something I wanted to say earlier but I
2 didn't because I wanted to wait until Renee was in the room
3 was that we really have worked very hard together, the
4 general counsel's office and the OIG's office and my office,
5 to work through these rules, to get to the point where we'd
6 have language that we all felt did strike that appropriate
7 balance. And it was not easy at times, and I think we all
8 worked together in that spirit of cooperation and
9 collaboration that you've talked about a number of times.

10 And I think we were successful in doing that, and I
11 think we all came into this process feeling that we did want
12 to make an effort, a real sincere effort, and that we can
13 work together to resolve these issues in a way that we can
14 all live with.

15 MS. BATTLE: Which is, I think, really key to the
16 process because it is a collaborative --

17 MS. PERLE: I just want to impart this, to thank
18 Renee and Ed for really pulling with the same oar. We
19 weren't sure at the outset that we could do that, but we all
20 proved that we really could. I just wanted to make that
21 point.

22 MS. BATTLE: Okay, so noted.

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1 MS. MERCADO: The Board appreciates it.

2 MS. PERLE: But you will hear this again tomorrow.

3 MS. BATTLE: Let's move to 1621.4, complaints about
4 denial of assistance. (a), a recipient shall establish a
5 simple procedure for review of a complaint by an applicant
6 for service regarding a decision that the applicant for
7 service is financially ineligible or that assistance is
8 prohibited by the act or Corporation regulations, or that
9 assistance was denied on the basis of priorities established
10 by the recipient pursuant to 1620, or other case acceptance
11 criteria that the recipient has established or imposed to
12 determine which cases to accept from among priority cases of
13 financially eligible persons or groups.

14 MS. PERLE: I apologize for the length and sort of
15 complexity of that sentence, but we wanted to really make
16 sure that --

17 MS. BATTLE: Do we need both established or
18 imposed, when you get down to the case acceptance criteria
19 that the recipient has established or imposed to determine?

20 MS. MERCADO: How about just established and delete
21 "or imposed"?

22 MS. PERLE: I can't tell you why that's there. I

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1 can't really remember why that's there.

2 MR. McCALPIN: Can I ask this? Do you have to use
3 the phrase "applicant for service" twice in the second line?
4 Isn't it sufficient to use the word "applicant" the second
5 time? "A complaint by an applicant for service regarding the
6 decision that the applicant for service" -- can't you simply
7 say that the "applicant is financially ineligible"?

8 MS. PERLE: Take out the "for services"? Yes.

9 MS. GLASOW: I'd like to make a suggestion,
10 although it appears to be in the current rules. It says
11 Section 1620 and it really should be Part 1620.

12 MS. MERCADO: Okay.

13 MS. PERLE: There was a suggestion that was made to
14 me this week actually by a representative from Region 3
15 project directors, made a suggestion with respect to this
16 provision, which I think is a very appropriate one, which we
17 just never considered before.

18 They suggested that we add, in the first sentence,
19 in the first line of Section (a), we had some reference to
20 promptness or timeliness. After discussion, what we came up
21 with was that we should say "A recipient shall establish a
22 simple procedure for either prompt review or timely review."

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1 Because the person that I discussed this with said
2 that they wanted to make sure that these complaints didn't
3 just languish and that --

4 MS. MERCADO: Timely.

5 MS. BATTLE: -- trapped in some procedure, examples
6 that we could show them what we're talking about, and in
7 those procedure examples, you could establish some time frame
8 -- after the complaint is filed, how long it ought to take
9 for them to come resolution, based on the procedure.

10 MS. PERLE: If there's no objection, we'll just add
11 "timely" before "review."

12 MS. BATTLE: Yes, I think that's good.

13 MR. McCALPIN: Let me ask you, the reason for the
14 inclusion of the word "priority" in the last full line, or
15 other case acceptance -- let me see. On the basis of
16 priorities established under 1620, case acceptance criteria
17 as established or imposed to determine which cases to accept
18 from among priority cases."

19 MS. PERLE: Well, there is a rationale for that. I
20 don't know that it's -- upon reflection, it may not be
21 needed, but the notion was sometimes someone will come in and
22 say that they know that the program's priorities -- amongst

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1 their priorities are domestic relations, and they come in
2 with an uncontested divorce, with no children, no particular
3 property. And the program says domestic relations is among
4 our priorities, but we don't uncontested divorces because we
5 really just don't the resources to do that, or because people
6 in the private bar will do it for \$150, or for whatever
7 reason.

8 It may not be articulated specifically within their
9 priorities, but it may be that we don't need the among-
10 priority cases. I think just the notion was, again, that
11 because you're financially eligible and because a case was in
12 the priorities of a program doesn't mean necessarily that the
13 program must accept your case, and there isn't an
14 entitlement. That's really the notion. And it may be a
15 little overkill.

16 MR. McCALPIN: I'm satisfied. I suspected that
17 that could be the reason, but I wasn't sure.

18 MS. PERLE: But if you don't think we need it --

19 MS. MERCADO: I think we ought to keep it in. I'm
20 sorry, Bill.

21 MS. BATTLE: It's interesting. Really what (a)
22 does is to give all the reasons why it's legitimate to reject

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1 a particular complaint or to say you've got a right to
2 complain about --

3 MS. PERLE: And the case acceptance criteria was
4 intended to be a little bit of a catch-all, to cover those
5 things. I mean, one of the case acceptance criteria is that
6 this doesn't have any merit, you know. It's meritless. Yes,
7 we accept -- you know, whatever, these kinds of cases and
8 yes, you're financially eligible and yes, all these things,
9 but the point is, you have no case.

10 MS. BATTLE: Howard?

11 MR. DANA: I've been sitting back. I'm not
12 speaking on behalf of -- I'm not sure that if someone
13 applied, if you turned someone down because you concluded
14 that they just didn't have a case that that list is -- that
15 reason is there. So it seems to me that it would be a lot
16 easier to say something like this.

17 Right after "decision" on the second line, insert -
18 - it would read, "A recipient shall establish a simple
19 procedure for review of a complaint by an applicant for
20 service regarding a decision by the recipient to deny
21 service."

22 And you could say that a lot simpler, so that in a

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1 sense, you would just have a procedure for a denial of
2 service and decision for whatever reason. You listed four or
3 five reasons but I don't see in there the reason you
4 indicated just now, which is that you didn't have a case.

5 MR. MCCALPIN: The English and Canadian systems
6 regularly include such a provision.

7 MS. PERLE: I'm trying to think. I mean, I think
8 obviously the reason that we did it the way we did it is
9 because we were trying to follow the way that the part has
10 been written in the past. But I'm trying to figure out
11 whether there is any danger in the approach that Howard
12 suggests, and I don't know the answer to that right off the
13 bat.

14 MS. MERCADO: Would you leave the footnote? You
15 know, in your footnote 15, the last full sentence, you talk
16 about, you know, recipients can reject applicants for
17 services for other reasons, including conflicts, insufficient
18 merit, inadequate resources, closed intake, or other general
19 cases of this criteria and it should be designed to ensure
20 that applicants understand why they were rejected, and not
21 necessarily to challenge the rejection.

22 Now, would that type of a footnote be included?

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1 MS. PERLE: We can certainly include it in the
2 commentary. But what we could do, I think what we could do
3 is state (a) the way Howard suggested and then, in (b)(1),
4 make sure that the information -- that we include the
5 remainder of that, what's in (a), in (b)(1).

6 MS. MERCADO: Not necessarily because it doesn't
7 flow with the same tenor. I mean, the only way that I could
8 see doing it the way Judge Dana has said is to maybe put an
9 introductory sentence to all those categories, that among the
10 reasons for denial of services would be the following,
11 whatever those are, then list. And it could also incorporate
12 the other specific about it not having merit, if that's a
13 part of it.

14 MS. GLASOW: Or we can move all that down to
15 commentary.

16 MS. PERLE: We can certainly move it all down as
17 commentary. The only thing is I guess what I want to make
18 sure is that -- well, the purpose of this whole thing, and
19 maybe we were less than totally successful, was to make sure
20 that the information that's provided explains to the person
21 why they were denied service, so that they walk away
22 understanding why.

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1 And that's what we want to achieve here. And if it
2 doesn't achieve it, we want to fix it so it achieves it.

3 MS. GLASOW: Maybe we should just say that under
4 (b), somehow the procedure shall provide information --

5 MS. PERLE: That's what I suggested. And maybe
6 what we need to do is add, under (1) -- it says "case
7 acceptance criteria" and "any other information necessary to
8 explain the basis for denying service," something like that.

9 And then talk about in the commentary, that it
10 could insufficient merit, it could be conflict of interest,
11 it could be a variety of things.

12 MR. BROOKS: I think the Dana approach has
13 considerable merit and I suggest that we cut it short so that
14 we say simply to establish procedure for review of a
15 complaint regarding a decision to deny the applicant for
16 service and the reasons therefor.

17 MS. BATTLE: Okay, I think we can take into account
18 the concerns that Howard has raised and the listing and the
19 purpose of the listing to make this section clear about what
20 grounds are appropriate for a complaint, and use the comments
21 generally, I think.

22 MR. McCALPIN: Thinking about this latest

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1 discussion and looking ahead to where we go on the next, is
2 there a gap between eligibility and financial eligibility,
3 and do we need or have we empowered recipients to deny
4 service because of priority, because of conflict, because of
5 other matters?

6 You know, we have one on financial eligibility and
7 now we say over here, tell the client you've denied him
8 because of this and this and so on. Somewhere or other
9 recipients are empowered to deny service on the bases that we
10 are listing here.

11 MS. PERLE: Yes, and we've tried to do that. When
12 we get to 1611 tomorrow, we've tried to do the same thing
13 within that rule, to make it clear that financial eligibility
14 doesn't create an entitlement and that there are other bases
15 on which programs can deny service.

16 And again, we may not have done it as successfully
17 as we should have. We may have to rework it in some way.
18 We'll talk about that tomorrow. But we have definitely
19 tried to do that in the revision to 1611.

20 MR. McCALPIN: I note, interestingly enough, that
21 the index to the regulations in the book we've published
22 gives the title of 1611 as eligibility, financial

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1 eligibility.

2 MS. PERLE: It deals primarily with financial
3 eligibility.

4 MR. McCALPIN: And number 1611 ought to deal with
5 eligibility broadly and not be headed "financial
6 eligibility."

7 MS. PERLE: Well, we've changed the title to
8 "financial eligibility" in our revision. You're suggesting
9 that we may be going in the wrong direction.

10 MR. McCALPIN: Right.

11 MS. GLASOW: The regulation on priorities deals
12 with that issue, too, in the sense that you're required that
13 recipients establish priorities and then accept clients
14 pursuant to that, and that empowers them to make those types
15 of decisions on that basis. So it's not all in one place,
16 obviously, but it is there.

17 MS. PERLE: Now there are more references to 1611.
18 I think there was always some reference to 1611 priorities,
19 but I think it's a more explicit reference now.

20 MS. BATTLE: Okay, are we at a point where we can
21 move forward?

22 MR. McCALPIN: Are we finished with 21?

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1 MS. MERCADO: No, we have C and D.

2 MS. BATTLE: The procedure shall include
3 instructions regarding how applicants for service can obtain
4 information describing the recipient's priorities,
5 eligibility, guidelines, applicable restrictions on
6 representation contained nit eh Act and regulations and case
7 acceptance criteria.

8 MS. PERLE: And then we will add something that
9 suggests other information needed to explain the reasons.
10 We'll draft the language.

11 MS. BATTLE: Right, we talked about that. (2) make
12 a complaint questioning the denial of assistance, and (3)
13 confer with the director of the recipient or the director's
14 designee and, to the extent practicable, with a member of the
15 grievance committee established pursuant to 1621.2 regarding
16 the reasons for the decision denying service.

17 MS. PERLE: In other words, we didn't want to sort
18 of set this as part of the grievance procedure, but we wanted
19 to give someone who felt aggrieved an opportunity to talk
20 with someone on the board, or who was specifically on the
21 grievance committee. It's really just to give people an
22 opportunity to find out why they were denied service, not

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1 necessarily to reverse a decision.

2 I think it's likely -- well, I think it certainly
3 is possible that a decision could be reversed on the basis of
4 these discussions because it may be that information about
5 the client that's revealed in these discussions reveal more
6 about their circumstances that would have led the director to
7 make a different decision than the intake worker made
8 initially.

9 So certainly there is that opportunity and a
10 possibility. But it's really a mechanism to give people the
11 information they need to understand why the decision was made
12 that was made.

13 MS. BATTLE: We are now on -- is it (c)?
14 Recipients shall make reasonable and appropriate efforts to
15 inform applicants who have been denied service about the
16 complaint procedures.

17 MS. PERLE: There's a lot of history, fairly recent
18 history, actually, about this, why this is in here. In the
19 past --

20 MS. BATTLE: Before you get into that, isn't that
21 what we talked about early on, that when a person comes into
22 the program, they're going to get information at that point

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1 in time about the grievance procedure. Then we come back and
2 we say here, that we go a further step to make sure that any
3 particular person who's been denied service gets -- is that
4 further information or the same information?

5 MS. PERLE: This is really intended to deal with
6 those people who don't come into the office.

7 MS. BATTLE: Who do not come into the office?

8 MS. PERLE: Right, because the program is doing
9 intake on the phone.

10 MS. GLASOW: It's important to note that what
11 you're referring to, the initial visit, they get
12 information -- that applies to the other type of complaint.
13 That's the complaint for quality or manner of providing legal
14 services.

15 This is a separate type of complaint. They've been
16 denied assistance, so that information in the initial visit
17 language doesn't apply to this. This has always been seen
18 historically as a much faster procedure because often a crime
19 is committed and they need help now.

20 So it's not a long, drawn out thing. In essence,
21 we try to provide a different requirement here. And before,
22 it said adequate notice to the recipient. We took that out

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1 because we just never could determine what that meant, and
2 now we're saying reasonable notice.

3 That would be very quickly, simply because the
4 client -- you deny them and they want to know why.

5 MS. PERLE: The recent history is that monitoring
6 teams have gone out to programs across the country. We have
7 a large number of programs, probably 25 or 30 programs, where
8 the monitors have said that every time somebody calls up and
9 asks a question about service and is given information that
10 suggests that service couldn't be provided under particular
11 circumstances, that the program then has an obligation to
12 spell out in some detail the complaint procedure.

13 We're dealing with a situation where you might have
14 -- that this is done by a receptionist or an intake worker
15 who gets 1,000 phone calls a day. The kind of administrative
16 burdens that the Corporation was suggesting should be placed
17 on programs, they're just overwhelming.

18 And by the way, a number of these programs that
19 have been struggling, have been struggling with the
20 Corporation for months and sometimes years over what that
21 meant, what kind of standard there we're talking about. And
22 most of them have not been resolved. They're sort of been

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1 hanging around.

2 What this was intended to do is set up a standard
3 of reasonable and appropriate, so that the purpose is to give
4 information to as many people as is reasonable, to expect the
5 program to do, but to understand that not everybody is going
6 to get that information. The program will do whatever it can
7 to ensure that people get it.

8 MR. McCALPIN: Let me ask this. With reference to
9 the phrase at the end of (c), complaint procedure, are those
10 (b)(1), (2) and (3)? Is that what you're referring to?

11 MS. PERLE: Yes. Maybe we need to put a specific
12 reference in because there might be some confusion.

13 MR. McCALPIN: Yes. I went back and looked at what
14 we had done under 1621.3, which is for quality or manner of
15 the service, so it's obviously a much more elaborate
16 procedure. And I just wanted to make sure that here we were
17 referring simply to (b)(1), (2) and (3) above.

18 MS. PERLE: Yes.

19 MS. BATTLE: It seems that we should clarify that.

20 MS. PERLE: When we first drafted this, we
21 attempted -- the regs working group attempted to draft some
22 minimal procedural protections. And we set out a series of

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1 things -- those are the kinds of things that are mentioned in
2 footnote 19, which we thought would satisfy the standard.
3 And I think that the consensus, when people reviewed that,
4 was that we want to include those specific things, that it
5 would vary by local circumstances and that as technology
6 changed or as the technical assistance capacity of the
7 Corporation changed, that that standard might mean different
8 things, and we didn't want to really write anything into the
9 rule that would be controlling in terms of what was
10 appropriate and what wasn't appropriate. So we took that
11 out.

12 We did leave in (d) because that was basically what
13 the Corporation programs have to do. I will tell you that
14 I've had a couple of comments from some programs that suggest
15 that (d), for them, constitutes an invitation to do less than
16 what they do now.

17 So in other words, the committee may think about
18 taking out -- I mean, of course, you're free to take it out
19 anyway, but --

20 MS. BATTLE: I thought I heard Suzanne say earlier
21 that the import of (c) was in instances where you have phone
22 intakes. Then we come back in (d) and we say, in (d), if

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1 you're doing basically phone intakes, you don't have a
2 requirement to acknowledge those in writing and to respond
3 with this kind of information.

4 MS. PERLE: What this says is if you don't respond
5 in writing, you don't have any obligation, but if you do
6 respond in writing, that you should include some notice of
7 the complaint procedure in that writing.

8 And what programs have said to us, well, we now
9 acknowledge those complaints -- those contacts in writing,
10 but if you put this in, we're going to stop.

11 MS. MERCADO: So it won't generate more complaints.

12 MS. GLASOW: (g) is basically in a very specific
13 way describing what we would mean in terms of reasonable and
14 appropriate when we're talking about telephone inquiries.

15 This is really an effort to balance our concern
16 that clients are able to be informed about grievance
17 procedures with a concern that we don't impose such draconian
18 administrative burden on recipients that they're unable to do
19 their job. And we're walking a fine line sometimes, but
20 that's what we're attempting to do.

21 MS. PERLE: I think that what we might want to
22 consider, leaving (d) in but leaving out the last phrase,

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1 about the acknowledgements in writing. But that may open it
2 up more than -- because it may be that for some programs it
3 is possible to provide the information, even if it's only
4 telephone inquiries. I think it's really a decision for you
5 to make as to whether you think that that, (d), does more
6 harm than good. And if should --

7 MS. BATTLE: I tend to think sometimes a telephone
8 interview is so brief and involves such little information
9 that it becomes an administrative burden in some instances to
10 have to crank a letter out after somebody calls you.

11 MS. PERLE: Well, this isn't saying that you have
12 to do that. It's saying that if you do it, then you should
13 include the information. If you're sending a letter out
14 already, include boilerplate about how to find out about the
15 procedure, but that if you don't do it, you're not required
16 to make some separate -- you're not required at the end of
17 the telephone conversation, where you have just told the
18 person you can't provide them service, you're not required to
19 invite a complaint.

20 MR. McCALPIN: No, but I don't understand why at
21 the end of the telephone you can't or shouldn't say if you
22 have a problem with my answer, you can talk to the executive

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1 director or somebody, if you want to, and here's the number.

2 MS. PERLE: I guess the answer to that is it really
3 just depends -- it may depend on what the circumstances are
4 in terms of whether it's reasonable. If a program really
5 does a full-scale intake over the phone, I think it's
6 perfectly appropriate. If it consists of somebody calling up
7 and saying, "I need a lawyer; I just got arrested" and the
8 response is, "I'm sorry, we don't do criminal cases," do they
9 then have to say, "but if you're unhappy with this response,
10 you can call the executive director or whatever"?

11 I think it may really depend on the context of the
12 specific inquiry and the way that the intake is done by the
13 program and who's calling and a lot of those things. So I
14 think the more and more I've thought about it --

15 MS. BATTLE: Can't we, in a comment, encourage
16 programs to get this information out without making it part
17 of the regulation?

18 MS. PERLE: Yes, I think we can.

19 MS. BATTLE: I think that might be the best way to
20 handle it because I'd hate for there to be two different
21 standards, one for programs who just, as part of their
22 procedure, send letters out, to all of a sudden have to

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1 include information, and other programs don't have to do
2 anything because they don't.

3 MS. GLASOW: So do you want to stop after
4 "telephone inquiry"?

5 MS. BATTLE: Yes.

6 MS. PERLE: You want to stop after "telephone
7 inquiry" or do you want to leave out (d) entirely?

8 MS. BATTLE: Well, (d) really has to do with the
9 telephone inquiry, doesn't it?

10 MS. GLASOW: Yes.

11 MS. BATTLE: So the whole (d) can be handled in a
12 comment that talks about ways of getting that information
13 out, since we've got another section that already says you
14 need to get this information out to clients, citing examples
15 as to how to do it, so that every client at least has basic
16 information about the complaint procedures.

17 MS. PERLE: I think that's fine, as long as
18 everyone else is. Are you comfortable with it? If
19 everybody's comfortable with that.

20 MS. BATTLE: Is everybody comfortable?

21 MS. PERLE: I want to make sure that the client
22 community is comfortable with this, because it's really, you

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1 know, obviously we have a concern. We come from a place
2 where we have a concern about administrative burdens imposed
3 on programs, but clearly we also have a deep concern to
4 ensure that the client community feels like they're being
5 dealt with fairly with respect to these issues.

6 MS. BATTLE: My concern with this was, though, that
7 what you'll do is, as you suggested, that directors will say,
8 "Well, I'll just stop sending any information out if I've got
9 to put all this stuff in," if we start to administratively
10 burden it. Then what we need to do is to encourage them to
11 get the information out, and let them choose the way to get
12 it out, so long as it gets out.

13 MS. PERLE: I agree with that, and I just want to
14 make sure. And I suppose we'll elicit, in the comment
15 period, we will elicit responses from the client community to
16 make sure that this meets the needs that they see out there.

17 MS. BATTLE: Maria thought she had tedium in her
18 committee, until she came to this committee and sat in for a
19 little while.

20 Well, we have completed the tasks that we set out
21 to complete for today. And I'd like to just -- let's take a
22 brief recess and I'd like to just poll my folks to see if we

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1 want to get started with just getting back on information on
2 1611 this afternoon or if we want to start that fresh
3 tomorrow.

4 Anybody there?

5 (Laughter.)

6 MS. PERLE: Can I make a comment on that?

7 MS. BATTLE: Yes.

8 MS. PERLE: 1611 is kind of complicated.

9 MS. BATTLE: Do you want to start with it fresh --

10 MS. PERLE: I think that would probably be a good
11 idea.

12 MS. BATTLE: I see a lot of hands back there in the
13 audience saying "Yes, fresh in the morning." It's been a
14 long four days so far.

15 1611 is complex and I think that --

16 MS. PERLE: I don't think the issues are so
17 difficult. It's just hard to follow.

18 MS. BATTLE: Okay, I will entertain a motion to
19 adjourn, to recess the committee until tomorrow morning at
20 9:00.

21 MR. McCALPIN: So moved.

22 MS. WATLINGTON: Second.

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1 MS. BATTLE: Any opposition?

2 (No response.)

3 MS. BATTLE: Then we are now in recess. Thank you
4 very much for all your hard, diligent work on these
5 regulations.

6 (Whereupon, at 2:54 p.m., the committee recessed,
7 to reconvene at 9:00 a.m., Monday, June 20, 1994.)

8 * * * * *

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