

LEGAL SERVICES CORPORATION  
BOARD OF DIRECTORS MEETING  
PROVISION FOR THE DELIVERY OF LEGAL SERVICES  
COMMITTEE MEETING

RECEIVED

May 17, 1992

MAY 19 1992

Executive Office

2:00 p.m.

The Marriott Suites Alexandria  
801 North St. Asaph Street  
THE CONFERENCE CENTER  
ALEXANDRIA, VIRGINIA 22314

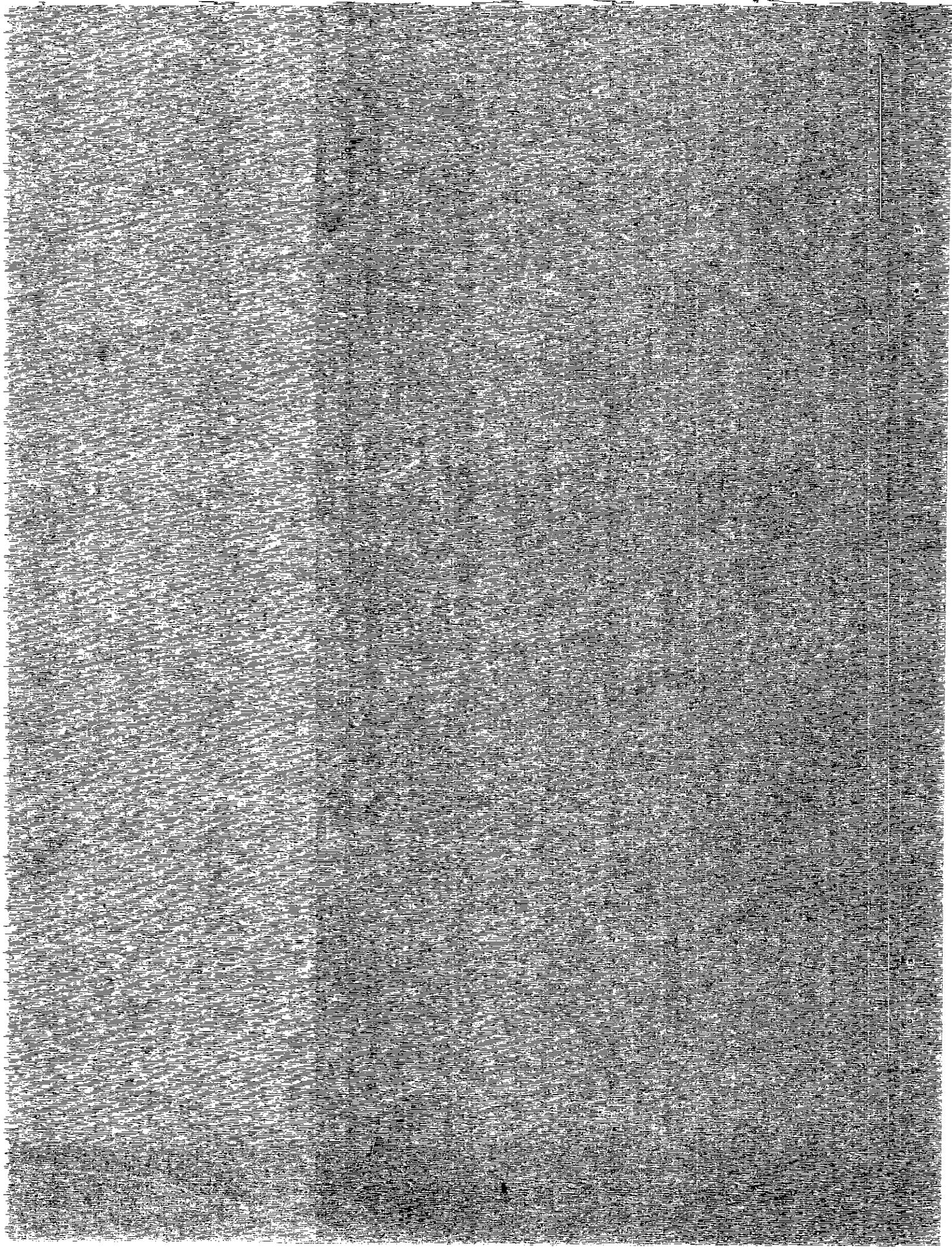
Board Members Present:

Jeanine E. Wolbeck, Chairman  
Howard H. Dana, Jr.  
Jo Betts Love  
George W. Wittgraf

Staff Present:

John P. O'Hara, President  
Patricia Batie, Secretary  
Emilia DiSanto

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P R O C E E D I N G S

CHAIRWOMAN WOLBECK: Sunday afternoon, May 17th. This is a Provision for the Delivery of Legal Services Committee meeting. I will be chairing in place of Blakeley Hall who will not be able to be here until later.

Present today are Committee members: myself, Jeanine Wolbeck, Jo Betts Love, and, in addition, we have Howard Dana, another Board member. The agenda we'll be following is in the white Board Book in the back of the room.

Let me ask for an approval of the agenda.

M O T I O N

CHAIRWOMAN WOLBECK: The agenda is approved by Jo Betts, and I guess I have to second it.

MS. LOVE: So moved.

CHAIRWOMAN WOLBECK: So moved. Then we need to approve the minutes of the meeting on April 5th and April 7th.

MS. LOVE: So moved.

M O T I O N

CHAIRWOMAN WOLBECK: So moved by Jo Betts, seconded by myself. I'm going to call on Ellen Smead. She's going to talk about the Innovative and Meritorious Grant Award

1 projects.

2 PRESENTATION OF ELLEN SMEAD

3 MS. SMEAD: Good afternoon. For the record, my  
4 name is Ellen Smead, and I'm the director for the Office of  
5 Field Services. Since we last met, we published a notice in  
6 the Federal Register on April 26, 1992, announcing the  
7 availability of the Meritorious Innovative Grant program.

8 The submission deadline for proposals is June 30,  
9 1992. The final draft of the solicitation was sent to all  
10 Board members of the Committee and the Board at Blakeley  
11 Hall's request last week, and we hope to be able to  
12 distribute to the potential applicants on about May 19th or  
13 20th or Tuesday or Wednesday of this week.

14 As of the middle of last week, we'd received about  
15 175 requests for applications. So there has been quite an  
16 interest in this program. Tomorrow, the committee on Audit  
17 and Appropriations will be meeting to review the source of  
18 funding for this project, and the staff is in the process now  
19 of organizing a review task force, which will include at  
20 least two members selected from field programs to help  
21 evaluate the proposals, once they're received.

22 We anticipate that we will be able to announce the

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1 awards for these solicitations about August 20th, and the  
2 grant start dates could begin sometime in September, and that  
3 ends my report.

4 CHAIRWOMAN WOLBECK: Any comment or questions from  
5 the Board?

6 MR. DANA: Madam Chairman, I just would like to  
7 confirm that we, the Audit and Appropriations Committee,  
8 tomorrow morning at the ungodly hour of 7 o'clock, will be  
9 looking through the budget and determining from where we will  
10 extract the \$500,000 that -- I think the Board has already  
11 approved this. Thank you.

12 CHAIRWOMAN WOLBECK: Okay. I'll go on to Agenda  
13 Item No. 4. Ellen.

14 MS. SMEAD: The next item is about attorney  
15 recruitment and retention. When we met, I don't know if it  
16 was the last time or the time before, we noted that we wanted  
17 to do a survey of what the programs will be interested in, in  
18 terms of assistance and attorney recruitment and attention.

19 At that point, we also learned that NLADA and  
20 National Association of Public Interest Lawyers had done a  
21 similar survey back in the late 1980s, and we conferred with  
22 them to try and have access -- they agreed to provide us

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1 access to the data, if they had it still.

2 We've now learned that that 1989 survey data is no  
3 longer available. We have drafted a survey of our own, and  
4 we've provided to both NLADA and National Association of  
5 Public Interest Lawyers for review and comment, and we expect  
6 to receive some final comments this week, and that ends that  
7 report.

8 CHAIRWOMAN WOLBECK: Any comment or questions from  
9 Board members?

10 MR. DANA: What kind of a time frame is this on?

11 MS. SMEAD: We're looking at trying to get out the  
12 survey after we move.

13 CHAIRWOMAN WOLBECK: And again, Ellen, Agenda Item  
14 No. 5.

15 MS. SMEAD: Alternative Dispute Resolution, I want  
16 to give you a brief update on the activity since the last  
17 meeting. After that, Suzanne Glasow, who is the senior  
18 counsel for Operations and Regulations in the Office of  
19 General Counsel, will discuss the legal authority and  
20 considerations relative to ADR, the provisions of the new  
21 authorization bill regarding ADR, the federal government's  
22 involvement with ADR, and LSC's involvement with ADR in the

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1 1980s.

2 After these staff presentations, they will be  
3 followed by presentations from three members of the public,  
4 Mr. Houseman, Mr. Lewis, and Ms. Hanfling. Since our last  
5 meeting, we've established a staff committee to look at ADR.  
6 The staff committee consists of myself, Cris Sundseth,  
7 Suzanne Glasow and Leslie Russell.

8 The Committee's role will be to coordinate our  
9 activities in ADR and to implement any Board initiatives in  
10 the area. On April 27th, several members of the staff met  
11 with Paul Kramer of Conflict Management, Inc., Carolyn  
12 Worrell, who until recently was an executive director in  
13 Pennsylvania, and Robert Byrd, the executive director from  
14 Texas.

15 This was a follow-up to the presentation that  
16 Mr. Byrd had made at your hearing back in April. At this  
17 meeting, we discussed with Conflict Management what services  
18 they could provide particularly in the area of training,  
19 negotiation skills, and conflict management process.

20 In addition, Ms. Worrell and Mr. Byrd said if we  
21 did decide to do a training, they might be willing to help us  
22 out in facilitating it. On May 6th, Chairman Wittgraf and

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1 LSC staff met with officials from Higher International  
2 regarding the success of a migrant farm worker grower  
3 mediation project called Proteus.

4 It is my understanding that Chairman Wittgraf will  
5 discuss this in greater detail in his report to the Board  
6 tomorrow. Last week, Leslie Russell visited Wayne County  
7 Neighborhood Legal Services Housing Dispute Center in  
8 Detroit, Michigan. This was a follow-up also to last time's  
9 hearing, when Linda Bernard made a presentation to you.

10 Next month, Cris Sundseth will attend the ABA  
11 Committee on Dispute Resolution meeting and has also been  
12 admitted to negotiation skills training at Harvard Law School  
13 in late June. That ends my presentation. Suzanne now has  
14 some comments.

15 PRESENTATION OF SUZANNE GLASOW

16 MS. GLASOW: Good morning. My name is Suzanne  
17 Glasow. I work in the Office of General Counsel at Legal  
18 Services, and I'd first like to have a brief run-down on the  
19 authority that LSC has to be involved in ADR. In 1988, LSC  
20 Office of General Counsel issued an internal opinion that was  
21 thereafter made public. It was sent out with an external  
22 opinion, so it has been made public.

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1           That opinion, basically, found that the LSC Act  
2 authorizes LSC to fund only those ADR activities that are  
3 done by attorneys, that there is no authority in the LSC Act  
4 to fund ADR as done by nonattorneys.

5           We did, however, in a subsequent opinion, find that  
6 there is an exception for our tribal funds, and that is due,  
7 basically, to the very special nature of Indian law and the  
8 fact that Indian tribes are sovereign, and they have their  
9 own court systems.

10           There is a whole body of federal Indian law, and  
11 there are many exceptions in the LSC Act that deal with the  
12 tribal funds or the Indian tribes, and within all that  
13 framework we found that ADR can be done by nonattorneys for  
14 our tribal funds and for our Indian programs.

15           There are several legal considerations that LSC  
16 needs to look at in this growing area of ADR. Each state, of  
17 course, has its own law on the unauthorized practice of law,  
18 and we need to look into that and see what is developing in  
19 state ethical codes, in terms of if something happened in the  
20 law that allowed LSC to get involved in funding nonattorney  
21 provided ADR, then we would have to look into the state laws  
22 for each -- where each grantee is to see how that conflicts

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1 with the unauthorized practice of law.

2 Presently, and I was told by Ken Boehm the end of  
3 this week, that this provision still exists in the Frank  
4 bill, which is H.R. 2039. It has a section which requires  
5 grantees to adopt policies to attempt negotiations in ADRs  
6 where appropriate and available before filing suit.

7 The exceptions to this general rule are LSC cannot  
8 require recipients to use ADRs before filing suit, and two,  
9 the general rule may not require ADR when the attorney  
10 determines it's not in the best interest of the client.  
11 So, basically, this provides would encourage the use of ADR  
12 but does not make it mandatory for our grantees.

13 Now, I'd like to very briefly tell you what the  
14 federal government is doing with ADR. In 1990, Congress  
15 enacted the Administrative Dispute Resolution Act and the  
16 Negotiated Rule-Making Act, which require federal agencies to  
17 appoint an ADR coordinator and develop and publish an ADR  
18 policy.

19 The legislation does not mandate the use of ADR,  
20 rather it encourages use of the various ADR techniques as an  
21 alternative to litigation. Subsequent to that, in 1991,  
22 President Bush issued an executive order requiring agencies

1 to train personnel in ADR techniques.

2 Of course, we know that LSC is not a federal  
3 agency. We are not subject to this law, but it certainly  
4 would be very beneficial to look into it further and to see  
5 what the federal agencies are doing in terms of training  
6 their attorneys and getting involved in ADR.

7 Briefly, I would like to explain to you LSC's  
8 involvement in ADR in the 1980s. In the 1980s, the LSC's  
9 Chairman of the Board, Clark Durant, publicly encouraged the  
10 use of ADR by Legal Services attorneys. A recent article by  
11 Linda Singer and Alan Houseman and others criticized LSC for  
12 espousing ADR as a substitute for effective representation.

13 However, as I've mentioned earlier, in our legal  
14 analysis of what LSC could do, in terms of ADR, we found that  
15 only attorneys could provide legal assistance with the use of  
16 our funds, and, in that instance, I think we were encouraging  
17 quality ADR involvement.

18 Unfortunately, LSC did not get very involved in  
19 ADR. We did issue some RFPs for one-time grants. We noticed  
20 one that we were considering a grant to the Neighbor-to-  
21 Neighbor Justice Center in Minnesota, but that was challenged  
22 by the Minnesota State Bar on the grounds that nonattorney

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1 legal assistants could not be funded with LSC funds, and, as  
2 I've already told you, we agreed with that.

3 We, consequently, funded only a handful of one-time  
4 grants for attorney provided or attorney supervised ADR  
5 projects. Presently, LSC is not funding any ADR projects,  
6 however, most likely LSC recipients are probably using ADR  
7 techniques in a variety of ways.

8 One point I'd like to make is even though that OGC  
9 opinion was made public -- it was sent to, maybe, one or two,  
10 maybe three grantees -- I don't believe that it's the -- the  
11 finding that LSC cannot fund nonattorney provided ADR has  
12 never been noticed or really made known to the field partly  
13 because we really just didn't get involved in it, I would  
14 assume.

15 CHAIRWOMAN WOLBECK: Any comment or questions?

16 (No response.)

17 CHAIRWOMAN WOLBECK: Thank you, Ms. Glasow and  
18 Ms. Smead. I failed to put on the record that Jack O'Hara is  
19 also present with us. I'd like to do that. Sorry, Jack.

20 MR. DANA: Madam Chairman, could I also observe  
21 that in the audience today is a man from whom we will be  
22 hearing tomorrow, a former president of the American Bar

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1 Association and the Chair of the ABA ADR Committee, Bob  
2 Raven. Welcome, Robert.

3 CHAIRWOMAN WOLBECK: Then we'll continue with Alan  
4 Houseman, and I believe he's going to come up and give his  
5 presentation.

6 PRESENTATION OF ALAN HOUSEMAN

7 MR. HOUSEMAN: Let me just hand out a few things.  
8 I'm going to make a presentation which is, for the most part,  
9 covered in some remarks that I prepared prior to the Austin  
10 meeting of this committee, which I couldn't attend because of  
11 the LSC or what we thought might be the LSC Reauthorization  
12 Bill.

13 I want to elaborate slightly on some things I  
14 didn't mention there, but I would -- I'm not planning to go  
15 into as much depth on this issue, because the two people that  
16 will follow me are clearly the national experts on ADR, Legal  
17 Services, and poor people, and I want to give you the time to  
18 talk to them and not to me, who you hear from all the time.

19 Let me just begin with a little bit of background,  
20 which you may not realize, about my involvement in ADR, just  
21 to, sort of, set the stage for some of the comments that I'm  
22 about to make.

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1 I've been involved in working with ADR since 1969,  
2 when I began an ADR program in Michigan, when I was director  
3 of Michigan Legal Services. It first involved  
4 landlord/tenant and then involved small consumer issues.  
5 That program continued through the early '70s, when some of  
6 the funding for it ran out.

7 In 1977, after I was at the Legal Services  
8 Corporation as director of the Research Institute under then-  
9 President Tom Erlich, the Corporation began to take a look at  
10 the use of ADR in Legal Services.

11 Tom, I, Clint, and a number of others attended the  
12 ABA national conference on ADR in 1977, where I presented a  
13 paper and was a reporter. In 1978 we issued a research  
14 fellowship to Linda Singer, who will appear here in a second,  
15 and she undertook a study of ADR and Legal Services, which  
16 was reprinted in the Clearinghouse Review in 1979.

17 In 1985, I did a study on ADR in Legal Services for  
18 the National Institute of Dispute Resolution, when that  
19 organization, which is a national leader in ADR, was  
20 considering a development of a project on ADR and Legal  
21 Services.

22 I surveyed Legal Services programs at that time as

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1 to what they were doing and not doing in ADR and came up with  
2 a number of recommendations, some of which the national  
3 institutes followed in some of its funding efforts over the  
4 past several years.

5 More recently, I have been involved -- our office  
6 has been involved in two efforts. We have produced a manual  
7 for mediators for mediators around the country, a manual for  
8 mediators on the implications in family law on poor people,  
9 particularly the public benefits implications for poor  
10 people.

11 Many mediators who get involved in mediation are  
12 totally unaware of the potential consequences when they  
13 mediate family matters, potential consequences on AFDC, on  
14 SSI, on food stamps, et cetera, which, by the nature of the  
15 mediation they could produce an agreement which has an  
16 adverse detrimental effect on the continued receipt of AFDC  
17 or inadvertently cuts people off AFDC or inadvertently  
18 creates problems for food stamps, et cetera, because they're  
19 unaware of the implications of these benefit programs on  
20 negotiated settlements that might arise out of this.

21 I can make a copy of that manual available to you  
22 if you're interested. I have one here. We are revising that

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1 manual now, which is what I'd prefer to share with you, which  
2 will be done sometime this summer, updating it to take  
3 account of changes in the public benefit laws, range of  
4 public benefit laws.

5 In addition, last year, with a grant from the  
6 National Institute of Dispute Resolution, my staff and the  
7 Center for Dispute Settlement, Linda Singer, Michael Lewis,  
8 et cetera, produced a study and recommendations on how to use  
9 conciliation in the Federal Family Support Act and Federal  
10 Jobs Program, which is the work welfare program, under the  
11 Family Support Act.

12 There is a provision in Family Support Act for the  
13 use of conciliation. The fact of the matter is that most  
14 state agencies who administer the Family Support Act aren't  
15 using conciliation even though it's required. They don't  
16 have any idea what conciliation was. We have produced a  
17 paper and recommendations to state agencies on how to develop  
18 conciliation procedures and how it can be expanded in its use  
19 on conciliation in the Family Support Act.

20 Finally, which Linda and Michael will talk about at  
21 greater length, since 1990, I have been involved in a small  
22 way in a Ford-funded project to focus on ADR and Legal

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1 Services. We have conducted a substantial number of  
2 trainings, papers, materials, and were provided extensive  
3 technical assistance to Legal Services programs around the  
4 country on the use of ADR.

5 I'm going to save further comment on that until  
6 Linda and Michael are here, who can tell you much more than I  
7 about what we have done on that project. That was a one-time  
8 two year grant that will run out shortly. We don't yet know  
9 whether that grant will be refunded or not, but we have been,  
10 particularly Linda and Michael, extensively involved in Legal  
11 Services programs around the country in assisting them in  
12 getting more involved and how to get involved effectively in  
13 ADR.

14 Let me just say a couple of words in terms of what  
15 I see the opportunity for the Corporation and for this  
16 committee is, and I think it's a major opportunity that we  
17 have to expand the use of ADR in Legal Services.

18 As I indicate in my short analysis, paper, whatever  
19 you want to call it, remarks, there are really three reasons  
20 why I think this opportunity can be realized, if we  
21 effectively approached it. One is the new legislation, which  
22 Suzanne mentioned to you a few moments ago, and that

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1 legislation does create a responsibility on the part of every  
2 governing body of every Legal Services program to create a  
3 policy on the use of ADR and negotiation in Legal Services.

4 Now, the Corporation must ensure that these  
5 governing bodies adopt such a policy, but the legislation  
6 makes clear and the committee report makes clear that it does  
7 not authorize the Corporation to impose any additional  
8 procedural or substantive requirements on recipients, and it  
9 spells out what it can and cannot do.

10 The fact of the matter is that this requirement,  
11 which will likely become law, was not subject to amendment in  
12 the House. I think it will be in -- whatever the Senate  
13 does, if the Senate does anything, I think this will become  
14 law relatively soon, will require that each governing body of  
15 every program, in each program, explore the ADR, what's  
16 available in the community, what isn't available in the  
17 community and explore how they can effectively develop  
18 policies in the use of ADR for their programs.

19 This is going to, inevitably, force every Legal  
20 Services program to think seriously about ADR and what can  
21 and cannot be done in ADR, and I think, because of that, we  
22 stand at a real opportunity to constructively and

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1 affirmatively work with programs and help them develop  
2 effective and proactive policies on ADR.

3 In addition, as Linda Michael can say much more  
4 than I, there are a number of court systems now that are  
5 expanding the use of ADR in many of the kinds of cases which  
6 Legal Services brings, and this is far beyond this, sort of,  
7 normal, sort of, judge discretion.

8 There are a number of court systems that are now  
9 state-wide requiring the use of ADR in many civil types of  
10 cases, and that, too, is going to require Legal Services  
11 programs to become much more involved in ADR because the  
12 clients are going to be required to participate in ADR, and  
13 that raises a whole host of questions, which Linda and  
14 Michael or others may talk about better than I.

15 Many of these court annexed programs require that  
16 the people using them pay fees to participate in them, pay  
17 the mediators or arbitrators, and, of course, that possess a  
18 practical problem for poor people who are Legal Services  
19 clients as to who is going to pay that fee, and, if they  
20 don't pay that fee, what kind of mediator or arbitrator are  
21 they going to have.

22 A whole host of issues arise from these statutes,

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1 which Legal Services programs are going to have to be  
2 grappling with in the next several years as more statutes and  
3 efforts like this go on. Finally, there is a growing  
4 realization of the need and the possibilities of the use of  
5 ADR in Legal Services among Legal Services recipients.

6 In our project, we have found time and time again  
7 that Legal Services people are actively involved and  
8 concerned about this, want to get more involved with it, and  
9 there is, as you heard at your last hearing, some efforts in  
10 Legal Services that were talked about, Gulf Coast and the  
11 program in Wayne County Neighborhood Legal Services.

12 Even so, what we find is that there are many  
13 programs and many areas where Legal Services have not been  
14 that involved in ADR and are very uneasy about ADR because of  
15 a variety of problems and issues and have some real problem  
16 in figuring out how best to get involved with ADR.

17 Now, in some areas, there are not ADR problems,  
18 contrary to what you may have been told. There are large  
19 areas in this country there are no programs whatsoever; they  
20 are very few or they are very small. Most ADR programs have  
21 never worked with poor people in any significant degree  
22 whatsoever.

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1           So, in many Legal Services areas, there is not a  
2 free-standing mediation clinic or program that they have  
3 worked with. In other areas there are. There are community  
4 justice centers. There are a variety of different mechanisms  
5 that Linda and Michael can talk more about, but it's  
6 important to understand that, in many parts of the country,  
7 on many kinds of issues, there do not exist today mechanisms  
8 that can be used.

9           So, when you're thinking about what to do and  
10 thinking about policy, one has to be aware that the situation  
11 that you might see in Atlanta or in some places in California  
12 or in Wayne County is not the same situation you're going to  
13 find in other parts of the country.

14           So given that there is, in my view, a real need to  
15 help programs respond to these initiatives at the state level  
16 and to help programs respond to the new requirement of  
17 negotiation, there is a real need, in my view, for  
18 information and help so that programs can effectively plan  
19 for the increased use of ADR within their programs, within  
20 state court systems, within the new federal court and  
21 administrative agency initiatives. There is a real need for  
22 assistance and help on this.

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1           Yet, I think there are major dangers that we in  
2 this community and you, particularly at the Corporation face,  
3 and I want to talk briefly about those, because sometimes we  
4 may not want to, sort of, face us to this in a hard way.

5           I think it would be a disaster for ADR if this  
6 issue was turned into a political issue within the community.  
7 If it was turned into another initiative like Clark Durant's,  
8 which was read, maybe misread, but I don't think so, by many  
9 people as suggesting that ADR could replace the delivery of  
10 Legal Services through attorneys and staff attorneys. I  
11 would see that happening through a variety of possibilities.

12           There may be notions that some kind of mediation  
13 requirement should be mandated on programs. That would be a  
14 terrible mistake. There may be ideas that the Corporation  
15 should fund ADR centers. That would be a terrible mistake.

16           I think it would be a mistake as well, although one  
17 can differ on this, for the Corporation itself to get  
18 involved in training on ADR, and I think it would be a  
19 mistake for the Corporation to move too early into funding  
20 demonstration projects when we have not had an opportunity to  
21 think about what kinds of projects, if we go in a  
22 demonstrated route, might make sense.

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1 Well, then, what should be done, given the  
2 framework we're in, given the need for assistance? It seems  
3 to me that what should be done is the traditional approach  
4 that we've successfully used in the past, and that is to  
5 develop some kind of funded effort to ensure national  
6 training and education; that materials, manuals, and guides  
7 are prepared and to provide a capacity for ongoing technical  
8 assistance to local programs around ADR issues.

9 I've described these efforts in my handout. I  
10 don't need to go over them in greater length now, but I would  
11 stress two things, because, when I say something like  
12 training and technical assistance, it may be misread. I'm  
13 not suggesting that the Corporation fund a new national  
14 support center or anything like that.

15 There are existing entities out there that can be  
16 funded to produce training. Ellen described the meetings  
17 that they'd had with CMI and Bob Byrd and Carolyn Worrell.  
18 That's an example of an effort that could be funded, provide  
19 technical assistance around negotiation.

20 There are other efforts out there that could be  
21 funded to ensure an ongoing training and education effort,  
22 the development of manuals and materials and ongoing

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1 technical assistance, and we stand at a real opportunity of  
2 working with a variety of organizations on doing and assuring  
3 that this kind of training and technical assistance effort  
4 goes forward.

5 So I think, in my view, if I was making a  
6 recommendation to you, that I would strongly encourage you to  
7 move in a direction that sets aside some money for an  
8 expanded education and technical assistance effort. However,  
9 I want to make it quite clear those are my own views. I do  
10 not speak, in this instance, in any way, for the Legal  
11 Services community, and there may be far different  
12 perspectives and view about this that you will hear.

13 If I read the transcript correctly, Dee Miller, for  
14 example, at your last meeting wondered whether a support  
15 effort was really necessary. I think there are other views  
16 that you've heard from Bob Byrd and others that may question  
17 exactly what the Corporation should do.

18 In light of that, I would strongly urge you to  
19 consider some kind of a small working group, if you wish,  
20 from field people and from those who have been substantially  
21 involved in ADR in Legal Services to work with your staff in  
22 some kind of a joint effort to develop and think through the

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1 kinds of things that the Corporation should do.

2 I think that would be the preferable way to go, but  
3 if you feel that you somehow shouldn't enter into another  
4 such effort, then I would strongly urge you to think about a  
5 training and technical assistance effort.

6 Finally, it seems to me that if the Corporation  
7 really wants to set a role model for ADR, it has a wonderful  
8 opportunity to do so. The Alternative Dispute Resolution  
9 Act, which I have handed out to you, which requires federal  
10 agencies to consider using ADR in their disputes with  
11 grantees, that's what it's all about, while this does not  
12 bind you, you are not a federal agency, this is not law, you  
13 are not bound to comply with any of this, you could, as you  
14 have in the past, adopt the provisions of this, which permit  
15 you to use means of ADR in resolving disputes with grantees.

16 I urge you strongly to consider an internal effort  
17 to model the use of ADR, if you wish, by developing an  
18 approach and mechanisms of using ADR in resolving disputes  
19 with grantees. This act clearly provides authority for  
20 federal agencies to use ADR in disputes with grantees. Even  
21 if the statutory authority says they have to do one thing,  
22 this act says, in that light, you can use mediation. You can

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1 use arbitration.

2           There are a variety of different vehicles to try to  
3 resolve disputes, and it seems to me, if you want to model  
4 the use of ADR, here is a great opportunity for you to do so.  
5 So I would strongly urge you to look carefully at this and to  
6 think about this as another part of your thinking and  
7 discussions around ADR.

8           This ends my remarks, and you may have some  
9 questions, but I would urge you, instead of spending a lot of  
10 time with me to spend more time with Linda and Michael, who  
11 are the true national experts on Legal Services in ADR and  
12 who will follow my presentation. Thank you.

13           CHAIRWOMAN WOLBECK: I think, with that, we will go  
14 on and have questions after with Michael Lewis and Linda  
15 Singer. If you would come forward, please. I want to  
16 acknowledge also that George Wittgraf has joined us.

17           PRESENTATION OF LINDA SINGER AND MICHAEL LEWIS

18           MS. SINGER: I'm Linda Singer, and this Michael  
19 Lewis. We appreciate the opportunity to be with you this  
20 afternoon. We thought it might be useful if we told you a  
21 little bit about our background, describe in particular the  
22 experience that we've had over the past two years working

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1 with Alan Houseman on Ford-funded grant to help Legal  
2 Services programs respond to ADR, and to talk briefly about  
3 some other ADR developments nationally that relate to the  
4 work of Legal Services folks.

5 Our own background, in 1971, an organization that I  
6 put together and have run since, which at that point was  
7 named the Center for Community Justice and is now called the  
8 Center for Dispute Settlement, received one of the first  
9 demonstration grants from OEO's Office of Legal Services,  
10 and, under that grant, we are providing legal services to  
11 prisoners.

12 We quickly discovered how ill-suited the courts  
13 were for some, actually for most, of the problems and  
14 complaints that prisoners had and began working under what  
15 was a precursor of an LSC grant to develop Alternative  
16 Dispute Resolutions in the prisons.

17 We moved from there to programs in public schools,  
18 some of which still exist today, and then, by then, the  
19 national administration was beginning to look at community  
20 justice centers, which at the time were called neighborhood  
21 justice centers, and now we're known by lots of different  
22 names, municipal mediation, whatever.

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1           We got an early grant to begin one of those centers  
2 in the District of Columbia, which still exists, called the  
3 D.C. Mediation Service and which we run and to help a number  
4 of cities across the country develop similar centers, most of  
5 which still exist.

6           Then we started doing some work with the courts  
7 spurred by the Pound Conference on the causes of popular  
8 dissatisfaction with the administration of justice, which  
9 former Chief Justice Warren Berger put together in 1976, and  
10 for the first time brought together representatives of the  
11 bench and bar to look at some possibilities for alternatives  
12 to and adjuncts to litigation for resolving problems.

13           As Alan Houseman mentioned, I then got a fellowship  
14 from the Corporation and produced the article that was  
15 published in the Clearinghouse review in 1979. It's no  
16 surprise that that article did not exactly land with a bang  
17 in the legal services community, and relatively little was  
18 done for some years.

19           At the same time, however, we were working in  
20 various fields that affect the work of poverty lawyers to  
21 develop alternative processes, such as racial discrimination,  
22 special education for handicapped children, social welfare

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1 programs and most recently, as Alan mentioned, the Jobs  
2 Program, and most recently looking at large public disputes  
3 that affect the majority of a whole community, maybe  
4 environmental disputes, maybe disputes on allocation of  
5 public budgets.

6 We are both lawyers, mediators. We teach both  
7 negotiation and mediation at Georgetown Law School and at  
8 Harvard program of instruction for lawyers, and I guess, at  
9 this point, we've trained, probably, thousands of lawyers and  
10 others to deal with ADR. Michael Lewis was, for some time,  
11 deputy director of the National Institute for Dispute  
12 Resolution.

13 I formerly was a member of the ABA Committee on  
14 Dispute Resolution, which Bob Raven, who is here today,  
15 currently chairs, and most recently, we've been working to  
16 develop standards for court connected mediation programs with  
17 a grant from the State Justice Institute.

18 We did succeed in getting two Legal Services  
19 lawyers onto the advisory board of that project. So that we  
20 hope that the final product will reflect the views of the  
21 Legal Services field, and one of the things that we think  
22 needs to be done far more of is to integrate Legal Services

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1 lawyers into some of the national efforts that are going on  
2 to create ADR mechanisms both inside and outside the courts.

3 Michael Lewis is going to describe some of the work  
4 that we've been doing with Legal Services lawyers and others  
5 in the past two years under a grant from the Ford Foundation.

6 MR. LEWIS: Thank you. Roughly two years ago the  
7 Ford Foundation awarded a grant to the Center, which, in  
8 conjunction with Alan Houseman at the Center for Law and  
9 Social Policy has been working since that time with Legal  
10 Services providers to do a couple of things.

11 The first is to help the Legal Services community  
12 become more conversant with and therefore, we hope, better  
13 able to use to the advantage of their clients the range of  
14 ADR processes that are clearly going into place or are in  
15 place in states and in the federal government across this  
16 country, and Linda will talk some more about the various  
17 places across the country now where ADR has been put into  
18 place.

19 It was our sense, starting out, when we wrote that  
20 Ford project, that Ford grant, that the voices those who  
21 represent the poor in this country were not being heard as  
22 these new systems were being designed, and once they were

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1 designed that the advocates for the poor were, frankly, no  
2 better equipped to represent their clients than the general  
3 bar has been.

4 Obviously, we're focusing on advocates for the poor  
5 here today, but I think if one looked around at the general  
6 bar, that it is, except in a very few places, ill-informed  
7 and ill-equipped to represent their clients in the range of  
8 ADR processes.

9 The Ford effort had three main thrusts: The first  
10 was to provide orientation and training to project and  
11 litigation directors, because, clearly, these are the  
12 supervisors in the field offices, to help them understand  
13 better what this range of dispute resolution processes and  
14 where the new systems were being created.

15 The second thing we're going to do is to provide  
16 some greater training for those who are actually working with  
17 clients and who might be involved in creating new systems.  
18 The grant provided for some limited technical assistance.  
19 Alan mentioned that, and I'll talk a little bit more about  
20 that later.

21 We were charged with or said that we would write a  
22 new article for the Clearinghouse Review. Once we started

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1 this project, we discovered, in fact, that more was going on  
2 than we knew about, and partially, as a consequences of that  
3 -- in fact, we held up writing the Clearinghouse article  
4 until we could figure out what was going on.

5           It turned out that there were a number of Legal  
6 Services programs out there that were exploring uses of  
7 dispute resolution, that had been using them in some way or  
8 had encountered dispute resolution systems in their local and  
9 their state court systems, and, therefore, had been obliged  
10 to deal with learning about these systems, and one of the  
11 things we discovered was that we didn't know as much as we  
12 thought we did, when we started out.

13           What have we done today? Alan has mentioned that  
14 we've done a number of trainings, both in large conference  
15 settings, for example the NLADA, or last spring we did two  
16 presentations for advocates working on migrant issues. We  
17 have done trainings for project directors, litigation  
18 directors.

19           Last fall we did a program for all of the staff of  
20 the Alabama grantees at their annual meeting, have written at  
21 this point the Clearinghouse article. I think Alan gave you  
22 copy of it, and we expect it out this summer in

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1 Clearinghouse.

2           What have we learned? We've learned some things  
3 that may be useful to you as you consider what you might want  
4 to do. There is a great variation in sophistication and  
5 knowledge among Legal Services advocates about ADR. Some of  
6 that variation has to do with what is going on in a  
7 particular state.

8           There are some states where state court judges have  
9 the authority to send, to refer, essentially, any civil case  
10 to mediation or arbitration. There are many more states in  
11 which that isn't so. So, as one might expect, the states in  
12 which the states courts have gotten much more active, you  
13 find greater sophistication and knowledge. In states in  
14 which the state courts haven't done very much, you tend to  
15 find less sophistication and knowledge.

16           We've also found that some field offices or some  
17 advocates have been approaching, looking at ADR as a way of  
18 generating more resources in a time of scarcity. For  
19 example, there are funds available in some states, and  
20 generally funds that have resulted from increased filing fees  
21 that can be used to create dispute resolution programs.

22           There are Legal Services programs that are looking

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1 at those funds and asking themselves a question about whether  
2 they should, in conjunction with others, help to create a new  
3 dispute resolution program, taking advantage of the  
4 availability of these state funds and hoping, thereby, to  
5 resolve some of the disputes of their clients through those  
6 new programs.

7           There is a general desire to know more. There is  
8 still some healthy skepticism as, frankly, we think there  
9 should be. The adherents or proponents of ADR have not  
10 always done themselves -- sometimes have been their own worst  
11 enemies, frankly. The proponents haven't always considered  
12 sufficiently some of the, sort of, tough questions that need  
13 to be asked and answered before one can say, "Well, this is a  
14 terrific idea."

15           The other thing that we have found is that programs  
16 generally have not believed that they could support  
17 attendance at training sessions focused solely on ADR. That  
18 has meant that much of the training we have done in the past  
19 has been built on existing conferences or meetings, and that  
20 to the extent that one cannot do that, any training effort  
21 becomes significantly more expensive, and, frankly, we didn't  
22 have the money in this Ford grant to provide free-standing.

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1 training and support people's travel fees, and whatever and  
2 lodging fees.

3           The other thing that we can tell you is that each  
4 training or presentation that we have done has led to a  
5 request for help, and the range of requests has been from  
6 someone asking us to look at a proposal that they're putting  
7 together to go after these state funds that I mentioned  
8 earlier to a lawyer who was representing clients who were  
9 concerned about the siting of a facility that might be a  
10 polluter, might have some environmental consequences, and  
11 there were some dispute resolution provisions in the contract  
12 that had been put forward, offered by the group constructing  
13 that facility.

14           So there have been a range of technical assistance  
15 requests that we have gotten, and, frankly, we have not been  
16 able to be as active in fulfilling those requests as we would  
17 like. Once again, the limitations of the Ford grant  
18 permitted us to do a paper review, permitted us to have long  
19 telephone discussions with people but certainly has not  
20 permitted us to get on an airplane and fly to some place and  
21 sit down and meet with people over two or three days,  
22 perhaps, or meet with a range of people to try and resolve or

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1 help them think through whatever the issue might be.

2           Based on what we've seen, what do we think is  
3 needed? Continuing help with training and technical  
4 assistance. In regard to training, let me just say that  
5 having read the transcript of your April 7th, I think it was,  
6 meeting, that we wanted to make sure that you understood that  
7 at least as we understand what CMI, what Bob Byrd was saying  
8 to you about CMI in Austin, that is focused, really, on  
9 negotiation, negotiation training, and that's important.

10           You should not, however, view that as the kind of  
11 broader ADR training that, frankly, we're talking about. The  
12 kind of training that we're talking about would do a number  
13 of things. It would provide advocates for the poor with a  
14 basic understanding of the range of ADR processes. It would  
15 help them think through the question of, "How do you choose a  
16 process for a given dispute or classes of disputes?"

17           It would help them think through the question of,  
18 "What is the role of advocates and clients in the various ADR  
19 processes?" For example, if you're in a mediation, generally  
20 the clients are expected to be active participants. That's  
21 not so in litigation or adjudication or arbitration.

22           I mean, if the client has any role, it's as a

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1 witness, but it's certainly generally is not sitting at the  
2 table and being part of the give and take, and those are  
3 things that all lawyers, in this case, advocates for the  
4 poor, need to understand.

5           Finally, we think it is crucial that advocates for  
6 the poor have the knowledge and can bring -- have enough  
7 knowledge about dispute resolution so that they can bring  
8 their perspective, the perspective of Legal Services' clients  
9 to bear on the state and federal systems that are currently  
10 being created in this country so that once they are created  
11 they will be as receptive and as amenable to the problems of  
12 the poor as they are to the problems of everyone else. Thank  
13 you.

14           MS. SINGER: I want to talk briefly about some of  
15 the other developments that have been taking place over the  
16 past few years at both the state and federal level that  
17 affect poor people and affect the work that their advocates  
18 do. Courts have become very active in creating all kinds of  
19 alternatives. The states are a bit of a hodgepodge right  
20 now.

21           The most active have been Florida and Texas where,  
22 by legislation, any judge may refer any case that is either

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1 civil or family mandatorily to ADR and, in fact, whole  
2 categories of cases now exist where the can't get a trial  
3 unless you go through a mandatory ADR process first.

4 So, as you might imagine, there is a lot of  
5 activity there, and lawyers who practice there have to  
6 understand what's going to happen to them. That ranges to  
7 some places that haven't done anything at all and more  
8 commonly, sort of, uneven pattern with lots going on in the  
9 family area, some in landlord/tenant, and somewhat less in  
10 both civil and small claims.

11 Under the Civil Justice Reform Act, otherwise known  
12 as the Biden Bill, every federal district court was directed  
13 to have a study committee on cost and delay of litigation.  
14 Those committees are beginning to report. Of the first 34  
15 that reported, 31 recommended greatly expanded use of ADR by  
16 the federal courts.

17 From what we can see, the courts are following the  
18 recommendations of those committees. So anybody who  
19 litigates under federal court, in federal court, is going to  
20 find a somewhat dizzying array of mediation, nonbinding  
21 arbitration and early neutral evaluation programs, not to  
22 mention many trials and summary jury trials.

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1           The federal agency, a couple of people have already  
2 mentioned the Administrative Dispute Resolution Act.  
3 Although it doesn't direct agencies to institute ADR  
4 programs, our experience, and we were working with a large  
5 number of federal agencies under the Act, our experience are  
6 that many of them are developing pilot programs quickly,  
7 adopting policies and getting their people trained, so that  
8 more and more you're going to see programs that may be used  
9 by Legal Services people.

10           Actually, I was at a conference a few days ago  
11 where the Labor Department was describing a new pilot program  
12 to resolve disputes, and in the front row was a Legal  
13 Services lawyer from the migrant program who was asking all  
14 the right questions about how does she get access to these  
15 programs for her clients, are they going to have to travel,  
16 will the Labor Department people come to them, was quite  
17 savvy about what was going on. I wish there had been more  
18 people like her there.

19           Under the Negotiated Rule-Making Act, which hasn't  
20 been mentioned so far but was also passed in the fall of  
21 1990, many federal agencies are starting to negotiate their  
22 rules with representatives of affected constituencies.

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1           So that you could well see rules in the health and  
2 welfare and employment areas being negotiated, and one of the  
3 things that Legal Services programs are going to have to do  
4 in response is to figure out how important these things are  
5 to them, and is it worth their while to come to Washington  
6 -- there are limited funds available for participation for  
7 people who can't afford to fund themselves -- and actually be  
8 part of what sometimes are fairly extended processes to  
9 negotiate the new rules instead of waiting until the rules  
10 are published in the Federal Register and then deciding  
11 whether to try to take a pot shot at it usually after it's  
12 too late to affect the rule.

13           There is an executive order that came out in  
14 October of '91 that directs all federal agencies with  
15 litigation responsibilities to use negotiation or ADR  
16 processes and to offer them unilaterally, if necessary, to  
17 people against whom they litigate, and that actually hearing  
18 the new provision of the authorization bill for the LSC  
19 described, it sounds very much like a parallel of that  
20 provision that already affects the Justice Department and  
21 other litigating agencies and under which Department of  
22 Justice is just about to issue guidance to all of its own

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1 attorneys, and we've been involved in training attorneys from  
2 the civil division at Justice on how they're going to respond  
3 to this initiative that is parallel in many ways to the  
4 initiative that sounds like is about to apply to LSC.

5 MR. DANA: Excuse me. Could you amplify on what  
6 you were just saying? What is about to apply to what?

7 MS. SINGER: Well, as Alan was mentioning -- and  
8 he's probably more of an expert on this than I am -- there is  
9 a clause in your new reauthorization act that talks about ADR  
10 policies for LSC offices and a preference that lawyers  
11 attempt to negotiate or use ADR as an alternative to  
12 litigation.

13 That is pretty much what the executive order has  
14 directed litigating agencies in the federal government to do,  
15 and they are mounting fairly substantial training efforts in  
16 order to fulfill that mandate on the theory, which seems  
17 pretty reasonable to us, that you can't use ADR until you've  
18 been trained in what the processes are and trained to  
19 represent clients in the various processes.

20 I don't know if we've made clear up until now that  
21 we don't see ADR programs, in many cases, as an alternative  
22 to representation. Sometimes they may present an alternative

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1 forum to a court, and sometimes they may present a  
2 supplemental resource that programs can use either for  
3 clients that they're actively representing or for clients who  
4 don't come within their priorities and for whom they're  
5 simply looking for places to refer.

6 Other federal programs, whether by statute or by  
7 rule, some have been mentioned, some are not, the Jobs  
8 Program now does require welfare offices to offer  
9 conciliation before terminating participants. The fair  
10 housing amendments of 1988 have an ADR provision in them.

11 Special education, by regulation, many states are  
12 offering mediation to parents who want to challenge the  
13 individual educational programs that the schools are supposed  
14 to prepare annually for handicapped or otherwise disabled  
15 children.

16 The Americans with Disabilities Act and other  
17 discrimination legislation is encouraging ADR, and many EEO  
18 offices at the state and local level are beginning to offer  
19 mediation to people who complain of racial or other kinds of  
20 discrimination. The HHS Grants Appeals Board for many years  
21 has dealt with its own disputes with its grantees by offering  
22 mediation.

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1           Contrary to what Suzanne Glasow said a little while  
2 ago, in our experience, the whole issue of unauthorized  
3 practice of law by ADR programs has not come up for the past  
4 at least 10 or 15 years. It was an early concern. Most  
5 state bars have, since that time, adopted ethical statements  
6 that say that being a neutral in an ADR process does not  
7 constitute representing a client and does not constitute the  
8 unauthorized practice if done by a nonlawyer.

9           Actually, one state bar has gone to the other  
10 extreme. The Colorado Supreme Court recently adopted an  
11 amendment to Colorado's Code of Ethics for attorneys that  
12 says that it's an ethical violation for an attorney to fail  
13 to discuss with clients alternatives to litigation in all  
14 appropriate cases, and that provision has gotten enough  
15 attention recently that we would expect that more and more  
16 we're going to start seeing that in state ethical codes that  
17 apply to attorneys.

18           MR. DANA: Thank you. Could I ask a couple  
19 questions?

20           MS. SINGER: Sure.

21           MR. DANA: Do you see an ethical problem -- some  
22 people, I think naively and incorrectly view ADR as a way of

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1 getting lawyers out of dispute resolution, and, in that  
2 sense, if we created an alternate system of justice where  
3 lawyers were barred and lay advocates were coming to the  
4 fore, do you see an unauthorized practice of law problem in  
5 that mind set? Although I don't think that's probably a  
6 reality, I do think that some people think of ADR as anti-  
7 lawyers. I think most practitioners don't.

8 MS. SINGER: Well, some of the early programs for  
9 mediating, particularly family disputes, even those that were  
10 attached to the courts, attempted to bar lawyers from  
11 representing their clients in various processes, mostly  
12 mediation processes.

13 That has changed in almost every program,  
14 particularly those that have been instituted by statute, and  
15 those are starting to guarantee a lawyer the right to  
16 accompany a client to a mediation session, and frankly, we  
17 think that a lot of the concern that has existed in the field  
18 is a well-placed concern to having lawyers displaced and  
19 having everything resolved by consensus.

20 Everything is not amenable to being resolved by a  
21 nonadjudicative process. While it does make sense to help  
22 people reach consensus on a variety of disputes, some people,

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1 first of all, are looking for rules, are looking for  
2 precedents, which can't be created simply through a  
3 consensus.

4 Others are representing a client where there is  
5 such an imbalance of power that it is unrealistic to think  
6 that this is something that can be negotiated with or without  
7 lawyers.

8 We know that the community has been particularly  
9 concerned about programs for mediating family disputes that  
10 don't attempt to screen out serious cases of domestic  
11 violence, and that's the kind of thing that really has raised  
12 the hackles of Legal Services lawyers in the field and that  
13 we think you need to be sensitive to when you, sort of, think  
14 through what it is that you want to do.

15 MR. DANA: It seems to me that notwithstanding, I  
16 guess, the good efforts of you and Alan and others back 15,  
17 16 years ago to promote ADR, the seeds you've sown back then  
18 are just now taking hold, and that it is really entirely  
19 unnecessary and maybe even counterproductive, I think you're  
20 telling me this, for the Corporation to get up on a bully  
21 pulpit in this area.

22 What we probably need to do is help our advocates

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1 deal with what's happening out there and help them get the  
2 skills to, A, participate in what other people have created,  
3 and B, in those instances where the fora are being created  
4 without the poor in mind to speak up for their clients. Is  
5 that what I'm hearing?

6 MR. LEWIS: Absolutely.

7 MS. SINGER: I think you're saying it better than  
8 we could. We're not proposing that you fund ADR programs, at  
9 least not at this point. There is an awful lot of work that  
10 needs to be done before we think that even ought to be on the  
11 agenda, and the most important thing is to make sure that  
12 Legal Services people are ADR smart, and, as you said, that  
13 takes, sort of, two forms.

14 One is representing clients more effectively, and  
15 the other is being part of the action when ADR programs are  
16 being created at both the state and the federal level. Every  
17 federal district court now has a court cost and delay  
18 committee. Legal Services lawyers ought to be on those  
19 committees. We don't think they are in most places. They're  
20 on a few of them.

21 MR. DANA: They're clearly on a few, because we've  
22 spoken to some of them, but there are many more district

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1 court committees, our impression is, where they're clearly  
2 just not represented.

3 MS. SINGER: There are statewide, state supreme  
4 court created ADR committees in growing numbers of states  
5 that will have a lot to say about the allocation of any state  
6 funds to support ADR and will have a lot to say about poor  
7 people's concerns, for example, as Alan mentioned earlier, in  
8 programs that permit fees to be charged for ADR as a  
9 precondition of coming to trial.

10 MR. DANA: You've indicated that -- you've talked  
11 about something called an act or a policy at the federal  
12 level to negotiate rules. The name of that is the what?

13 MR. LEWIS: It's the Negotiated Rule-Making Act of  
14 1990.

15 MR. DANA: Okay. It seems to me implicit in that  
16 concept is a federal agency that says rather than litigate or  
17 have hearings over rules, let's invite all the players in and  
18 sit down and talk about it?

19 MR. LEWIS: There were some experiments in some  
20 federal agencies before the Act was passed in 1990, really  
21 about ten years' worth of experience mostly in the  
22 Environmental Protection Agency but not exclusively. A

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1 number of other federal agencies did one or two. EPA  
2 probably did eight or nine, maybe even ten.

3 The theory was that under the Administrative  
4 Procedure Act that the agency sits in its ivory tower,  
5 proposes a rule, publishes it, gets comments, gets, you know,  
6 thousands of pages, goes back to the ivory tower, promulgates  
7 a final rule, and then gets sued, and, in fact, EPA was  
8 finding that 80 percent of its rules became subject to court  
9 challenge.

10 The net effect of that was to simply not be able to  
11 fulfill the intent of Congress when it said, "Do X." It  
12 couldn't do X, because they were fighting about it in the  
13 courts.

14 So the theory is to get everyone who is interested  
15 or concerned, all the constituencies in a given problem, try  
16 to identify them, get them in one room, and then, with the  
17 agency, try to create a proposed rule that then goes out for  
18 notice and comment in the regular APA mechanism, but the  
19 theory being if we can get everyone into this room, and if we  
20 can reach consensus, then, once we promulgate a final rule,  
21 we're less likely to be sued, and the experience of that 1980  
22 to 1990, the experience was that that's absolutely right.

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1           So the Act makes that kind of process a legitimate  
2 one for all federal agencies, and I, frankly, can't tell you  
3 whether it has led to an expansion in the number of  
4 regulatory negotiations that are taking place, but we know of  
5 agencies that, you know, two years ago weren't thinking of  
6 them who are now thinking of regulatory negotiations for  
7 particular problems.

8           MS. SINGER: I think the FTC is about to have a  
9 regulatory negotiation on the whole subject of nonstate  
10 insured financial institutions as a result of the Latin  
11 American investment scandal, and that's the sort of thing  
12 that we would think would directly impact some clients, Legal  
13 Services clients.

14           I suppose it's a contradiction in terms to say that  
15 people who have enough money to put in the bank may still be  
16 poor, but, from what I read, some of the people who were hurt  
17 the hardest when that bank failed here locally were very poor  
18 people.

19           MR. WITTGRAF: Let me ask a question, if I may, and  
20 I've approached this possibility of an area where perhaps the  
21 Legal Services Corporation might be a bully pulpit in this  
22 specific area, as opposed to the colloquy that you had with

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1 Mr. Dana, where the three of you were in agreement that  
2 generally the Corporation not be a bully pulpit.

3 It has to do with a specific area of agricultural  
4 producer-migrant labor disputes. I think Mr. Houseman would  
5 agree with me that one of the main reasons, if not the main  
6 reason, for the inclusion of the Alternative Dispute  
7 Resolution in H.R. 2039, the Legal Services Reauthorization  
8 Act, was to overcome criticisms by the agriculture producer  
9 community about alleged misuse of the Agriculture Workers  
10 Protection Act.

11 You did mention, I guess, a migrant Legal Services  
12 attorney who happened to be at a seminar that you appeared  
13 before recently. I've become aware just in the last several  
14 months, as have my colleagues on the Board and our staff,  
15 about a migrant labor ombudsman program utilized in the state  
16 of Iowa in 1991, a private nonprofit corporation was the  
17 middle entity, something called Proteus, Incorporated.

18 On the one hand, a number of seed corn growers,  
19 Pioneer, Decalb and others were providing some of the funds.  
20 I believe the Department of Labor was providing some funds  
21 through this Proteus, and, on the other hand were the migrant  
22 workers and their representatives, although I'm not sure that

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1 Legal Services attorneys from Legal Services Corporation of  
2 Iowa were actively involved, specifically I believe six  
3 bilingual ombudsmen were employed during the, essentially,  
4 the corn detasseling season, which could have been a couple  
5 summer months of last year.

6 Our understanding from at least some of the people  
7 at Pioneer is that this is an effort that will be utilized  
8 again in 1992. As the level of political controversy has  
9 subsided somewhat as it surrounds the Legal Services  
10 Corporation and the concept of civil legal services for the  
11 poor are being funded by the federal government, one of the  
12 knottiest areas that remains politically, I think, is the  
13 relationship between agriculture producers and migrant  
14 laborers.

15 That's why, as I said earlier, perhaps, for me at  
16 least, this is an area where the Corporation might consider  
17 being on the bully pulpit. With all of that background  
18 comment, my question is, are you aware of any efforts, other  
19 than the one I've described, to resolve producer-migrant  
20 labor problems, disputes, other than the one I've referred  
21 to?

22 MR. LEWIS: There are at least two that I know of,

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1 and there may be others. Three. Okay. I stand corrected.

2 There are now three.

3 MR. WITTGRAF: I'm asking both of you.

4 MR. LEWIS: I'll only talk about the two I know of.  
5 There was -- and I cannot tell you what the current status is  
6 -- there was an attempt in Pennsylvania over two or three  
7 years now to develop a mediation system using -- starting  
8 primarily with law professors who teach at Dickenson, and the  
9 area of Pennsylvania they were focused on is, I think, North  
10 Central, but I may be wrong about that --

11 MR. WITTGRAF: Under whose auspices?

12 MR. LEWIS: Well, let's see. The entities that  
13 work together, as I understand it, let's see, were Friends of  
14 Farm Workers -- I think that's the name of the Pennsylvania  
15 program -- and a growers association, and I'm sorry, I don't  
16 know the name of the growers association.

17 As part of this Ford grant, we consulted some with  
18 Friends of Farm Workers. This was, let's see, at least a  
19 year after they had started. So this was into their second  
20 year. There are clearly some problems, and we think that the  
21 migrant area is an area in which there are problems that make  
22 it quite difficult, not impossible, perhaps, but make it

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1 quite difficult.

2 One of the problems is often, at least for some of  
3 the AWPA violations or wage -- let's say for wage and hour  
4 violations, the attorneys' advocates don't even find out  
5 about them until their clients are someplace else. I mean,  
6 that presents problems with an ombud system or a mediation  
7 system, clearly.

8 The other program that I know of is one that took  
9 place and may still be taking place in North Carolina  
10 involving the Pickle Growers Association, and, once again, a  
11 Legal Services grantee. I'm not sure of the name of the  
12 program.

13 A PARTICIPANT: It's Legal Services of North  
14 Carolina.

15 MR. LEWIS: Okay. Thank you. I can't tell you  
16 very much about that program except that we do know that it  
17 exists. Actually, you had --

18 MS. SINGER: A little bit. I think what they were  
19 trying to do is to work with an ADR program out of Duke  
20 University, and they had found, I think it was a retired  
21 judge, who had some credibility both with the Legal Services  
22 program and with the pickle growers, and the idea was that

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1 that judge was going to hear complaints during the season and  
2 give a recommendation.

3 The program is only a year old, and, as far as I  
4 know, it's only experience was last summer, when it was just  
5 getting off the ground. The third, and I know the reason you  
6 didn't think of it is I'm not sure it's had any activity.

7 MR. LEWIS: I can now remember.

8 MS. SINGER: It's in West Virginia.

9 MR. LEWIS: Right. Now I remember.

10 MS. SINGER: And it's also worked with, I think it  
11 was the Local Agriculture Extension Service, the University  
12 of West Virginia, and the local Legal Services program to  
13 deal with problems around apple picking.

14 The Migrant Legal Services program, as Michael  
15 mentioned quickly earlier, invited us to its national  
16 conference last year, and we did some work with the advocates  
17 there. MLAP is aware of the programs that are going on. It  
18 is a struggle to get a program going with a population that  
19 by definition is transitory and that the only people who stay  
20 are the lawyers, who then get accused by the growers of being  
21 the only ones who really have the grievances, because the  
22 clients have gone on to someplace else.

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1           MR. LEWIS: Actually, let me just add one footnote  
2 to that. In my work with Friends of Farm Workers, one of the  
3 things I discovered is what is grown in an area really  
4 affects a whole range of issues, how long people are here,  
5 whether they're transitory, whether they stay.

6           For example, in the mushroom growing region of  
7 Pennsylvania, apparently, there are far fewer migrant  
8 workers. There are still lots of farm workers, but they tend  
9 not to travel. Because of the nature of mushroom growing,  
10 apparently, it's done year round, or at least some of it is  
11 done year round. So they're year-round jobs.

12           So that a system that you might create to resolve  
13 disputes in that setting would be very different from the  
14 system that they created in North Central or Northeastern  
15 Pennsylvania.

16           MR. WITTGRAF: I might suggest that this might be  
17 an instance for the use of a bully pulpit. I don't think I  
18 was assuming that we would be able to do something, sort of,  
19 unilaterally like McDonald's or any other franchise would fit  
20 every one.

21           I think I understand that, but both because of the  
22 difficulty, in the absence of the established bar or the

1 court system or others having what you might call a vested  
2 interest in the utilization of mediation in this area  
3 combined with the political significance of it, which at  
4 least for me is important, to me it would seem to be an area  
5 where the Corporation needs to take an even closer look than,  
6 perhaps, even some of the other areas where bar associations,  
7 where the court systems and others have begun to move, family  
8 law probably being the best example.

9 Your answers are very helpful, thank you.

10 CHAIRWOMAN WOLBECK: Are there any other questions  
11 or comments?

12 (No response.)

13 MS. SINGER: Thank you for the opportunity.

14 MR. DANA: Thank you very much.

15 CHAIRWOMAN WOLBECK: Thank you very much. Phyllis  
16 Hanfling, would you like to come up and show the  
17 presentation?

18 PRESENTATION OF PHYLLIS HANFLING

19 MS. HANFLING: It's a pleasure to be here today on  
20 this Sunday afternoon and have the chance to talk to you  
21 about some training and about United States Arbitration and  
22 Mediation. When Linda and Michael talked about the thousands

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1 of attorneys they trained, I have to tell you that I am one  
2 of them.

3 I was trained about seven years ago, and I think,  
4 thanks to them, I have had an interest in ADR ever since. I  
5 am executive director of United States Arbitration and  
6 Mediation of Metropolitan Washington, D.C., and it's one of  
7 the newest offices for United States arbitration and  
8 mediation, and it covers D.C., Northern Virginia, and  
9 Southern Maryland.

10 Like our other 42 office holders throughout the  
11 United States and five international office holders, I am an  
12 attorney who has been involved in and has a deep commitment  
13 to the field of alternative dispute resolution.

14 Before joining USA&M, I was an assistant general  
15 counsel for the Manville personal injury settlement trust  
16 where I was responsible for developing and administering an  
17 ADR program to resolve Manville's asbestos related personal  
18 injury disputes, and, in addition to that, for five years I  
19 had mediated for the D.C. and Montgomery courts and for the  
20 D.C. Office of Human Rights.

21 In addition to providing mediation services to  
22 clients on a local basis in this area, I am the coordinator

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1 for all United States arbitration and mediation federal work,  
2 thus, although we have the capability to provide training,  
3 systems design, consulting, and mediation services in all  
4 major cities throughout the country, my presence here in D.C.  
5 assures consistency and immediate access, and I'm available  
6 to work with the D.C.-based office to determine their needs  
7 and see how our network of trainers, system designers,  
8 mediators, and case administrators might best assist them.

9 I know that Martha Jamison from our Houston office  
10 spoke with you at your April Board meeting. At the risk,  
11 therefore, of being redundant, I'd like to tell you a little  
12 bit more about how we're structured. As I mentioned  
13 previously, each office holder is an attorney with expertise  
14 in the field of ADR, and each office has a case administrator  
15 whose responsibility it is to educate the parties about  
16 mediation, encourage participation in the process, assist  
17 with information exchange, if necessary, do all the  
18 scheduling and shepherd the case through to completion.

19 Each office has several panels of mediators with  
20 expertise in specific subject areas, all of whom are  
21 attorneys who have been trained in mediation techniques.  
22 Although each office provides arbitration services and other

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1 types of ADR, such as intermediation, judicial settlement  
2 conferences, which are often custom designed to meet the  
3 individual client's needs, we find that mediation is most  
4 frequently requested by our clients, and we believe it to be  
5 the most effective and satisfactory form of ADR.

6 As far as trainers, we have trainers throughout the  
7 country in all the major regions. Many of them are adjunct  
8 professors in local universities and law schools. So they  
9 have teaching skills as well as ADR expertise.

10 In addition to training for mediators, we provide  
11 training in negotiation skills, conflict management, and in  
12 how to use mediation to settle claims; that is, how to select  
13 appropriate cases and how to represent your client at  
14 mediation.

15 All of our training, as is typical of any good ADR  
16 training, is customized to the client's needs and consists of  
17 several components: lectures, role plays, written materials,  
18 evaluations, and some kind of follow-through, whether  
19 mentoring or additional training after the trainees have had  
20 time to try their new skills.

21 By customization, I mean that the client's needs  
22 are assessed and lectures and role plays are designed to

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1 correspond to situations in which the trainees would expect  
2 to find themselves. All training is highly interactive, thus  
3 stimulating and maintaining interest and enthusiasm.

4 We've done training for insurance companies,  
5 corporations, hospitals, law firms, workers' comp boards and  
6 government agencies, and, as an example of one of our  
7 customized trainings, I've given you a copy of last spring's  
8 ADR update, which is published by United States Arbitration  
9 and Mediation.

10 The last page describes the conciliation training  
11 designed for one of HUD's regional Office of Fair Housing to  
12 help their investigators meet their mandate of resolving  
13 complaints within 100 days.

14 This two-day training taught active listening  
15 skills, negotiation and mediation skills and included dealing  
16 with multiple parties, dealing with anger and with issues of  
17 cultural diversity. This program was very successful, and it  
18 was requested and repeated by other regions of HUD.

19 It's my understanding that you have several  
20 situations for which you might be interested in ADR training,  
21 and the first would be for the in-take people. It seems as  
22 if there might be two different issues here. One, whether an

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1 in-coming complaint might be handled by a local dispute  
2 resolution center, which, as you know, are in many parts of  
3 the country.

4           These centers provide mediation at no cost using  
5 volunteer trained mediators and are very good resources for  
6 common problems that community people have, and there is one  
7 here in D.C. which handles cases referred to it by the police  
8 department that are self-referred. It deals with community  
9 problems, with problems between neighbors, with small claims  
10 issues, and these are very good resources.

11           Again, in situations in local communities, our  
12 local offices would be happy to refer you to these dispute  
13 resolution centers, if you're offices weren't familiar with  
14 them.

15           If the in-take people needed training in  
16 determining whether a claim had merit and whether Legal  
17 Services might provide mediation or ultimately litigate the  
18 case, we could develop a manual with kinds of very simple  
19 fill in the boxes kinds of forms that the staff could use,  
20 and they could be trained, and we could provide the training  
21 to use it.

22           That would be very short kind of training with the

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1 staff practicing on simulated cases while using the forms in  
2 the manual and thus developing the competency and the  
3 confidence in using it, and this manual, of course, could  
4 then be reproduced and used in-house to train new in-take  
5 personnel.

6 To train attorneys in how to determine whether ADR  
7 would be appropriate and which type of ADR might be  
8 appropriate for a specific case, the first step would be to  
9 do a needs assessment, which would entail interviewing  
10 several attorneys and several supervisors, trying to  
11 determine the kinds of problems that they run into, the kinds  
12 of cases that they would see.

13 A program would then be developed teaching them how  
14 to do a case review or a file review, the type of program  
15 that we do continually all over the country for insurance  
16 companies, and, again, manuals and role plays would be  
17 developed for the training.

18 As an alternative to regional training, this  
19 training could be provided by our local offices who would, in  
20 any case, be available on an ongoing basis for follow-up. An  
21 additional part of this training would include how to  
22 preparing for mediation, how to prepare the client for the

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1 mediation, and how to best represent the client at the  
2 mediation. This is something, again, that we frequently do  
3 for the insurance industry and have done for law firms.

4 Finally, if you wanted to actually train your in-  
5 house staff to be mediators, a program could be developed to  
6 do that, and that is a mediation program teaching skills.  
7 Forty hours training is the best. It's the maximum. It can  
8 be done for less number of hours, providing that there is  
9 good follow-up, and, again, we are in a position, because of  
10 our national network, to provide opportunities for co-  
11 mediation and mentoring on a local basis.

12 Of course, any kind of program would be designed to  
13 meet the specific needs of Legal Services, and I'll be happy  
14 to answer any questions you might have.

15 MR. DANA: My understanding is that, in addition to  
16 providing training, your primary or one major aspect of your  
17 business is actually conducting mediations?

18 MS. HANFLING: That's correct.

19 MR. DANA: And the common denominator of those  
20 mediations is that the participants pay the cost of the  
21 neutral and a fee for each case to handle the administration?

22 MS. HANFLING: That's correct.

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1 MR. DANA: Do you see how Legal Services could  
2 interface with your organization in that regard?

3 MS. HANFLING: Well, I was really focusing  
4 primarily on training your staff to perform that function,  
5 but, in terms of the interface, there are couple of ways you  
6 could do that. When I was at the Manville trust, I had hired  
7 USA&M to administer the program. That's how I got to know  
8 them.

9 We worked that out so that we had pulled together  
10 panels of mediators. We didn't use only USA&M mediators. We  
11 really felt we needed to use plaintiff's attorneys from  
12 around the country. So we used -- we found those attorneys,  
13 and those were people who were agreeable to all parties in  
14 the dispute. Those were people who the plaintiff's attorneys  
15 and well as defense counsel could agree upon.

16 They were trained, and they were then put on the  
17 roster of mediators around the country, and USA&M provided  
18 administration in two regions, one for the whole East Coast  
19 out of Philadelphia and one for the West Coast out of  
20 Washington. That was done on a flat fee administrative cost  
21 per case, and the mediators who were people -- had been  
22 selected were paid for, again, on a flat rate around the

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1 country. We usually have differing rates around the country,  
2 depending on the region. So this set a flat rate.

3 MR. DANA: In your training that you spoke of, are  
4 you typically training people to participate in your system,  
5 how to use the system that you are administering, or are you  
6 training, sort of, generic skills in mediation and  
7 arbitration?

8 MS. HANFLING: Well, I think we do both. Most of  
9 the training in actual mediation skills is for people who are  
10 going to be on our panels.

11 MR. DANA: I see.

12 MS. HANFLING: The other training that we've done,  
13 particularly how to determine which cases are amenable to  
14 ADR, particularly to mediation, how to conciliate a case on  
15 the phone, how to negotiate; that is not done for our people.  
16 That is work that we do in the insurance companies, in some  
17 hospitals. As I've mentioned, we done some work with some  
18 ombuds programs. So that is external to USA&M.

19 MR. DANA: Thank you.

20 CHAIRWOMAN WOLBECK: Anybody else?

21 (No response.)

22 CHAIRWOMAN WOLBECK: Okay.

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1 MR. DANA: Thank you very much.

2 MS. HANFLING: Thank you.

3 CHAIRWOMAN WOLBECK: Are there any other questions  
4 or comments?

5 (No response.)

6 CHAIRWOMAN WOLBECK: Then I guess we can adjourn.  
7 Do you have a motion?

8 M O T I O N

9 MS. LOVE: So moved.

10 CHAIRWOMAN WOLBECK: I guess I'll second. The  
11 Inspector General's Oversight Committee meeting will start at  
12 4 o'clock.

13 (Whereupon, at 3:45 p.m., the meeting was  
14 adjourned.)

15 \* \* \* \* \*

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