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HEARING ON INDIGENT DEFENSE FUNDS

LEGAL SERVICES CORPORATION

OPERATIONS AND REGULATIONS COMMITTEE MEETING

October 10, 1985

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LEGAL SERVICES CORPORATION

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OPERATIONS AND REGULATIONS COMMITTEE MEETING

Meeting held at the Mountain Air Lodge, Route 11A,
Gilford, New Hampshire 03246, on Thursday, October
10, 1985, commencing at 8:15 A.M. and ending at 2:15
P.M.

Operations and Regulations Committee Members Present:

Michael Wallace, Chairman
LeAnne Bernstein
Lorain Miller
Thomas Smegal
W. Clark Durant, III, Ex-officio

Other Board Members Present:

James Wentzel, President of the Board
Robert Valois
Pepe Mendez
Basile Uddo
Hortencia Benavidez
Claude Swafford
Paul Eaglin

Others Present:

Thomas Bovard, Assistant General Counsel of Legal Service Corporation
Alan W. Houseman, Center for Law & Social Policy, Attorney for: NLABA, PAG, NOSSU & NOLSW
Tim Baker, Board Coordinator and Assistant To General Counsel

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OPERATIONS AND REGULATIONS COMMITTEE

BOARD OF DIRECTORS

LEGAL SERVICES CORPORATION

October 10, 1985

MR. WALLACE:

I'd like to get everybody's attention. I will call the meeting to order at this point. This is the meeting of the Operations and Regulations Committee, Board of Directors of the Legal Services Corporation, pursuant to notice duly given in the Federal Register. The first item on our agenda today is to approve the agenda itself. I have one change that I would like to make in the agenda, subject to the Committee's agreement. I would like to go ahead and do private attorney involvement ahead of questioned costs. I know we're going to finish private attorney involvement today, we're going to do a lot of work on questioned costs but Mr. Mendez has asked us not to make a final decision on that, pending his Committee meeting later in the day that's going to look at the audit. What

1 I would like to do is start with what I know
2 we intend to finish and then get on with the
3 other items that are on the agenda. So, I
4 would like to take five and six and reverse
5 them in place of three and four unless there
6 is some objection to that from any member of
7 the Committee.

8 MS. BERNSTEIN: No objection.

9 MR. WALLACE: If that suits the Committee by unanimous
10 consent, then we will amend the agenda and
11 do private attorney involvement ahead of
12 questioned costs. Is there any other
13 suggestion from the Committee with regard to
14 the agenda? If not then---Ma'am?

15 MS. BERNSTEIN: Let me just ask this question. Was it
16 your intention to get to the position of
17 making recommendations to the full Board on
18 lobbying.

19 MR. WALLACE: I think it is very unlikely that we will do
20 so on that. We are here in New Hampshire
21 and we want to hear from anybody up here on
22 lobbying that doesn't ordinarily get to our
23 meetings in Washington. We've got one set
24 of reg's we're going to finish and another

1 MR. WALLACE:

Please proceed.

2 MR. SMEGAL:

3 Page six, where there is a list of the
4 recommendations of Mr. Flowers in the first
5 full paragraph, maybe what he says is
6 correctly reported here but it certainly
7 would seem to be just the opposite to me.
8 There's a recommendation that would read,
9 "Prohibiting program employees from lobbying
10 on their own time on issues of high impact
11 to a program." It would seem to me that if
12 they were going to lobby on anything it
13 would be on matters of high impact, rather
14 than low impact. Maybe that sentence should
15 read low impact.

16 MR. WALLACE:

17 I think that is what he said and as I
18 recall, what he was after was the avoidance
19 of conflict of interest, that people may have
20 First Amendment rights but they ought not to
21 use them on matters that are intimately
22 connected with their own program and their
23 own business. That's a questionable
24 assumption. I think it's the point he was
making.

1 MR. SMEGAL: So, it isn't a question of the program's
2 activities, it's a question of an impact on
3 a program per se. I read this to...

4 MR. WALLACE: I think...

5 MR. SMEGAL: If you've got an issue that's very
6 significant to Legal Services, that in my
7 view is a high impact issue. Now, that
8 isn't what's meant here or at least you're
9 saying that's not what he intended to say by
10 his comments.

11 MR. DAUGHERTY: He raised in context of it wanting to have a
12 great deal of background and a great deal of
13 education on an issue as part of the program
14 and it raised the question in his mind as to
15 whether or not one was really pursuing the
16 business of a Legal Services grantee that
17 would prohibit lobbying in the guise of
18 doing it on one's own time.

19 MR. WALLACE: I think what he was saying was that if you
20 want to go out and lobby on something that
21 is of personal interest to you, fine. If
22 you want to take training and resources
23 you've built up with federal money as a
24

1 staff member, then you shouldn't use them
2 for presumably personal purposes. That's a
3 principle that is open to some dispute but I
4 think that's the point he was trying to make.
5 MR. SMEGAL: I've got one other of that magnitude on page
6 seven, there's a statement, "Often included
7 with this material are retainer forms and
8 the information that a client has needed
9 because a program has not been invited to
10 testify." My question again is, not? Is
11 that really what he said.
12 MR. WALLACE: Which paragraph, Mr. Smegal.
13 MR. SMEGAL: The bottom of page seven, just six or seven
14 lines there. I wonder if the word not is
15 necessary or...
16 MR. BOVARD: "...has not been invited to testify by a
17 state legislator...." To lobby or to
18 testify would have to come under one or two
19 exceptions.
20 MR. SMEGAL: You mean the other exception? They don't
21 fall in the other exception so the client
22 retainer would be necessary. On page nine,
23 at the top of the first little paragraph,
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Representative Mothershead is described but I see we didn't do that on the next page. On page ten we've got four people listed, none of whom I would have known who they were had I not been there to know who they were.

MR. WALLACE:

They were all listed in the first paragraph on page one. I don't know why we re-identified Mr. Mothershead on page nine, but I do know that on page one we identified Mr. Taylor, Ms. MacMillan, I guess Ms. O'Brien...

MR. SMEGAL:

I would recommend that we be consistent. Maybe we should treat everybody the same way. Either give them a full description where they appeared or do as we did to--

MR. WALLACE:

The easiest thing to do is to strike on page nine, where it says after Mr. Mothershead's name, a member of the North Carolina House of Representatives, because everybody is identified upfront by unanimous consent. We will go ahead and make that strike.

MR. SMEGAL:

You're right, Mike. That appears on page one.

1 MR. WALLACE: Excuse me for my voice today, I've been
2 fighting a sore throat all week and I'm
3 afraid it's winning. Anything else, Mr.
4 Smegal?

5 MR. SMEGAL: That's all. Thank you.

6 MR. WALLACE: Did any other members notice any
7 difficulties with these minutes?

8 MS. BERNSTEIN: I move that they be adopted with the
9 amendment that Mr. Smegal has suggested.

10 MR. WALLACE: Is there a second.

11 MS. MILLER: I second.

12 MR. WALLACE: Moved and seconded that minutes be adopted
13 as amended. Any further discussion? All in
14 favor say I. Opposed? Hearing no dissent
15 the minutes, as amended, are approved. We
16 will begin substantive work with private
17 attorney involvement which is Part 1614 of
18 our regulations. The first thing on our
19 agenda is a report from the General
20 Counsel's Office. Before the General
21 Counsel reports, I may usurp some of it's
22 function because I have been through our
23 regulations and I've been through comments
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on them and I would like to take my prerogative as chairman to try to summarize those comments with members of the Board and my thoughts on them and then the General Counsel may have some things that I have skipped and I'll let him get on with his report at that point. There were some general comments that--I think, first of all, let me tell you what we were trying to do when we sent these regulations out again, and we said so at the time. These regulations have been substantially amended from the original draft as they presently exist. The draft that is in force now and has been in force since 1984, has been substantially amended by what we now have before us and what was republished a couple of months ago. What we stated we wanted to do in Salt Lake City was to give people an opportunity to comment on the changes that we had made. We do not want to take any great detail in revisiting matters that were in the original regulations and of these

1 regulations and there has been no change.
2 We've worked on those, we think we know
3 where we stand on them. Our main focus is
4 on things that we have added to this new set
5 of regulations to give people a chance to
6 double check the work we've done, give us
7 some ideas we may not have thought about and
8 try to clarify matters. That has been done,
9 I think we've gotten some good suggestions
10 on the comments, there are some changes I
11 know I want to make along those lines. We
12 have, naturally, received comments asking us
13 to make big changes on issues that the Board
14 considered in 1984 and again in 1985. I'm
15 not interested in making those changes.
16 We've looked at those issues, but members of
17 the Committee may feel differently. There
18 is one general point that has been made
19 several times and pops up again and again in
20 comments. That is the extent to which these
21 regulations places in an adversarial
22 relationship with our recipients. We ought
23 to be in position of helping our recipients
24 with private attorney involvement and not

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placing penalty on them. I believe that that's correct, we ought to do that, we ought to be cooperating with people. At the same time, the function of regulations is to say what the rules are and what happens when you don't comply with the rules. What the function of our staff ought to be is to assist people in complying with the rules. I don't see much point in filling up the regulations with a lot of language about how we all ought to be nice people and cooperate with each other; it's a waste of paper and ink. We ought to do that, if we're not doing that somebody please tell me about it. What the regulations ought to be and what these regulations are for, is to show people what it is we're cooperating towards. These are the requirements that the Board feels the programs ought to meet and we've stated them as clearly and as understandably as we know how. To a certain extent, we haven't known how to do that very well, we've had some suggestions on things that are unclear and I think this Board is

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1 going to want to respond to those. That's
2 the general comment. I'm not going to
3 respond to every single comment that we've
4 had but I want to walk through the
5 regulations and give you an idea of what I
6 thought were some of the major comments. The
7 General Counsel may have some things to add
8 and other Board members may have things to
9 add and the public will certainly have
10 things to add that we ought to focus on.
11 Section 1614.3 - Range of Activities - We've
12 received some comments with regard to our
13 decision to require local programs to
14 provide direct delivery of legal services as
15 part of their PAI Program. There was a
16 little opposition to the direct delivery
17 requirement, but not much. The main
18 question was in interpretation of the direct
19 delivery requirement. Do we intend that
20 programs or recipients should have to do
21 direct delivery through outside groups.
22 Should they have to contract out to private
23 law firms, Subgrant the bar associations.
24

1 The answer to that is , no. I look at this
2 language and I have a hard time finding that
3 requirement in there anywhere and so I don't
4 know how to change it. What I would like
5 our preliminary remarks to say when they are
6 drafted and they finally go in the Federal
7 Register, is that there is no intent that
8 direct delivery has to be done through grant
9 or through subgrants or contracts or what
10 have you. If you can administer an
11 organized pro bono plan in house, that's
12 fine. The lawyers have to be outside
13 private lawyers but if you do the
14 administration work inside and that's the
15 way you want to do it, that's fine. There
16 is no requirement here that you subgrant
17 this money to somebody else. Still in
18 Section 1614.3, and this gets into
19 Subsection E of that Section, we've had a
20 comment asking us to clarify whether or not
21 we intend for subgrants still to include
22 the prior approval requirements of Part
23 1627. The language that gives rise
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1 concern is at the bottom of page 68 of your
2 book and at the top of page 69. We have
3 told folks how to--The purpose of this
4 section is how to do your accounting. It
5 says, "You shall accurately identify and
6 account for Subsection iii--Contractual
7 Payments to Individuals or Organizations
8 that do PAI". This has to do with subgrants
9 and we have said that the audit must comply
10 with part 1627 on subgrants. We have not
11 said that you have to comply with prior
12 approval of part 1627 because there wasn't
13 any need to. This is about accounting, this
14 tell you how to do audits and we are telling
15 you on subgrants, do audits in connection
16 with part 1627. We have not intended and we
17 do not intend to waive any other portions of
18 part 1627, we don't say that we do and I
19 don't see any need to make that any more
20 clear than it already is, but that seems to
21 be something that can be taken care of in
22 the preliminary remarks. If some member of
23 the Committee believes that we should waive
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1 prior approval provisions with regard to
2 these subgrants, we'll have a chance to talk
3 about that and we'll bring it to the full
4 Committee. I don't believe that was our
5 intent to this point, and I don't believe
6 this language says that. The next major
7 area of concern comes in Section 1614.4, on
8 procedures which requires the recipient to
9 develop a PAI program and to present it
10 every year to local bar associations and
11 tell us what local bar associations have to
12 say about that. There is no intention, and
13 I don't think the language should be so
14 construed, that you have to do a new plan
15 every year. What you do have to do in this
16 organization is to present the refunding
17 application every year and we are saying
18 that when you present your refunding
19 application, tell us of what your PAI plan
20 is. We certainly think that from time to
21 time it ought to be checked, it ought to be
22 changed if necessary. If you've got the
23 same plan as last year then it's the same
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1 plan as last year. Whatever the plan is,
2 run it out to your bar association. You may
3 not want to change it this year, a recipient
4 may not want to change it this year, but a
5 local bar association may have some comments
6 to make to suggest changes that ought to be
7 made. If they don't, they don't, there's
8 nothing to summarize. We believe the plan
9 ought to be in your grant application every
10 year and it ought to be run past the local
11 bars. There are certainly logistical
12 problems, especially in areas that have a
13 lot of local bar associations. We believe
14 that what it amounts to is sending them a
15 letter, sending one letter to one bar
16 association or thirty letters to thirty bar
17 associations if that is what you have, and
18 if you get thirty answers, summarize them.
19 We'd like to hear, we want local bars to be
20 advised of what's going on and that's all
21 we're requiring is that they be advised of
22 what's going on. I think it's a fairly
23 simple requirement. With regard to the next
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1 Section 1614.5, we've had a lot of
2 complaints about the prohibition of
3 revolving litigation funds, that it's
4 confusing, and that it may prohibit us from
5 recovering funds that we ought to recover.
6 I agree, it's confusing. We sat down last
7 night and tried to come up with some
8 language which you'd like better and the
9 General Counsel's office will have it for us
10 a little later, that I think makes sense.
11 Other members of the Committee may be happy
12 with what we've got. I thought those
13 comments were well taken and we've tried to
14 do some work on clearing up part five.
15 Section 1614.6 is the waivers. There's a
16 couple of things about the waiver section
17 that I want to bring out. We got some
18 complaints from some folks that you may have
19 to file a waiver request every year out of
20 self defense because you don't know how
21 close to 12.5% you are. My response to that
22 would be, yes, you may have to do that. It
23 is the intention of the Board and it is the
24 sense of the Board as it has been the sense

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of previous boards that private attorney involvement is a good thing, and that substantial private attorney involvement is a better thing and that 12.5% is a minimum requirement. If you're running a program that is trying to hit the minimum and not trying to leave much leeway, then you may have to file a waiver requirement every year because you're running close and we expect you do do that. If you are a program that agrees with the board that PAI is a good thing and substantial PAI is a better thing, than you're not going to be that close to 12.5, you're going to be closer to 15 or 20 and you're not going to have to worry about the waiver requirement every year. What you're shooting for is to hit the target on the dot, then maybe you will have to file a precautionary waiver. We'd like to hope that recipients are not trying to hit the bare minimum, they are trying to involve PAI in their community as strongly as they possibly can and we hope they'll be succeeding where they won't have to worry

1 about whether they're going to get 12.4% to
2 12.6% every year. If your program is that
3 close, get a waiver in and tell us what your
4 problem is because we have devised the
5 waiver system and the failure to comply
6 system so that the only thing that you
7 really get sanctions for is failing to tell
8 us what your problems are. If you ask for a
9 waiver, there are no permanent or semi-
10 permanent consequences, you just have to
11 spend the funds next year instead of this
12 year. We think that is simple and if you're
13 that close to the line, get us a waiver
14 request and tell us what the problems are.
15 There were particular suggestions to new
16 waivers that came to us, none of which
17 convinced the chairman that they ought to be
18 done. Other members of the Committee may
19 have other ideas about them. One other
20 thing that we got from the American Bar
21 Association, before I get on to individual
22 waivers, from the standing Committee on
23 Legal Aid and Indigent Defense of the
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1 American Bar Association, filed a comment
2 with regard to our suggestion in Subsection
3 C-3, that a recipient needs to be in touch
4 with OFS and they were concerned that we
5 meant this exclusively; you ought to contact
6 OFS, you shouldn't contact the ABA. We
7 don't mean that, there's nothing in there
8 that says you can't contact the ABA, we
9 hope local recipients will contact anybody
10 local recipients think can be of use to
11 them, including the ABA. The only people
12 we're saying you have to contact is OFS so
13 that we know what your problems are and what
14 we may be able to do to assist. On to the
15 individual waivers that came up. One waiver
16 that was suggested is that PAI, private
17 attorney involvement is not the most
18 economical and efficient means of delivery,
19 we should be able to get a waiver on it. We
20 realize that there is a substantial amount
21 of discretion in the hands of local boards,
22 but it was because for many years the local
23 boards and the national boards almost
24

1 uniformly did not believe that PAI was the
2 most economical and efficient means of
3 service, that our predecessors and ourselves
4 have come to the point of overruling that
5 judgement, saying that we think it's
6 economical and efficient and to a certain
7 extent we are going to require that you do
8 it. So, it may not be the most economical
9 and efficient means in the opinion of local
10 boards, but it was because a substantial
11 proportion of the organized bar and congress
12 and the majority of this Board disagreed
13 with that judgement that was being made at
14 the local level, that this regulation exists
15 to begin with. If local boards thought it
16 was most economical and efficient,
17 presumably we wouldn't need to do this. The
18 mere feeling of local boards that it is not
19 the most economical and efficient is not
20 enough for a waiver or we wouldn't be here.
21 This is a judgement that is overriding the
22 judgement of the local boards and it's
23 because of a long history of disagreement on
24

1 the national level with those judgements we
2 have gotten here. There are circumstances
3 in which that judgement by a local board
4 will be respected and that's set out in
5 waiver number six. I think the focus of
6 that waiver is not just to say that it's not
7 the most economical and efficient, but it's
8 not economical and efficient at all under
9 local circumstances and there are other
10 concrete measures that can be used to show
11 what we're doing and what we're trying to do
12 that would be satisfactory to the board and
13 that is the measure of your caseload. There
14 was another waiver question about two-year
15 averaging. I don't have any problem with
16 that as a matter of principle, I think it's
17 automatically taken care of under Section
18 1614.7, and I'll explain why. The concern
19 on the waiver is that the program will start
20 up, it will have trouble meeting 12.5% it's
21 first year because of the normal lag time in
22 start up procedures. By the second year it
23 will be well over 12.5% and they will

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1 average 12.5% for two years. This is
2 precisely what automatically happens under
3 Section 1614.7, if you tell OFS you're
4 having a problem your first year, you submit
5 a waiver and you don't get the waiver, if
6 you get the waiver, you get the waiver. You
7 don't need the two year averaging. If you
8 don't get it, the worst that happens is that
9 you're required to make it up next year. If
10 you do make it up next year, you've got two-
11 year averaging. It's built in to Section
12 1614.7, so I think that's a good waiver idea
13 but I think it's already inherent in the
14 structure of what we have. The final
15 waiver, and the one we got the most on, is a
16 variation of the waiver suggested by the
17 American Bar Association. If a program, if
18 a local program and a local bar agree on a
19 waiver and agree on a program, then we ought
20 to presume that it's correct and we ought to
21 approve it. We discussed this in Salt Lake
22 City and the language we had before us at
23 that time suggested that it would be okay
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1 only if it provided for substantial
2 involvement. I said that my problem with
3 that was getting a concrete measure of what
4 substantial is. We have had a second
5 suggestion that uses the terms of
6 significant and effective. I don't find
7 that a lot more concrete than substantial.
8 If somebody gives me some concrete terms,
9 I'll consider this but I haven't seen it
10 yet, the terms that would satisfy me. A lot
11 of this, it seems to me, is handled under
12 our Subsection 6, it doesn't mention the
13 local bar, you don't have to get the local
14 bar's approval, but if your governing body
15 says it's just not economical and efficient
16 for us to spend all the money but we are
17 meeting an alternative concrete standard, we
18 are handling 12.5% of the cases brought on
19 behalf of our eligible clients through PAI,
20 that's a concrete standard, it's an
21 alternative concrete standard that we can
22 measure and understand. That is
23 satisfactory to the chairman, if somebody
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1 else can give me another concrete standard
2 other than using words like substantial,
3 effective and significant I'd be delighted to
4 consider it but I haven't seen that yet.
5 The final set of comments have to do with
6 our Failure to Comply Section, 1614.7.
7 There are a lot of complaints here that this
8 gives substantial discretion to the staff.
9 This was written to minimize the discretion
10 on the part of the staff. It was written to
11 be as precise as possible as to what the
12 staff is supposed to do. The only
13 discretion that this section gives to the
14 staff is to determine whether or not under
15 Subsection A, whether or not a recipient
16 fails, without good cause, to seek the
17 waiver during the term of the grant. That's
18 really the only judgement call in here
19 because as a matter of mathematics on the
20 audit, either you meet it or you don't. If
21 you ask for a waiver, what happens to you if
22 you fail to meet it is you have to make up
23 that money next year. If you don't ask for a
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1 waiver, and you don't have good cause for
2 asking for a waiver, then that money is
3 subtracted from your grant and goes to
4 somebody else, under Subsection C. That is
5 the only judgement call the staff makes is
6 whether or not you had good cause for not
7 seeking a waiver. To me, the classic case
8 of judgement call of good cause, is the
9 problem I was discussing earlier, where you
10 had 12.4% and you didn't know until your
11 audit came in that you didn't have 12.5%.
12 That is the classic case of good cause, it
13 seems to me. I could write that in here but
14 there may be other good causes and I
15 wouldn't want to exclude those. I don't see
16 how you could get all judgement calls out of
17 this regulation, but this is the only
18 judgement call that this regulation leaves
19 to the staff is whether or not you have good
20 cause. Otherwise it is a matter of
21 mathematics, either the audit shows that you
22 made it or it shows that you didn't. Now,
23 there is a question that several people have
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raised on Subsection C. If funds are withheld maybe they will be made available for use in the recipient's service area. We have had comments that this would be inefficient, that this would cause disruption in the local service area, competition including local firms in the local provider. All I can say to that is I agree with you, this was written in Detroit at the table at the common concurrence of Mrs. Bernstein, Mr. Smegal and this chairman had better sense than to try to stand in the way of that combination. I'm not going to get beat up on that issue. We did get those comments and it's the position I took in Detroit and got out voted on, so if anybody wants to reopen that issue, that's fine with me. There are a couple of other things that did not come out of the comments but I think the general counsel will deal with. One question we had in Salt Lake at the board level was-- What is a private attorney? I have asked the counsel's office to prepare a

1 definition of private attorney's to be
2 considered here today and I'm sure he will
3 cover that in his report. Before my voice
4 fails me all together, I'm going to shut
5 up. That goes over the regulations, the
6 comments that we've had, the high points
7 that I saw and how I would propose we would
8 deal with them. I've let the General
9 Counsel make the report and I will ask for
10 general comments from the floor and I know
11 Mr. Houseman is here on behalf of the
12 organization that he represents and he has
13 given us some suggestions which I believe
14 are in your book and some others that are
15 here on the table before you. After that, I
16 would be prepared for us to walk through
17 this section by section and make such
18 changes that may be necessary this morning.
19 With that, I will shut up and let the
20 General Counsel proceed with his report.
21 Let me have you identify yourself for the
22 court reporter. This is Tom Bovard who is
23 our Assistant General Counsel and is

24

1 assigned to work with this Committee. We
2 appreciate the work that you've been doing
3 on three sets of regulations with dead
4 computers and if you can tell where we are,
5 I'd appreciate it.

6 MR. BOVARD:

7 Each of you has lengthy summaries of the
8 comments received in your packets there .
9 You'll notice on 1614 there were thirty five
10 timely comments, all of those have been
11 carefully considered. There's a total list
12 of forty nine and they continue to trickle
13 in, I think there may be about fifty one or
14 fifty two right now. We tried to carefully
15 consider everything and we have summarized
16 here not only the portions that Mike went
17 over, but the criticisms of our approach to
18 PAI in general. I would like to go over
19 just a couple of provisions in addition to
20 what Mike has done. He mentioned that there
21 has been a lot of confusion with respect to
22 revolving litigation funds. If people would
23 look at page 71 of the Committee book, 13 of
24 the draft, the proposed change that we've

1 worked out would read as follows, the main
2 change is going to be in the first
3 paragraph, Paragraph A, which is almost
4 completely rewritten. It would read, "A
5 revolving litigation fund system is a system
6 under which (that remains the same, that
7 portion there) under which a recipient
8 systematically encourages the acceptance of
9 fee generating cases as defined in Section
10 1609.2 of these regulations, by advancing
11 funds to private attorneys to enable them to
12 pay costs, expenses or attorney fees for
13 representing clients." We have keyed in the
14 definition of revolving litigation funds to
15 our fee generating regulation to show what
16 we're trying to aim at here. This is sort
17 of a hard thing to deal with and to define.
18 The second paragraph, B, would read as
19 follows, "No funds received from the Legal
20 Services Corporation shall be used to
21 establish or maintain revolving litigation
22 fund systems." That reads as it is now in
23 the draft with just a period after the word
24

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1 systems and everything else stricken.
2 Perhaps the principal objection in the
3 comments is that the staff or the version
4 that passed the board, did not allow
5 recipients to recover costs and expenses in
6 some cases. Without the definition that we
7 previously put in there was feeling that
8 this revolving litigation fund thing might
9 even go after judicare programs, it might be
10 broader than we had planned. We propose
11 adding a new Paragraph D, which would read
12 as follows, "Nothing in this section shall
13 prevent a recipient from recovering from a
14 private attorney the amount advanced for any
15 costs, expenses, or fees, from an award to
16 the attorney for representing an eligible
17 client." We believe that would take care of
18 the objections that were raised in the
19 comments.

20 MS. BERNSTEIN:

Read that again.

21 MR. BOVARD:

"Nothing in this section shall prevent a
22 recipient from recovering from a private
23 attorney the amount advanced for any costs,
24

1 expenses, or fees, from an award to the
2 attorney for representing an eligible
3 client."

4 MR. WALLACE:

5 Let me say something about the rationale
6 behind all of this. We got some comments
7 that anything that encourages fee generating
8 cases is already prohibited by Section 1609.
9 That's right, it is. Revolving litigation
10 funds probably would be prohibited by that
11 section. They have also been prohibited for
12 quite some time by this section, we did not
13 want to eliminate this section but what we
14 wanted to make clear is the this is the evil
15 that we are trying to get at, a systematic
16 encouragement to violations of 1609. There
17 is some evidence, and I've not read all the
18 various reports that we apparently have, I
19 don't know if they are public or not, but
20 there has been some evidence that in the
21 past, revolving litigation funds do
22 systematically encourage violations of
23 Section 1609.2, have existed. If they have
24 existed, we don't want them to exist and

1 that is why this section, we would
2 recommend, would stay in but it would be
3 cleaned up because I think the comments were
4 right. It's a mess as it is. I think we
5 need to tighten up on what it is that we
6 really are trying to prohibit here.

7 MS. BERNSTEIN: Is it appropriate to ask questions as we go
8 along?

9 MR. WALLACE: Go ahead.

10 MS. BERNSTEIN: My question is, since the program pays the
11 costs if they are going to pursue a case for
12 their clients that are in house, that are
13 handled by the staff in the program, why is
14 it--I mean, the payment of the costs happens
15 period, for the client. I'm just wondering
16 why we're wanting to recover back the costs
17 that we already--In other words, you're
18 saying that if the costs were awarded...

19 MR. BOVARD: By a court.

20 MS. BERNSTEIN: By the courts that it is recovered back.
21 Then my next question is does that go in to
22 the private attorney involvement accounting
23 or does this go back in to just the general--

24

1 I mean, it seems to me that this just goes
2 back to the accounting section and I'm not
3 so sure that we've absolutely cleared that
4 up. I see Fred, who deals with the whole
5 process of monitoring and audit, nodding,
6 and I'm not so sure that we've got that
7 cleared up as to where these costs would
8 go. Would they go back in to the PAI pot,
9 because they are separately accounted for.
10 I presume they do, I'm not sure we've said
11 that.

12 MR. BOVARD: We can say that. I think perhaps we ought
13 to understand that there apparently is at
14 least one case in which that's supposed to
15 be a problem right now. I'm not familiar
16 with the facts, I was just told by word of
17 mouth that the funds recouped are not being
18 used for private attorney involvement. We
19 might add ...

20 MR. WALLACE: You could add another sentence at the end of
21 D which says, "Such recovered funds shall be
22 reserved for PAI use." That may not be the
23 language. Mr. Williams, you, I guess, are

24

1 our new expert on accounting so I'll ask
2 you. Can you come forward and introduce
3 yourself for just a second and respond to
4 Mrs. Bernstein's concern as best you can?
5 Would you identify yourself for the
6 committee and give us an idea of your
7 thoughts.

8 MR. WILLIAMS:

I'm Fred Williams. I'm the new Director of
9 the Office of Monitoring Audit and
10 Compliance. The new draft audit guide has a
11 provision that deals with this sort of
12 program income and suggests that that
13 program income should go into the account
14 from which the expenses that generated that
15 income came out of and be subject to the
16 same restrictions as any other money going
17 into that account.

18 MS. BERNSTEIN:

So you are basically saying that we don't
19 need to specifically address it here since
20 it would be covered in the general approach
21 to accounting.

22 MR. WILLIAMS:

That's the ordinary way that most
23 accountants would treat income derived for a
24

1 particular activity. Plug the income back
2 into that same activity.

3 MS. BERNSTEIN: Okay.

4 MR. WALLACE: Mr. Bovard, proceed to wherever you were
5 headed.

6 MR. BOVARD: Actually, I will back up. My apologies for
7 doing that. We discussed at the Board of
8 Directors meeting whether there should be a
9 definition of private attorney and there was
10 a lot of discussion as to how to do that. I
11 would like to make a suggestion that would
12 do two things, basically it will track the
13 approach of the Ethics in Government Act and
14 my approach would use Regulation 1600.1 of
15 the regulations which defines a staff
16 attorney and we'll define private attorney
17 in terms of who is not a staff attorney. I
18 would suggest that a Paragraph C be added to
19 the first section--Excuse me, a Paragraph D,
20 be added to the first section of this, which
21 would read as follows, "As of January 1st,
22 1986 the term private attorney as used in
23 this part, means an attorney who for at
24

1

2

MR. BOVARD: That's right. .

3

MR. SMEGAL: Why the two year limitation?

4

MR. BOVARD: The reason for the two year is we felt that we wanted to avoid the situation that some people say is occurring where people basically go off the staff programs and go into the private attorney programs and continue the staff program as it were, but just receive PAI funds. The two year period is basically the same period that is used in the Ethics in Government Act, if somebody leaves the federal government we place restrictions on the kinds of occupations they can engage in. We thought we would track that approach with respect to attorney's who work for Legal Services Corporation since we are trying not to give another option to our staff attorneys, we're trying to bring people into the delivery of legal services who have not been involved before in the delivery of legal services for the poor.

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MS. BERNSTEIN: Tom, there have been situations where

1 programs have laid off attorneys and then
2 contracted with them and then they are
3 utilizing the money that is in the contract
4 to pay the same attorneys for doing the same
5 work that they were doing before as a staff.
6 We haven't really expanded or utilized the
7 private bar in that instance and I think
8 there is a sense that we are not going
9 beyond the people that are already dealing
10 with clients and are already serving the
11 eligible clients in that geographical area.
12 We're not really using this as a lever to
13 get more involvement. The next problem is
14 an appearance of impropriety and that's why
15 the reference to the conflict section.
16 There is an appearance of impropriety of
17 being in a situation of having been a staff
18 attorney and then deriving a contract from
19 the program within that period for doing
20 essentially the same kind of work and it
21 tracks the two year period as kind of
22 uniform throughout government and I think
23 it's a reasonable period.

24

1

2

MR. HOUSEMAN: Are we going to discuss this?

3

MR. WALLACE: We haven't voted on any of these.

4

MR. HOUSEMAN: This is very new, Mike. I'm not sure you should be doing this at this point.

5

6

MR. WALLACE Well, we will...

7

MR. HOUSEMAN: It's going to raise all kinds of problems. There's all kinds of problems with this, people have never seen this definition before. I've never seen it until this day and I really think it's going to raise a lot of problems.

10

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MR. WALLACE: It may, and after the General Counsel is finished, we will open for floor comments and go through them one by one. It's a problem that was discussed in Salt Lake, that we needed a definition of private attorneys and it is one that has been in the works. It wasn't published because we didn't have a definition in Salt Lake, that's why we had to ask for one. Mr. Smegal?

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MR. SMEGAL: I wasn't in Salt Lake. I think that a private attorney definition is fine

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1 I want to continue this questioning. I
2 don't want to do it now, I'll do it at the
3 appropriate time but I have a lot more to
4 say about what I have just heard Tom read
5 and I'd like to have the language in front
6 of me to do that.

7 MR. BOVARD: I have copies of the language that I'd like
8 to give to everybody. We've made one change
9 this morning. This says C, it should be D,
10 but the main change this morning is to add
11 to the beginning of the language that I will
12 give you, and effective date.

13 MR. WALLACE: An effective date.

14 MR. BOVARD: An effective date to make clear that this is
15 not retroactive. I will read my language
16 out again and allow people to amend the
17 version that they have in front of them.
18 Just strike out the words "as used" in this
19 part and substitute for them, "As of January
20 1st, 1986.

21 MS. BERNSTEIN: I think you still need to use the words "as
22 used".

23 MR. BOVARD: The words "as used" in this part will now
24

1 come after the words "private attorney". So
2 it will read, "As of January 1st, 1986 the
3 term private attorney as used in this
4 part...." and then it should read the way
5 that the handout that I gave you is.

6 AUDIENCE QUESTION: Excuse me, are there handouts for the
7 audience.

8 MR. BOVARD: There are a few.

9 MR. SMEGAL: While Tom is doing that , two things come
10 to my mind immediately. It seems to me we
11 are disenfranchising what I would consider
12 to be a valuable pool of resources to our
13 program. I don't think we should create a
14 class of second class citizens because you
15 have worked as a staff member and you go out
16 into the private bar and you have some
17 expertise in a certain area and all of a
18 sudden for two years you can't voluntarily
19 use that expertise to leverage out the Legal
20 Service Corporation function. I am troubled
21 by that and I'd like to hear some more
22 comment on that.

23 MR. BOVARD: The Ethics in Government...

24

1 MR. SMEGAL: I can see the Ethics in Government problem
2 and I can appreciate that, but a new matter
3 comes in, a dissolution comes in a week
4 after somebody leaves, there is no conflict,
5 there's no Ethics in Government problem.

6 MS. BERNSTEIN: There's no reason, Tom, that they couldn't
7 still do that for the program if they wanted
8 to refer to them. It just would not count as
9 part of their 12.5 PAI. They could contract
10 with that attorney to take care of those
11 cases that were not not utilizing that
12 expertise. It's a matter that for the
13 purposes of the PAI, the definition of a
14 private attorney, a person who is a private
15 attorney in the sense, meeting the two
16 criteria, leveraging our funds to get in new
17 blood, new resources for serving clients but
18 also obviously, if you're talking about the
19 isolated instances or situations in which
20 there is a particular expertise in the
21 predominant area of practice of that
22 attorney which includes that expertise, then
23 I think there would be less of a problem

24

1 then getting into a situation where the
2 attorney is once again deriving his income,
3 a large proportion or substantial proportion
4 of his income, from the same program that he
5 just left. Now, a few cases or volunteering
6 on a judicare panel, I don't think that is
7 prohibitive under this.

8 MR. SMEGAL: One other comment, I don't want to prolong
9 this right now. I have some agreement with
10 what you are saying. The other comment I
11 would make though is I fail to see anywhere
12 in any of this material that we are supposed
13 to be reaching out only to those who have
14 not been involved in the program before,
15 where does that come from. You use that
16 language, Tom. I wrote it down here, "who
17 have not been involved before."

18 MR. BOVARD: Well, we've not tried to define private
19 attorney before. If we are trying to bring
20 the private bar in, if we're using people
21 who have been in staff before, that is not
22 bringing the private bar into involvement.
23 That's just continuing in a different form
24

1 of the staff attorney program.

2 MR. SMEGAL: The only comment I was going to make is,
3 let's assume we have somebody in an area who
4 has voluntary done pro bono activities
5 for a number of years with the program. We
6 now decide in that particular area we are
7 going to have some voucher program or some
8 contract program or some other program and
9 now you're telling me that that individual
10 who has been a pro bono volunteer for ten
11 years is ineligible because he did not, or
12 she did not, fall within the definition of
13 someone who has not been involved before.

14 MR. BOVARD: Did the person make--The issue here is
15 whether that person made more than 50% of
16 his or her income from that involvement and
17 if it was pro bono, they didn't make any
18 income at all.

19 MR. SMEGAL: I realize there is that distinction but when
20 you made that statement, it wasn't with
21 respect to whether they made 50% of their
22 income or not. The generality was we are
23 trying to reach other people who haven't

24

1 been involved before. Therefore,
2 disenfranchising those, in my view, who have
3 been involved before, pro bono or otherwise
4 and I certainly don't think it's legitimate.

5 MR. BOVARD: There is no intention of saying that we
6 mustn't deal with people who do not make
7 more than 50% of their, and people who have
8 in the past not made more than 50% of their
9 income. Ten years ago they were a staff
10 attorney under that definition, doesn't make
11 any difference. This just sets a period. I
12 wanted to make one point in connection with
13 this, the Ethics in Government Act period,
14 was originally one year and several years
15 ago it was increased to two.

16 MR. SMEGAL: June 30, 1982.

17 MR. BOVARD: We might want to consider the time period on
18 that. Maybe two years is too long, maybe it
19 should be longer, maybe it should be
20 shorter. Anyway, that's where the two
21 came from.

22 MR. HOUSEMAN: Mike, can I just ask why anybody thinks the
23 Ethics in Government Act has any
24

1 relationship whatsoever to this.

2 MR. WALLACE: It doesn't have any direct relationship
3 because we're not, for reasons that I still
4 don't understand, a federal agency.

5 MR. HOUSEMAN: The Ethics in Government Act was designed to
6 prevent an employee from an agency getting
7 involved in a matter with which that
8 employee was involved at the agency and
9 using that employees expertise to go out
10 into the private world and make money.
11 That's not what we're talking about here.
12 What we're talking about here is a staff
13 attorney who has worked some years in a
14 legal services program, who goes into
15 private practice, there is no conflict of
16 interest between the staff attorney's work
17 in private practice and the prior work in
18 the program and because of his expertise,
19 the program, and he is on a panel whether
20 it's a judicare panel, whether it's-
21 -whatever panel--and the program wants to
22 contract with him because of his expertise
23 to handle some case, I don't understand,

24

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1 that has nothing to do with the Government
2 in Ethics Act.

3 MR. WALLACE: How is that different?

4 MR. HOUSEMAN The only way you are saying it is you are
5 saying that there is a conflict, there's a
6 conflict of interest between a staff
7 attorney working in the program and a
8 private lawyer working on the outside.

9 MR. WALLACE: It's not a conflict of interest in the sense
10 that a lawyer understands it from a
11 professional sense, but how is it different
12 from--I mean, as I have understood the
13 Ethics in Government Act, which may not be
14 very carefully, I grant, as I understood it,
15 one of the purposes of the Ethics in
16 Government Act was to keep people in the
17 Pentagon from shovelling money to their
18 retired friends at North American Rockwell
19 and the purpose of this would be to keep
20 people and programs from shovelling money to
21 their retired friends who are now in private
22 practice. It may be an imaginary problem
23 but it may be an imaginary problem in the

24

1 Defense Department too, but Congress has
2 considered it very carefully and they have
3 decided that they think there's a conflict
4 of interest and they're going to stop it for
5 a two year period. That's what I understood
6 the Ethics in Government Act to be about and
7 I'm not sure why the principle, if it
8 applies to the Pentagon, doesn't apply to us.

9 MR. HOUSEMAN:

10 It can certainly apply to the Corporation
11 staff, I don't have any problem with that
12 but I don't understand how there is any
13 logical relationship between a staff
14 attorney and this issue unless you're
15 defining, somehow...

16 MR. WALLACE:

17 Doesn't a program have a natural affinity,
18 isn't there a reasonable fear that a
19 program, when deciding what private
20 attorneys to use, is going to naturally
21 favor people with whom it has been recently
22 acquainted. That is the fear that I think,
23 sparked the Ethics in Government act and
24 what we're saying is that you have a two
year cooling off period and you want that
money to go to other people, not people who

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1 have recently been on your payroll. Maybe
2 there isn't a conflict of interest, but
3 that, I think is the principle that the
4 Ethics in Government Act is all about, that
5 people who are handling federal funds don't
6 hand those federal funds to people who have
7 been recently on their staff. If it means
8 something else, I'm ready to be educated on
9 it. That's what I thought the Ethics in
10 Government Act was all about.

11 MR. SMEGAL:

12 It seems to me that the discussion we are
13 having here is because what we are talking
14 about is too broad to cover the situation
15 that I suggested, Mike. What I see or what
16 I would see happening is some lawyer in the
17 program who has become an expert in a
18 certain area, let me just use San Francisco
19 and let me just use a situation they have
20 there. Somebody works one of the programs
21 and becomes an expert on Juvenile Law, and
22 there's a conflict panel set up in a local
23 bar because the public defender in a
24 criminal situation, there's a conflicts
panel set up, we've got a lawyer out in the

1 set up a contract program, that lawyer can
2 come in and bid at a lower price than any
3 other lawyer in the community because of the
4 expertise that lawyer has, can come in and
5 do those cases for \$50.00, the next best bid
6 is \$150.00 and you're saying we can't use
7 that \$50.00 bid, because this guy has been
8 in the program within the last two years.

9 MR. WALLACE:

10 Back to what Mrs. Bernstein said. We're not
11 saying that you can't use that \$50.00 bid,
12 you can use that \$50.00 bid, you can hire
13 him, you can send him the money, you can put
14 him to work on the problem. What you can't
15 do, is count that \$50.00 toward your 12.5%
16 private attorney involvement. In that
17 sense, this is more lenient than the Ethics
18 in Government Act, because as I understand
19 it, you can't deal with your old friends at
20 all under the Ethics in Government Act. This
21 permits dealing, in those circumstances, but
22 it just doesn't reduce the amount of funds
23 that have to be expended to other private
24 attorneys.

1 MR. SMEGAL: No, I understand. I agree with what you're
2 saying. I agree that that is the effect and
3 I'm just questioning whether we want that
4 kind of effect.

5 MR. WALLACE: Let me let the General Counsel get on to the
6 other points that he's got, then we'll get
7 open to public comment and then we'll walk
8 through these section by section.

9 MR. BOVARD: There are two more suggestions that I would
10 make. The next is in the waiver provision,
11 the 6th waiver, page 73 of the Committee
12 book, page 15 of the draft. This is the
13 waiver that deals with situations where a
14 recipient governing body might determine
15 that it's not economical and efficient for
16 the recipient to use it's full 12.5% amount
17 of funds for PAI activities. Originally,
18 there was rather vague language in earlier
19 drafts on receiving substantial
20 contributions from the private bar and thus
21 handling a large number of cases or using
22 resources efficiently and thus handling a
23 substantial number of cases. In the last

24

1 draft that passed the board we added to each
2 of those provisions the requirement that the
3 recipient have handled 12.5% of its cases by
4 PAI in order to receive this waiver. That
5 effectively reduced those provisions, 1 and
6 2 to one waiver and I would propose that we
7 strike the first waiver and leave in it's
8 place only the second one that starts, "The
9 recipient has been unusually efficient in the
10 use of it's PAI resources and consequently
11 the recipient has handled and expects to
12 continue to handle at least 12.5 of it's
13 cases through it's PAI programs." Now, there
14 is one other change that I would make in the
15 provision that remains. The word "its"
16 before "cases", I would suggest should be
17 stricken because technically cases that are
18 handled under pro bono program or by private
19 attorneys or a judicare panel are not
20 necessarily the recipients cases, they are
21 cases brought on behalf of eligible
22 clients. I would strike the word "its"
23 before "cases" and insert after the word
24

1 "cases" the words "brought on behalf of
2 eligible clients". I will read the waiver
3 as it would now appear again, "The recipient
4 has been unusually efficient in the use of
5 its PAI resources and consequently the
6 recipient has handled and expects to
7 continue to handle at least 12.5% of cases
8 brought in behalf of eligible clients
9 through its PAI programs." Does everybody
10 have that language.

11 MR. HOUSEMAN: What was the basis for striking Sub-
12 paragraph 1 again, Tom.

13 MR. BOVARD: The fact that with the addition of the
14 requirement of handling 12.5% of its cases,
15 either of these would be under the other.
16 If you handle 12.5% of your cases through
17 PAI because you've been efficient or because
18 you've received contributions which amounts
19 to the same thing at least in our view, you
20 get your waiver.

21 MR. HOUSEMAN: You view this as a technical term?

22 MR. BOVARD: It's just a technical term. The language
23 had effectively collapsed into one waiver
24

1 already by the addition of that requirement
2 on the number of cases. So why have two
3 sentences when you can have one.

4 MR. WALLACE: Strictly a change to spare some trees.

5 MR. SMEGAL: Maybe I missed part of this but there isn't
6 still a difference? You could be incredibly
7 inefficient with 5% of your cases and the
8 private bar could pro bono the other 7 1/2%
9 and the total makes you look really
10 efficient. I see a difference.

11 MR. BOVARD: Well, we've left the one dealing with
12 efficiency which is our major concern anyway
13 and if they get money from the private bar
14 and that contributes to their efficiency,
15 then that's fine. We certainly don't intend
16 to prohibit contributions from the private
17 bar and other sources helping the recipient
18 develop an efficient program. It's just
19 that we need to have that separate provision.

20 MR. SMEGAL: My point is, what difference does it make
21 how they got there, as long as they got
22 there.

23 MR. WALLACE: I would think that the use of private bar to
24

1 get 12.5% would be an aspect of efficiency.
2 You may say, "Boy are we jerks in-house",
3 but we're going to use the private bar to
4 get us 12.5% of the cases, that is a
5 recognition, that is an efficient way to use
6 your time.

7 MR. BOVARD: We can strike the first phrase and just say
8 "the recipient has handled and expects to
9 continue to handle at least 12.5% of cases
10 brought on behalf of eligible clients
11 through its PAI programs", but I do think
12 since we are supposed to encourage the-
13 -Actually it's usually an effective...

14 MR. SMEGAL: Well, in my view, the first section takes
15 care of Roche's problem, he's incredibly
16 inefficient and his bar down there is so
17 helpful to him that they make him look good
18 by taking all his cases pro bono. That's
19 Roche.

20 MR. WALLACE: I think we all know what we are trying to do
21 with this section and when we get down to
22 actual drafting, let's see where we are. I
23 just wanted Tom to introduce the question
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and then we could, maybe in the next few minutes, somebody will think of a beautiful way to draft this but this is what we're trying to do.

MR. BOVARD:

The final concern is the Failure to Comply Section and the making clear that the penalty provision end of this section is not the equivalent of a termination of financial assistance or denial of refunding. I would propose a new Paragraph D be added at the end, to be read as follows, "The withholding of funds under this section shall not be construed as a termination of financial assistance under part 1606 or a denial of refunding under part 1625 of these regulations." "Under part 1606 of these regulations, or a denial of refunding under part 1625 of these regulations", excuse me, use "of these regulations" twice.

MR. WALLACE:

We've used language similar to this in the questioned cost regulations that we've talked about before and will talk about again. That goes over what the general

1 Counsel and the chairman called out of these
2 comments. Before I ask comments from Mr.
3 Houseman and other representatives, other
4 people, here today, any members of the
5 committee that have any concerns they want
6 to bring up that we've not touched on so far
7 this morning.

8 MS. BERNSTEIN: I have a concern that I would like to go
9 back to in 1614.1. I would like to have
10 inserted, I don't know whether you would
11 want these things in the way of motions or
12 if you just want to..

13 MR. WALLACE: At this point, let's just raise the issues
14 and then when we have heard all of the
15 comments we'll walk through them section by
16 section. It would be a motion at that time
17 but if you want to raise the issue now, that
18 would be appropriate.

19 MS. BERNSTEIN: The purpose of the 12.5% is to involve the
20 private bar in the direct delivery of legal
21 services for clients and to the extent that
22 we are funding recipients to provide direct
23 delivery under 1006(a)(1)(A) of our Act, I

24

1 would, in order to clarify that, I would
2 include under 1614.1(a)--"this part is
3 designed to ensure that recipients of Legal
4 Services Corporation Section 1006:(a)(1)(A)
5 Funds, involve private attorneys", and then
6 on down, also insert Section 1006:(a)(1)(A)
7 between LSC and annualized, so that it would
8 read, "At least 12.5% of the recipients LSC
9 1006:(a)(1)(A) annualized basic field
10 award" to reemphasize the nature of the
11 direct delivery involvement. In other
12 words, this would be a portion of whatever
13 funds are provided for direct delivery.

14 MR. WALLACE:

When we start walking through this that will
15 probably be the first issue we take up if
16 it's in the first sentence of the
17 regulation. Any other comments.

18 MS. BERNSTEIN:

Well, I have one comment about the two year
19 averaging. I don't have any problems with
20 the wording as it is there and I don't have
21 any problems with your analysis that it's
22 covered in the remedies portion. What I
23 would just point out as part of the
24

1 legislative history of this that this has
2 been in effect for a couple of years and
3 that start up has long since passed or
4 should have long since passed. So, the
5 complaint that start-up, you may not be able
6 to get to 12.5%, I would think that two
7 years down the pike we're past the start-up.

8 MR. HOUSEMAN: Not if there is a new program. These are
9 prospective reg's. If you find a new
10 program, that may not be the case. That's
11 what it's about.

12 MR. WALLACE: Members of the Committee. Any further
13 comments. Mr. Houseman, I will defer to you
14 on behalf of the organization that you
15 represent and I'm sure you'll understand if
16 I listen to you while I get another cup of
17 coffee.

18 MR. HOUSEMAN: Frankly, I think most of what I would say is
19 going to be taken up when we get to the
20 discussion of the specific issues. I'm
21 frankly troubled by the private attorney
22 definition, which we just heard for the
23 first time and I think it's going to have
24

1 some implications that are far beyond
2 anything we've considered. We can argue
3 about it, but I really don't think it should
4 be put in the reg at the last moment without
5 an opportunity for programs to understand
6 the impact of this. This is a substantial
7 change, there has been no notice to anybody
8 about this kind of definition, nobody was
9 suggesting this kind of a definition in Salt
10 Lake City and just as a procedural matter, I
11 don't think it is proper to put in a
12 definition which substantially alters how
13 everybody has been viewing this, without an
14 opportunity to comment by programs in the
15 private bar. That, it seems to me, is at
16 least a concern that I think we have to deal
17 with.

18 MS. BERNSTEIN:

19 The concern that I have is that in Salt Lake
20 and Tom, you're welcome to check the
21 transcript, but in Salt Lake it was
22 suggested at the very end of that meeting
23 that we simply define private attorney as
24 not a staff attorney. That was in the open

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meeting in Salt Lake and since the question of making a definition of staff attorney was brought up very directly at that meeting, I disagree with you in terms of this being the first time that there has been availability. Since that time, over my objection, it was re-published for comment for another 30 days and the question I have is, did we receive any suggestions from the field as far as a definition of staff attorney, Tom.

MR. BOVARD:

No.

MS. BERNSTEIN:

Not one suggestion came in.

MR. HOUSEMAN:

But you never mention it in your preamble as an issue, the preamble to the PI doesn't mention this issue.

MR. WALLACE:

That is correct.

MR. HOUSEMAN:

There's not notice other than what was said and there was no assumption in Salt Lake that we were going to, that the board was going to, come up with a definition without some notice.

MS. BERNSTEIN:

As I understood it though, the reason, one of the reasons you gave to me, that you felt

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that it would be, although you've told me that you don't think it's legally required for us to re-publish these things, that you felt that one of the reasons that you wanted to do this was because a definition had not been involved.

MR. WALLACE: I think I said that in Salt Lake, I don't think that worked its way into the preamble, it should have, it didn't. I don't think that as a technical matter.

MS. BERNSTEIN: It's not legal either?

MR. WALLACE: I don't think it should be a surprise to anybody that when you are working on private attorney involvement, that defining private attorney is within potential scope of what's on our minds. Anybody who was in Salt Lake, and heard what we said, and that includes a lot of the folks that are here today, the Board's concern that we wanted to define private attorney, I think, was pretty clearly set forth. Now, spinning in the Ethics in Government Act may or may not have been mentioned in Salt Lake. I don't

1 recall. The need for a definition of
2 private attorney should not be a surprise to
3 anybody and the question on the floor today
4 is whether or not this is a good definition
5 of private attorney, it may not be. That's
6 a matter to argue. I think this definition,
7 some definition, needs to be given and I
8 think this is a perfectly appropriate time
9 to do it.

10 MR. HOUSEMAN:

11 I was making a few comments and I started by
12 suggesting that if you're going to adopt
13 that definition, which is a substantial
14 change, that you ought to put programs on
15 notice and allow some comment on the new
16 definitions. If what you are going to do is
17 adopt a definition that is something like
18 non-staff attorney, which everybody would
19 accept, I don't think that's a problem at
20 all. Most of the other issues we talked
21 about and will come to, when we get to the
22 specific amendments and I don't want to take
23 up anymore time at the moment. In terms of
24 general comments, the Board has our

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1 presentation, I will want to talk a little
2 about the ABA's labor when we get to that
3 issue and there is also some technical
4 amendments that I would like to talk about.
5 The final comment I would make is that on
6 the procedure, I would hope that you would
7 re-open this discussion about the
8 requirement of sending this to every local
9 bar association. A number of comments on
10 this talked about the difficulty this is
11 going to pose in a number of programs. For
12 example, the comment by the Iowa program
13 talks about the fact that there is 124
14 separate bar organizations operating in
15 Iowa, it's a statewide program. They
16 generally work with the state bar which has
17 a 98% participation rate, and is involved
18 directly in the operation of the program.
19 What this requirement is going to force them
20 to do is to send this to all of the local
21 bar associations and that kind of thing just
22 seems silly to me. To put it under 1614.4,
23 to create that kind of a problem, doesn't
24

1 make any sense to me and I would hope you
2 would reconsider this particular requirement
3 and I think you have a number of comments
4 that talked about the problems it is going
5 to create. That's the only thing that
6 wasn't, it seems to me, highlighted
7 sufficiently in your overview of this, or
8 that wasn't covered in some technical
9 discussions we are going to have when we get
10 to the actual language. Finally, there are
11 some problems with what Mrs. Bernstein has
12 suggested and we will discuss those, I take
13 it, when we get there. In effect, this is a
14 back door way of getting state and national
15 support back in and I will address that when
16 I deal with it.

17 MR. WALLACE:

18 Before we start walking through it section
19 by section, let me open the floor for any
20 comments that the public may have on the
21 discussion we have had so far. I think the
22 kind of issues the Committee intends to
23 address this morning have been laid out
24 before you. If anyone has any comments on

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those issues or any new issues that they think we ought to be addressing, please come forward and let us hear from you at this time. Seeing no response from the floor, let us go back to the beginning of this regulation on page 59 of the Board book and unless anybody else has a proposed amendment to the first section, I believe that Mrs. Bernstein's amendment is ready to be moved.

MS. BERNSTEIN:

I would move in 1614.1, purpose; that in what would be the third line that Section 1006(a)(1)(A)-referring to our Act, "funds", it continues on, "involve private attorneys in the delivery of legal assistance to eligible client, except as provided here after recipient of Legal Services Corporation funding shall devote an amount equal to at least 12.5% of the recipient", and again insert Section 1006(a)(1)(A) "annualized basic field award.

MR. BOVARD:

Do you want the word LSC in there?

MS BERNSTEIN:

"Recipients LSC 1006(a)(1)(A)" In other words, the reference to the direct delivery

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section of our Act, in terms of our funding, is not as Mr. Houseman calls it, a back door way of involving state support. I am simply trying to involve all the programs that are involved with direct delivery of legal services, into leveraging activities by the private bar. If they were receiving 1006(a)(1)(A) funds, then they would devote a 12.5% of whatever the amount of those funds that they are bidding, to private bar involvement. If they receive 50% of their grant under this Section, then it seems to me that it is reasonable to ask them to involve to the extent 12.5% of that 50% of their grant toward private attorney involvement. Otherwise, you see what we're doing? We're setting up a system whereby we've got programs that do something other than direct delivery, are completely exempted from what we think is a requirement and for the whole purpose of private attorney involvement because they happen to be getting some other funds and because they

1 may be designated as a state support
2 recipient or something. If they are giving
3 direct delivery to clients it seems to me
4 that they need, we need, to include them.
5 The question that had come up before was
6 whether or not this was not permissible
7 considering the riders that had been on our
8 appropriation, in terms of the application
9 of the 12.5% to state and national support.
10 I think that the clarifying by relating it
11 to our Act, to the direct delivery, helps to
12 alleviate that problem. Obviously we are in
13 a situation in which we are trying to get as
14 much involvement in delivery of services
15 from the private bar as possible and I don't
16 think that we should set up different
17 classes of recipients in terms of whether or
18 not we're going to try to get that
19 involvement. That's the reason for it.
20 It's not back door, it's straight forward.
21 I make that motion that we make the
22 insertion of that reference to the Act, to
23 make clear what our purpose is here.
24

1 MR. WALLACE: The chairman of the Committee will continue
2 to preside at this point. The last time
3 anything concerning state and national
4 support centers was before us, I was
5 informed that I had conflict of interest on
6 the subject and I presume I still do. I
7 will not do anything by preside on this. I
8 will not vote on it. Mrs. Bernstein's
9 motion is to insert Section 1006(a)(1)(A) at
10 two pertinent points in the regulation that
11 she has identified. Is there a second to
12 that motion.

13 MS. MILLER: I second the motion.

14 MR. WALLACE: Motion is made and seconded. Is there
15 discussion of the members of the Committee
16 on the subject? Mr. Smegal? By the way, for
17 the benefit of the reporter and everybody
18 else, I want to take a mid-morning break
19 about ten o'clock or soon thereafter. We
20 started a little after eight and that would
21 be a fair time to give everybody a break.
22 Anyway, Mr. Smegal, you were recognized
23 before the tape clicked.

24

1 MR. SMEGAL: Thank you, Mike. Is there a definition
2 section somewhere where the term,
3 "annualized basic field award" is defined.
4 MR. WALLACE: I was told at some point that that had a
5 specific meaning when we passed this the
6 first time. I can't tell you that I remember
7 what it is.
8 MR. BOVARD: I was told that I need to look into this. I
9 was told that without Ms. Bernstein's
10 addition it would apply only to local
11 programs and not to state and national
12 support programs. So the issue is straight
13 forward.
14 MS. BERNSTEIN: Straight forward.
15 MR. WALLACE: So that language is still controlling no
16 matter what you put in front of LSC or
17 before it.
18 MR. SMEGAL: I don't understand why the addition of the
19 1006(a)(1)(A), in front of "annualized basic
20 field awards" would change it because I was
21 told and it is my understanding that
22 annualized basic field awards are received,
23 not by state and national support programs
24

1 but solely by the local programs.

2 MR. WALLACE: So, this amendment....

3 MS. BERNSTEIN: Maybe we need to take out the recipient's
4 LSC...

5 MR. WALLACE: Basic field is what you want to take out.
6 Excuse me, I'm not voting and I had better
7 not advise.

8 MR. BOVARD: Referring to local grants to local programs
9 not to state and national support programs.
10 To do what you want to do...

11 MS. BERNSTEIN: You would take out the basic fields as well.

12 MR. BOVARD: Correct.

13 MS. BERNSTEIN: I guess maybe I don't know whether I should
14 accept that as a suggestion or as a friendly
15 amendment. Then, if that's acceptable to
16 the second, then that's the intent and if
17 this is something that needs to be, in order
18 to reach the goal. As I had understood the
19 annualized basic field, it referred to
20 direct delivery recipients.

21 MR. WALLACE: So, what is it that you...

22 MS. BERNSTEIN: So it would include the insert but take out
23 "basic field."
24

1 MR. WALLACE: Is that acceptable to the second.

2 MS. MILLER: Yes.

3 MR. WALLACE: That is the amendment on the table.

4 MR. HOUSEMAN: Well, then we are into the issue of state
5 and national support.

6 MR. WALLACE: I think we are squarely into it which is why
7 all I'm doing is presiding. Do we have any
8 further comments on Mrs. Bernstein's
9 recommendation.

10 MR. SMEGAL: Well, I would say if that's what her
11 recommendation is it is entirely
12 inconsistent with the underlined section and
13 changes entirely the underlined section, in
14 my view and therefore it may be out of order
15 under the set of rules that we may be
16 operating under.

17 MS. BERNSTEIN: It was originally in the draft that was
18 published that it applied to national and
19 state support, Tom.

20 MR. HOUSEMAN: No, not the one that was republished.

21 MR. WALLACE: Not the one that was republished 30 days ago.

22 MR. SMEGAL: That's the one we're dealing with.

23 MS. BERNSTEIN: But the comments that we received on the
24

1 first time related to the issue of state and
2 national support, so it's been in on the
3 regulation that we're dealing with.

4 MR. DURANT: What was the change that was made, Michael
5 that was made in the original publication
6 and the one 30 days ago and why was...

7 MR. WALLACE: Well..

8 MR. DURANT: As far as this issue is concerned.

9 MR. WALLACE: As far as this issue was concerned, our
10 original regulation, and you've got my book,
11 the one that is in effect right now and
12 remains in effect until we adopt something
13 else is in 1614 and the language of 1614, if
14 I can find it, is right here. "At least
15 12.5% of the recipients annualized basic
16 field award shall be used." I don't know
17 what that language means either because
18 we're just about to take it out if the
19 amendment passes. I think what is currently
20 in the books, Section 1614--Is there another
21 Section? It has been my understanding from
22 the beginning that current language applies
23 to state and national support centers. What
24

1 we did was to take it out and the..

2 MR. BOVARD: There's a deleted paragraph on top of page
3 61, at the top of page 3 of the Board Book,
4 we find, "stricken effective January 1st,
5 1985, national and state support grant
6 awards shall apply to percentage requirement
7 to that portion of their program related to
8 any direct activities in behalf of eligible
9 clients.

10 MR. DURANT: Why was that stricken?

11 MR. BOVARD: That has been stricken ever since I came on
12 board.

13 MR. HOUSEMAN: The Committee struck that earlier on a vote
14 that it should not apply to state and
15 national support for a variety of reasons.

16 MS. BERNSTEIN: One of the main reasons was that there was
17 currently a rider on our appropriations.

18 MR. HOUSEMAN: That wasn't the only reason. There were
19 policy reasons which I guess we're going to
20 get into. I didn't expect to. It was taken
21 out and this was an issue that was raised
22 and at Salt Lake we passed taking it out and
23 we assumed it was taken out. It's been in

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effect but because of the affirmative rider it's not been in effect this year or last year.

MR. WALLACE:

One of the first policy decisions we made was not to try to enforce this because we were losing lawsuits on the subject.

MR. SMEGAL:

Also, there was a lot of adverse comment that we had at that point from the first publication.

MR. WALLACE:

Excuse me, Mr. Sable has been trying to speak. Let me recognize him.

MR. SABLE:

My name is Robert Sable and I'm the Director of the National Consumer Law Center which is a national support center which would be affected by Ms. Bernstein's amendment. First of all, let me state that I think it is most untoward that this amendment should be considered at this time. It was considered previously, the national and state support was rejected and eliminated from the regulation. As a result, it was out understanding through the republication that this issue was at rest. Therefore,

1 none of my colleagues in the national
2 support centers, nor I presume none of the
3 state support centers, commented on the
4 issue because we agreed with it and
5 therefore I would sort of protest on
6 procedural grounds that this be taken out at
7 this time. I would like, if I could, to
8 address briefly, and I'm obviously
9 unprepared, the substance. Mr. Durant, I
10 think this procedure is a serious business.

11 MR. DURANT: I'm not denying that.

12 MR. SABLE: We provide a combination of support and
13 direct service. The line between support
14 and direct service is at best, a very, very
15 complex one. If our underlying assumption
16 is that most of what we do is the provision
17 of legal services, but that may or may not
18 be the case as this board finally decides to
19 define it. Let me try to explain the
20 problem from my point of view. It's quite
21 likely, for instance, that we might, at the
22 beginning, attempt to devote most of our
23 services to whatever these definitions would

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1 be considered support. We then get a
2 telephone call from a local program, as we
3 just did, saying that a number of poor and
4 elderly people in Virginia are in danger of
5 losing their homes because of an
6 unscrupulous second mortgage company which
7 has taken mortgages from them and has now
8 filed bankruptcy so that the possibility of
9 a counter claim has become immensely
10 complicated and is well beyond, I wouldn't
11 say it's beyond their capacity, but they
12 desperately need some help and they would
13 like us to come in as co-counsel. First of
14 all, I hope that we would have the good
15 sense to shift an enormous amount of
16 resources into this co-counsel effort.
17 Therefore, it's almost impossible for us to
18 plan at the beginning of the year, at the
19 middle of the year or at the end of the
20 year, how our resources are going to relate
21 between the support of legal services and
22 the direct provision of legal services.
23 Secondly, as a practical matter, we cannot
24

1 run in the traditional sense that there has
2 been discussed here, a private attorney
3 involvement program. As this board knows,
4 we are anxious to and do provide significant
5 support to private attorneys through our
6 manuals, through training, through answers
7 to service requests and so forth. I have no
8 way in Boston, to arrange for Nebraska
9 attorneys to work on Nebraska cases with
10 which I'm involved, nor Virginia attorneys
11 to work on Virginia cases, nor even Boston
12 attorneys to work on Boston cases. There's
13 a whole arrangement within Boston. So then,
14 I don't have any way, as the manager of a
15 national program, even though I am involved
16 in direct provision of legal services, to
17 arrange a formal private attorney
18 involvement program as is contemplated by
19 this regulation. It was my understanding
20 that all these issues were discussed
21 previously and it was decided that just as a
22 practical matter it didn't make any sense.
23 Clearly, we should be required to, and do,
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1 provide support to the private bar around
2 the country. We welcome that opportunity
3 and seek opportunities to expand it. But to
4 involve us in the provision of direct legal
5 services to private attorneys, simply
6 doesn't make any sense because of the type
7 of institution. I would venture to say that
8 similar issues exist for state support.

9 MR. WALLACE: Thank you, Mr. Sable. Could you identify
10 yourself.

11 MR. RODGERS: Yes, my name is Allan Rodgers, I'm the
12 Executive Director of the Massachusetts Bar
13 Reform Institute, which is a state support
14 center. I just want to echo Bob Sable's
15 remarks that the same considerations apply
16 to state support. It is almost
17 unmanageable, I think, to try to run a
18 private attorney involvement program on the
19 side of getting private attorneys to do work
20 to represent clients. There is the other
21 side which is the support for private
22 attorneys, which we do a lot of, but even
23 that depends entirely upon requests for help
24

1 to come in so it is very, very difficult in
2 most programs to be able to plan this, to
3 really know what you're going to do and what
4 you're going to end up with at the beginning
5 of the year. I think it really is
6 impractical. We will do as much as we can,
7 we do a great deal with the private bar and
8 we have documented that for the Corporation
9 and for other purposes. I think it is
10 unmanageable to apply this requirement in
11 the way that this suggests. Thank you.

12 MR. WALLACE: Thank you, Mr. Rodgers. Mrs. Bernstein, it
13 is your motion.

14 MS. BERNSTEIN: There are two things that I want to
15 address. First I want to address the
16 procedural, the complaints about the
17 procedure. Tom, correct me if I'm wrong but
18 this whole question of discussing these regs
19 began with the republication of the current
20 regulation in which we published, as part of
21 that regulation, 1614.2(B), which included
22 the question of applying it to part two,
23 State and National Support. That question

24

1 was, indeed, dealt with at an earlier
2 meeting and my conviction that we should not
3 create two different classes of deliverers
4 was overruled or I lost in terms of the
5 vote. The republication of this, though,
6 did not completely negate the fact that that
7 was an issue when we began this entire
8 regulation changing process. When we
9 republished it and asked for additional
10 comment, that doesn't negate the earlier
11 comments that we received and I presume
12 everybody had an opportunity at the earlier
13 time to comment on that Section. As I
14 remember, we got several comments on that
15 section which is why I lost the vote. Now,
16 therefore, procedurally, I think any time we
17 are in a situation of republishing anything
18 that had been discussed or was intrinsic in
19 the consideration of the regulation, is
20 proper. It's an ongoing process. I don't
21 know about the other Board members but I've
22 had my share of mail wanting us to go to a
23 guideline rather than mandating the 12.5%

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1 minimum and we solved that issue and it
2 didn't stop the mail. I think that all of
3 these things, as long as it's republished,
4 we're dealing with the regulation and you
5 correct me if I'm wrong, but as I understand
6 it, that includes regulatory process. As
7 long as we've got it open it's open. The
8 second thing that I want to address is the
9 issue of whether or not this is
10 impracticable let me give you a
11 hypothetical. If a program is receiving
12 funds as a state support center, but as a
13 practical matter they are expending half of
14 their grant funds on direct delivery to
15 clients, we are saying, "Well, you don't
16 have to do what all of the other local
17 programs are doing in terms of involving the
18 private bar." That seems to me genuinely
19 unfair to the local programs. That we are
20 giving out to a state support program that
21 may indeed, be dealing with as many clients
22 on a one to one basis as the local program
23 is. I object from the standpoint that I
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1 think if we're adopting this, and our
2 purpose, and this is the reason I made the
3 amendment in the purpose section, if our
4 purpose in this is to leverage and involve
5 private attorneys then I think it has to be
6 unrelated to whether or not they also get
7 some other kind of training grant or support
8 center grant or whatever. If they are
9 indeed, delivering legal services directly
10 to clients, then I think that they come
11 under the system. The individual that says
12 it is impractical because at the first of
13 the year they may not be able to decide what
14 their 12.5% is going to be, well, they look
15 back at the last years activities and if
16 they last year they have indeed, expended
17 30% of their grant award in delivering of
18 services directly to clients, and I would
19 presume they would keep records as to what
20 they did during the last year, then the
21 allocation of the 12.5% of that 30% is an
22 estimate. Now, as this has, as I understand
23 it, with the reg this is a prospective
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1 application, so to address Mr. Houseman's
2 concern earlier, this would to some extent
3 be a start-up to them and if they can't
4 reach the 12.5% this first year, then this
5 is a situation in which they also have a
6 remedy included. My basic concern is that
7 we have got to be encouraging across the
8 board and we can't say to one program, "You
9 don't have to try, or we are automatically
10 going to exclude you from the requirement
11 involving the private bar." I commend any
12 programs in the state and national support
13 programs that already have been and it may
14 be that if the state and national support
15 center doesn't do any direct delivery, at
16 which point they are not in this category.
17 This is the concern that I have.

18 MR. SABLE:

19 I wonder if I could respond to some of Ms.
20 Bernstein's points. First of all, as to the
21 procedure, I am not certain, as a technical
22 matter of administrative procedure law, what
23 the result would be to a challenge of that.
24 That is not exactly the point I was making.

1 The point I was making is one of fundamental
2 fairness which is that we were led to
3 believe that this matter had been laid to
4 rest and now with no warning, it has come
5 forward. Secondly, Ms. Bernstein states
6 that this is unfair to local programs. I am
7 unaware of a single local program which has
8 expressed any concern about the unfairness
9 of this procedure being applied to us.
10 Third, I think Ms. Bernstein is under a
11 fundamental misconception about the nature
12 of national and state support which may
13 perhaps explain her concerns and perhaps, if
14 I could clarify that, it might put the Board
15 more at ease in continuing this exemption.
16 When a national support or a state support
17 center provides direct delivery of legal
18 services, nearly every instance we are not
19 running a little legal aid program on the
20 side. It isn't that we have a support
21 program here and then we take a bunch of
22 clients over here and this is somehow a sort
23 of way around it and therefore it's really
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1 no different than anybody else's program and
2 ought to be subject to the same thing. In
3 our mind, what we are doing is providing
4 support. Sometimes that support is most
5 appropriate in a way that is unrelated to
6 any particular client and so we write a
7 manual or we put on a training program.
8 Other times, the best type of support we can
9 give to a local program is to go in with
10 that local program and help them directly in
11 the case, help them directly with the
12 client. If you ask the Virginia program
13 what we were doing when we came in and co-
14 counseled the case, they wouldn't say we are
15 providing direct delivery of legal services
16 to Virginia clients, they would say we are
17 supporting. We run a support program. That
18 support runs a variety of things. It is
19 therefore fundamentally different than a
20 field program which is taking in basic
21 cases. That accounts for why we should be
22 different in terms of this requirement and
23 it also explains why the requirement is
24

1 impractical to apply to us. We are not
2 running a separate legal services program
3 and a separate support program. Our support
4 consists in part, of delivery of legal
5 services in conjunction with and in
6 partnership with, field programs.. The
7 number of cases that we take, at least I am
8 not certain about state support, but the
9 number of cases that the national support
10 center folks take, without the involvement
11 of a local program, is miniscule or zero.
12 In my own program's case, it is zero, I have
13 heard of the occasional case and typically
14 that's a case in which the national program
15 got involved in a case and then for some
16 reason the local program sort of lucked out
17 and left them hanging with the case. We are
18 not running a separate provision of legal
19 services program.

20 MR. BERNSTEIN: Are you funded under 1006(a)(1)(A)?

21 MR. SABLE: Yes.

22 MS. BERNSTEIN: But you're saying you don't provide.

23 MR. SABLE: No, I am saying that the definition of
24

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1 provision, for the statute, and the
2 practical definition in terms of PAI
3 delivery, is a quite different thing. When
4 I go in, sign my name on the pleading along
5 with the Virginia program, clearly I am
6 involved in the provision of legal services
7 in some sense in that I am a lawyer and a
8 member of the bar and I'm responsible for
9 that client every bit as much as that local
10 Virginia attorney. That is one sense of
11 direct delivery of legal services. If you
12 ask why was my program set up or how does
13 the Virginia program deal, what is going on
14 here, what is going on here is I am
15 supporting the Virginia program, helping
16 them do a better job and a more efficient
17 job for their client. I submit to you that
18 100% of my program's activities and 99% of
19 all of the support activities in this
20 country, fit into exactly that picture.
21 That is, whether technically, under this
22 statute or under some local bar rules, we
23 are providing support or we are involved in

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the direct delivery of legal services. As a functional matter, what we are doing is we are providing support and our different ways of providing support.

MS. BERNSTEIN:

It just seems to me that under the Act, that support would fall under, would properly fall under 1006(a)(1)(B).

MR. SABLE:

I am not expert on the difference between 1006(a)(1) and (3). I would venture to say, though, that under the Act, it would be very difficult for you to say that I am not, in some technical sense, under the Act. I think we just have to see that words are used in different ways and in different contexts. Under the Act, when I am co-counsel in a Virginia court room, I am clearly providing the delivery of legal services or the delivery of legal services has no meaning in that sense. But, in terms of why am I there? What am I doing in terms of moving forward the purposes of the Legal Services Corporation? I am providing support to a local Virginia program. Now, the judge

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MS. BERNSTEIN:

is not going to not hold me in contempt because I said, "Your honor, I'm only a support lawyer." Obviously, I am a lawyer providing services. In terms of this Act and in terms of the purpose of this regulation, I am there in a support capacity. I understand what you are saying. I am simply saying that if support centers and, I frankly think that the import of what I'm requesting by the amendment would go more directly to state support centers, but I am concerned that on one hand, an entity that receives services to deliver services, you know, to qualified programs providing legal assistance to eligible clients. That is what 1006(a)(1)(A) says. Then the other section would include such things as research, and that includes research undertaken to represent an eligible client, training and technical assistance and a clearinghouse of information which is all the support kind of activity. I understand that if you are a co-counsel, that throws

1 you into 1006(a)(1)(A), for that portion of
2 the time. I'm simply saying if it turns out
3 that your particular center, and I know that
4 your center, as we talked yesterday, doesn't
5 do this much of it, but if a particular
6 center that is providing a support, is doing
7 a lot of that, then they ought to come under
8 the same regulation.

9 MR. SABLE:

10 I guess I just couldn't disagree with you
11 more. We are funded under both one and
12 three. I think partly out of the
13 corporations intelligent recognition that
14 this is a very complex and blurred line
15 between the two. What I would reiterate to
16 you is that any program, any national or
17 state program which performs a significant
18 portion of what we would agree would be
19 1006(a)(1) functions, is not performing them
20 out of it's own docket, it is performing
21 them in support of other programs. If it is
22 going to have that PAI involvement, am
23 I going to go out to Nebraska and line up
24 local Nebraska counsel? Am I going to go to

1 Virginia or is Allan Rodgers in
2 Massachusetts, in Boston, going to interrupt
3 Meg Connally's program and have his own
4 little piece of the action? Is he going to
5 go out to Springfield when he helps the
6 Springfield people with the case? I think
7 you've got to look at the function which is
8 a support function. Whether as a technical
9 matter it is defined as delivery of legal
10 services or not.

11 MR. WALLACE: Let me recognize Mr. Smegal who has had his
12 hand up.

13 MR. SMEGAL: I started about a half an hour ago to
14 suggest that there was a procedural problem
15 here and I don't know, Mr. Wallace, whether
16 you are following Robert's or Sturgess or
17 Durant or Wallace but, procedurally I don't
18 think this can go on. We discussed this
19 matter, as LeeAnne has indicated, she
20 brought this motion to us a number of months
21 ago, she lost, and now she is bringing it
22 back and you just can't do that proce
23 under whatever rules you are going to follow.

24

1 MR. WALLACE:

2 Procedurally, let me state where the chair
3 thinks we are as a matter of administrative
4 law and as a matter of procedure. The
5 existing regulation, which is still in
6 force, applies to state and national support
7 centers. The proposal which is before this
8 Committee, is the proposal which was printed
9 in the Federal Register in August. That
10 proposal proposes to stop applying the
11 regulations to state and national support
12 centers. It would repeal the exiting
13 1614.2(b). Mrs. Bernstein is proposing not
14 to follow the proposal. Not to follow what
15 was put in the Federal Register but to apply
16 it to national and state support centers. I
17 believe, as a matter of administrative law
18 it is property before us. We are here
19 working on a new document, I don't know of
20 any reason it's not a motion to reconsider
21 something that was done on the old document
22 that we took care of in Salt Lake City.
23 think, as a matter of law, it is proper
24 before us. That would be the ruling of th

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1 chair that it is not out of order. That is
2 a ruling that can be appealed from and that
3 would certainly be appropriate under
4 anybody's rules. As to whether you think
5 it's a good proposal or a bad proposal, what
6 you think of the procedure may influence how
7 you vote. I think properly, this motion may
8 be considered. I think it is in order, that
9 would be the ruling of the chair which is
10 subject to appeal.

11 MR. SMEGAL: Mr. Wallace, I think what is before us is a
12 proposed rule, not something that existed in
13 1982 or something you and I may agree is
14 still in effect. There is an act in effect.

15 MR. WALLACE: That's right.

16 MR. SMEGAL: There are some regulations in effect and
17 there are some rules in effect. What this
18 body is deliberating is a proposal that has
19 been published in the Federal Register and
20 that part of it is not before us because
21 this Board has already voted on that.

22 MS. BERNSTEIN: Not the Board, just the Committee.

23 MR. WALLACE: As I say, I have stated if this whole thing
24

1 goes down the pipes, if we get here tomorrow
2 and vote not to adopt what is in the Federal
3 Register, then state and national support
4 centers will continue to be covered as they
5 presently are by the existing regulations.
6 It is my ruling that because of that, it may
7 be hyper-technical, but I think that's the
8 law. I think it's properly before us and
9 that's my ruling. I may be wrong. Subject
10 to appeal and I'll be happy to entertain
11 such a motion to appeal my decision. I
12 think the motion is in order.

13 MR. DURANT:

I'm not necessarily appealing you, Mr.
14 Wallace. I'd like to ask Mr. Smegal a
15 question, if I might. Mr. Smegal, why do
16 you say that from a procedural standpoint,
17 that if Mr. Wallace is correct, and I think
18 he is correct that it has been a part of the
19 regulations, why do you feel that this is...

20 MR. SABLE:

Because there was a Board or Committee or
21 whoever passed the regulation, voted to
22 exclude the national and state support
23 centers after some significant discussion.
24

1 before the Committee is whether or not to
2 sustain the chair's ruling that Mrs.
3 Bernstein's motion is in order. A yes vote
4 on the motion sustains the chair, I think
5 that's the way it works. A yes vote
6 sustains the chair and permits the Committee
7 to vote later on Mrs Bernstein's motion. A
8 no vote overrules the chair, takes Mrs.
9 Bernstein's motion off the table, says we
10 will not vote on it and we move on to
11 something else. The question for the
12 Committee is whether to sustain the chair's
13 decision that the motion is in order. We
14 will take a roll call on that motion, on
15 whether or not to sustain the chair. Mrs.
16 Miller, how do you vote?

17 MS. MILLER: Yes.

18 MR. WALLACE: Mrs. Bernstein, how do you vote?

19 MRS. BERNSTEIN: Yes.

20 MR. WALLACE: Mr. Durant?

21 MR: DURANT: Yes.

22 MR. WALLACE: Mr. Smegal?

23 MR. SMEGAL: No.

24

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1 MR. WALLACE:

The chair is sustained, the motion is on the
2 table. Are there any further substantive--
3 The motion is not tabled, it is before the
4 Committee. Are there any more substantive
5 comments to be made on the motion? Any
6 final remarks from the floor and then we
7 will vote.

8 MR. HOUSEMAN:

I think there's some very practical
9 problems, many of which Bob has alluded to,
10 For example, state and national support is
11 co-counsel with the program and it's going
12 to be very hard to refer to private
13 attorneys in a number of cases that have the
14 kind of expertise the state and national
15 support centers have in order to develop
16 that specialized expertise for the local
17 program. That's the whole theory of state
18 and national support. I think as a
19 practical matter, as well as the whole
20 theory behind the expertise that is
21 developed in state and national support,
22 imposing this undercuts that and is going to
23 make it virtually impractical and impossible
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MS. BERNSTEIN:

to do it.

I think that's covered in the waiver section because it says that a waiver can be granted if there is an unavailability of qualified private attorneys, the attempt to carry out a PAI program would be futile. Or that it is going to be extremely difficult because of the circumstances to do that. I'm not trying to impose anything that is impossible here. I'm trying to put programs that are, in fact, delivering some support but also are doing direct delivery requirements, as I say, I think it applies more to state support, Bob, than it really does to national support. I think the incidents of your taking a case directly from a client or your being the sole counsel on a case, is much less in a national support situation. I don't think it's fair to have a dual system and not make a requirement when your purpose is to leverage private attorneys. According to the impossibility question, I know currently that state and

1 national support centers have, in the past,
2 contracted with private attorneys to take a
3 specialized case in certain instances
4 because it is the most efficient way to do
5 that. I'm simply saying I want to encourage
6 them and you said, "Well, are we supposed to
7 get a private attorney out in Nebraska? If
8 that would be an efficient way to handle it,
9 yes. You don't simply relate to your staff
10 in terms of having to provide everything and
11 you utilize private attorneys to the extent
12 that you can. I think that the waiver
13 sections handle these problems.

14 MR. SABLE:

If I could..

15 MR. WALLACE:

Very briefly, and then usually the proponent
16 gets the last word. Mr. Sable, I'll let you
17 make a response briefly and then let's get
18 on with it.

19 MR. SABLE:

First of all, the fact that the waiver is
20 there, my point is that the waiver should be
21 applied as a matter of policy across the
22 board. Obviously, I quite agree with Ms.
23 Bernstein, we do not want a dual system
24

1 where one set of rules apply to one people
2 and one set of rules apply to the other. We
3 would not want national and state support to
4 be able to hide under that label and provide
5 the services that local programs provide but
6 not subject to the restrictions. However,
7 that is not the practical situation and that
8 is not the way the program functions. There
9 is not a dual system, there is a single
10 section in which the national and state
11 people are providing support to local
12 programs. Some of that support is
13 technically the provision of Legal Services
14 but it is not in the practical sense of that
15 word carrying on a separate legal
16 services function directly with clients.
17 Therefore, it is very impractical and I
18 would urge the Committee to reject Mrs.
19 Bernstein's proposal.

20 MR. WALLACE:

Thank you, Mr. Sable. Are there further
21 comments from the Committee.

22 MR. SMEGAL:

I want to make sure that I understand what's
23 happening here, Mr. Wallace. Am I correct
24

1 first that the struck over items were
2 deleted from the recommended final rule that
3 was published in the Federal Register and
4 that 1614.1(b) was not in what was published
5 in the Federal Register.

6 MR. WALLACE: Was not published in August or September or
7 whenever we published.

8 MR. SMEGAL: So whatever we published does not have 2(b),
9 huh.

10 MR. WALLACE: What we published does not apply to state
11 and national support centers. What is
12 presently the law does apply to national and
13 state support centers.

14 MR. SMEGAL: You keep going back to that. I want to know
15 what was published, Mr. Wallace.

16 MR. WALLACE: What was published does not apply to state
17 and national support centers. That is a
18 fact.

19 MR. SMEGAL: I would like a clear statement from the
20 proponent as to what affect these amendments
21 will have and more particularly, is the
22 affect of the amendment to bring back in
23 1614.2(b), precisely as it was worded and
24

1 stricken in the proposed regs.

2 MS. BERNSTEIN: The other thing I think, Tom, is unless you

3 misspoke just now, you may be under the

4 misconception when these were published

5 again, they weren't published as final, as

6 proposed final They were simply published

7 again as proposed.

8 MR. WALLACE: As a new proposal.

9 MS. BERNSTEIN: Over my objection, Mike started the whole

10 process over again.

11 MR. WALLACE: The Board started the whole process again at

12 the chairman's recommendation.

13 MS. BERNSTEIN: We are in the process of creating a reg that

14 would change what is in effect. I am simply

15 saying we should keep it in effect.

16 MR. SMEGAL: What I want to understand is what we

17 published for consideration at this time, or

18 at some time, and it turns out it's this

19 time, is a set of proposed regulations that

20 do not include 1614.2(b).

21 MR. WALLACE: That is correct.

22 MR. SMEGAL: And now we are at a point where we can make

23 these final and now we have resurrected

24

1 1614.2(b), is that correct?

2 MR. WALLACE: If the motion passes, that is the effect.

3 As Mrs. Bernstein acclaims her motion, that

4 is what this vote would do.

5 MR. SMEGAL: And you ruled, Mr. Wallace, that that was

6 appropriate for this Committee to do.

7 MR. WALLACE: I so ruled and the Committee sustained my

8 ruling.

9 MR. SMEGAL: Now I understand.

10 MR. DURANT: Call the question.

11 MR. WALLACE: The question is called and at this point...

12 MR. DURANT: Just so I understand the question, we are

13 voting on Mrs. Bernstein's amendment to add..

14 MR. WALLACE: I will state the amendment. On page 59 of

15 the Board book, in Section 1614.1(a) on

16 line 3, insert before the word "funds",

17 Section 1006(a)(1)(A) and on line 10, insert

18 between the words "LSC" and "annualized",

19 Section 1006(a)(1)(A) and strike the words

20 "basic field". That is the motion before

21 the committee and Mrs. Bernstein has

22 explained it as keeping Section 1614.2(b),

23 which is in the existing regulation and

24

1 applying this to state and national support
2 centers and that's the motion before us.
3 The chair has restated the motion, the
4 Committee is prepared to vote. Mrs. Miller,
5 how do you vote?
6 MS. MILLER: Aye.
7 MR. WALLACE: Mrs. Bernstein?
8 MRS. BERNSTEIN: Aye.
9 MR. WALLACE: Mr Durant?
10 MR. DURANT: No.
11 MR. WALLACE: Mr. Smegal?
12 MR. SMEGAL: No.
13 MR. WALLACE: The motion fails on a tie vote. The chair,
14 as previously announced, has a conflict and
15 abstains. The next time the chair has a
16 conflict, he's going to leave the room. At
17 this point, we will take our ten minute
18 break which will probably extend to fifteen
19 as they usually do.
20 BREAK
21 MEETING RECONVENES
22 MR. WALLACE: We have just completed one amendment, one
23 motion with regard to I614.1, before
24

1 this section previously discussed by the
2 staff, are there any other amendments to
3 Section 1614.1 that any member of the
4 Committee wishes to propose? Hearing none,
5 I will ask Mr. Bovard to read the proposed
6 1614.1(b) as we have been redrafting it over
7 lunch. Over the break. Speaking of lunch,
8 I have been asked to announce that the
9 dining room of this establishment is
10 apparently not open to the general public.
11 The Committee is going to take a break at
12 12:00 and we are going to go upstairs and
13 apparently we have had lunch arranged for
14 us. We will come back here at 1:00 and try
15 to start up. I apologize to any members of
16 the general public who are going to have a
17 hard time grabbing much lunch. We've got a
18 lot of work and I don't see how we can take
19 more than an hour break at lunch time and get
20 things done today. That's the status of
21 where we are and that's the chairman's
22 intention as to schedule. Having said that,
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MR. BOVARD:

Mr. Bovard, will you read the language that we've been working on.

Before I read it, people will note that the first section of this is identical with the previous version except certain language is stricken, so I'll start reading the additional sentences. Paragraph D, "As of January 1st, 1986 the term private attorney, as used in this part, means an attorney who is not a staff attorney as defined in Section 1600.1 of these Regulations." Now the new sentence, "In circumstances where the expenditure of funds with respect to a private attorney, would violate the provisions of the Ethics in Government Act, 18USC-Section 207, Corporation or a federal agency, such funds may not be counted as part of the expenditure required by Subsection A of this Section. I'll read that sentence again. "In circumstances where the expenditure of funds with respect to a private attorney, would violate the provisions of the Ethics in Government Act,

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1 18USC-Section 207, Corporation or a federal
2 agency, such funds may not be counted as
3 part of the expenditure required by
4 Subsection A of this Section."

5 MR. WALLACE:

6 Having read that, the chair can apparently
7 move and second things in this Committee and
8 the chair would move the adoption of that
9 amendment as read. Is there a second to it?

10 MS. BERNSTEIN:

11 I'll second it.

12 MR. WALLACE:

13 Let me state the chair's intention here and
14 the purpose for drafting it this way. The
15 Ethics in Government Act is fairly
16 complicated, I believe as a matter of
17 principle it ought to apply to us. As I
18 stated a little while ago, I don't know why
19 we're not a federal agency, we are involved
20 in the expenditure of taxpayer funds and
21 anything that involves the expenditure of
22 taxpayer funds, it seems to me, ought to be
23 done in accordance with the general
24 principles applicable to the expenditure of
taxpayer funds. What we are saying here, we
are not simply picking out the two year

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1 provision of the Ethics in Government Act,
2 which is what the original proposal did. We
3 are simply saying that the Ethics in
4 Government Act applies to us for this
5 purpose, and this purpose only. As an
6 accounting measure to determine whether
7 funds given to a particular lawyer shall be
8 counted toward PAI. There are plenty of
9 circumstances, we've heard them discussed
10 and I'm sure they are true, where the best
11 thing you can do for your client is to give
12 it to somebody who has been a staff attorney
13 within the last two years. You can do
14 that. This amendment, as written, as
15 proposed, does not prohibit that. If
16 sending the money to that attorney would
17 violate the Ethics in Government Act, if we
18 were a federal agency, then even though you
19 can hire that attorney, you can spend that
20 money, what you can't do in those
21 circumstances is count it toward your
22 12.5%. It's not a blanket two year
23 prohibition, we are taking the Ethics in
24

1 Government Act and putting it into the regs
2 for accounting purposes. Not to prohibit
3 you using that lawyer but to prohibit you
4 using those funds as part of your 12.5%.
5 Now, I'm no expert on the Ethics in
6 Government Act. As a matter of principle I
7 think the Ethics in Government Act ought to
8 apply to us, the Hatch Act ought to apply to
9 us, every act I can think of that regulates
10 federal employees ought to apply to us. The
11 burden of persuading me to the contrary
12 rests on folks who would not have it apply
13 to us. That is my proposal but I am
14 prepared to be persuaded that it shouldn't
15 apply to us today, or before tomorrow
16 morning when we recommend this to the
17 Board. I simply am proposing this as a
18 principle, it ought to apply to us, we say
19 it does apply to us, but for accounting
20 purposes only. You can still do it, you can
21 still hire that lawyer, but if it would
22 violate the Ethics in Government Act, you
23 just can't count it towards your 12.5%. In
24

1 circumstances where there aren't any other
2 private attorneys you can use, and
3 circumstances where you have trouble meeting
4 your 12.5%, I would think that would be one
5 of the things that could be taken care of
6 under the waiver provision. You come to us
7 and say you're using private attorneys but
8 you're using former staff attorneys because
9 that's all we can get, then that ought to be
10 a good case to come under one of the waiver
11 provisions, it seems to me. That's the
12 chair's reason for doing this this way, the
13 chair is prepared to be persuaded to the
14 contrary by any comments you folks may
15 have. Before I open it up to folks who may
16 want to persuade me to the contrary, let me
17 ask members of the Committee if they've got
18 any comments or questions on the motion at
19 this point.

20 MR. SMEGAL:

21 I would only say it certainly takes care of
22 the concern I had expressed earlier on just
23 hearing it read, I may think differently
24 tomorrow, but at the moment I am favorable

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MR. HOUSEMAN:

know you have some concerns and I'm happy to entertain them at this point.

Well, first I think there's a number of people here that can talk very practically about what this may mean if what it means is similar to what was said previously. The problem that I think any of us have in commenting is, none of us have this in front of us and none of us have read the interpretations, I had no idea what the breadth of it is and I haven't looked into it. I never heard about this before and nobody else in the room has. The problem in trying to intelligently comment, and I think the problem you face, frankly, is you don't have any idea what the impact of what you just did is. It's not clear to me by a very quick reading, what it restricts and what it doesn't restrict. There are opinions on this issue, there are cases on this issue. I have not looked at any of these, I dare say you haven't looked at any of these.

1 and I don't think we know what we're
2 doing. It strikes me as crazy to try to put
3 it into a regulatory language at the last
4 minute, in an effort to deal with what may
5 be a problem in something that we don't know
6 what we're talking about. That's really
7 where we are. You said it yourself, I don't
8 know what's in there, nobody else is going
9 to be able to talk about it intelligently
10 and it makes no sense to me. On the basis
11 of just common sense, I would urge you to
12 pull it back.

13 MR. WALLACE: Here's my..

14 MR. HOUSEMAN: If we want to go down this route, go through
15 this process, you can make another
16 publication of another amendment later on.
17 We can go through the process on that and we
18 can go through the process on this issue
19 once we've all had a chance to think clearly
20 about it and understand what's going on.
21 We're not going to be able to do that
22 between now and tomorrow morning.

23 MR. WALLACE: Let me state why I think we do have a
24

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1 problem and again, there are good things
2 about coming to New Hampshire and there are
3 bad things about coming to New Hampshire.
4 The bad thing is we can't bring all of our
5 staff with us, the people who have been
6 working on this regulation on the staff
7 level, tell me that the monitoring people
8 inform them that this is a serious problem
9 and has been in several circumstances where
10 you have people who have been staff
11 attorneys and they stop being staff
12 attorneys and all of a sudden become
13 contract attorneys and you've got the same
14 people doing the same work except all
15 they've changed is their office address and
16 their accounting practices. That's not what
17 we're trying to do with PAI. I don't think
18 anybody would say that's what we ought to be
19 trying to do with PAI and if that's a
20 serious problem, we ought to address it.

21 MR. HOUSEMAN:

Let's address that problem, Mike. Let's
address that problem directly.

23 MR. WALLACE:

This is, I grant, a quick and dirty way of
addressing it, but we are adopting something

24

1 that has been carefully considered over and
2 over again by the congress and applies to
3 everybody in the government but us. Of
4 course, we're not from the government, they
5 keep telling us. We are spending taxpayer
6 funds and I think we ought to spend taxpayer
7 funds according to the Act. I think we do
8 have a real problem, we are adopting
9 something that has a whole history behind it
10 and my view, at this point, is to go ahead
11 and do this, because it is October and we
12 have to have, if any restrictions are going
13 to be placed on people, they need to be in
14 the regs by the end of the year. I will
15 commit to you and anybody else, that between
16 now and January 1st when this goes into
17 effect, if there are awful ramifications of
18 this thing, what we will do is to
19 immediately publish something, consider it
20 as soon as possible and take it out. This
21 is the problem of having to have regulations
22 in place before the grant year starts and I
23 think at this point in the year if we want
24

1 to deal with this problem, we have to deal
2 with it the best way we can, subject to
3 undealing with it later. I think the best
4 way we can deal with it is to take something
5 that has been used everywhere else in the
6 government that has a whole history behind
7 it. It's not perfect, but it's October and
8 if we're going to do this, I think we had
9 better do it now. This is the best thing I
10 know to do.

11 MR. HOUSEMAN:

12 I know, first of all, fine, it is October.
13 That isn't my problem and it's not your
14 problem in one sense. In another sense it
15 is. I think there is a problem administra-
16 tive law wise. If you attempt to impose a
17 congressional statute that congress has not
18 imposed, without an opportunity for comment
19 and understanding what it is you're doing,
20 and the implications of that, without an
21 opportunity for notice and comment. I think
22 there is an administrative law problem on
23 that, in fact, there is a series of cases
24 that say you can't put in something entirely

1 new, which is what this is, into the
2 process. So, there is a process problem. We
3 are prepared to try. We don't know what
4 this means. We are prepared under the
5 assumption that what it means is something
6 like what was said earlier, to try to
7 address the policies on this and we'll do
8 it. I just think it makes no sense to go
9 down this route. Regardless of October, it
10 seems to me the more sensible approach is
11 to pass the reg without this in here, let's
12 work on a definition, as soon as we get a
13 definition, let's put it in.

14 MR. WALLACE: As soon as we get a definition...

15 MR. HOUSEMAN: And it will be in effect--Probably the only
16 affect you have by not having it in is going
17 to be around the right to terminate a
18 program and we're not talking about that
19 here.

20 MR. WALLACE: Ms. Bernstein, go ahead.

21 MS. BERNSTEIN: As I understand it there have been questions
22 in the past about changes in grant
23 conditions that would take place after the

24

1 beginning of the grant year, and there were
2 allegations that because a regulation was
3 passed after a grant was issued, that that
4 was changing the terms and conditions of the
5 grant. Maybe I've got a faulty memory on
6 this, but I thought this was an allegation
7 that had been made.

8 MR. HOUSEMAN:

9 Let me just be clear so we understand what
10 we're saying here. We might as well act
11 with some clarity. There were two problems
12 that are raised by this issue. The first
13 was the so called affirmative rider which
14 said that you can't change the terms and
15 conditions of grants. We may have an
16 affirmative rider on the appropriations,
17 it's very unlikely from what we know, but
18 who knows? We are going to have an
19 affirmative rider on it. Now, if there was
20 an affirmative rider, yes, but I think that
21 the chances are probably dim. Secondly, the
22 only other place that this becomes a problem
23 is in your definition in 1606 of termin-
24 ation. In other words, for all other

1 purposes, unless you're going to terminate a
2 program for a grant condition that wasn't in
3 effect, for all other purposes a reg that
4 becomes affected is affected respectively
5 and from the time that the reg becomes
6 passed.

7 MR. WALLACE: So, what you're saying on 1606.3(a) of the
8 regs, is that the only time having it into
9 effect at the first of the year comes in, is
10 when you want to terminate and that this
11 thing, if it were adopted, in February then
12 for the rest of 1986, we could question the
13 costs. Of course if questioned costs turn
14 out to be termination that's a problem, too.

15 MR. HOUSEMAN: If it does.

16 MR. WALLACE: If it does. The main thing we can't do is
17 terminate somebody for doing kinds of
18 problems that monitoring tells us are going
19 on. If we want to terminate somebody, we've
20 got to do it by 1986.

21 MR. HOUSEMAN: On this issue.

22 MR. WALLACE: I understand that. If we want to do
23 anything else..

24 MR. HOUSEMAN: No, no, no. You wouldn't be terminating

1 them anyway, you'd be terminating them the
2 year after.

3 MR. WALLACE: I understand. We can't terminate them in
4 '86. If we wanted to terminate them in '87,
5 we couldn't do it on this issue unless it
6 were as of 1/1/86.

7 MR. HOUSEMAN: You couldn't do it during '86.

8 MR. WALLACE: You couldn't do it during '86.

9 MR. HOUSEMAN: You could deny the refunding to them.

10 MR. WALLACE: You could deny the refunding even if it
11 wasn't in place until February. I
12 understand what we're going at here.

13 MR. SMEGAL: What else you could do is 1614.7 or whatever
14 form it ends up having.

15 MR. WALLACE: Assuming..

16 MR. BOVARD: Unless it's construed as a termination.

17 MR. SMEGAL: You've got D in there, though.

18 MR. WALLACE: Not yet. One thing at a time here.

19 MR. HOUSEMAN: Finally, what I would say is you keep
20 talking about--I understand--I've heard it
21 privately and now I've heard it publicly. I
22 haven't heard one specific fact of what this
23 "abuse" is. There may be abuses, you're
24

1 legislating without having any presentation
2 from staff that tells you anything about
3 what the abuses are, we don't know what they
4 are and we can't address the problem. If
5 the problem is an abuse, let's understand
6 what the problem is and address it as
7 opposed to trying to do this. That's what my
8 suggestion would be. Nobody here wants to
9 create --We want to make sure that the funds
10 that go to PAI go to bonafide private
11 attorneys who are out there practicing law.
12 We want to make sure, I assume, that we
13 leverage those funds effectively. And we
14 want to make sure, I assume, that we give
15 the client the best possible
16 representation. I suggest to you that if
17 you adopt this definition as I understand it
18 from what is said, and I've read the thing
19 quickly and I don't think it applies. But,
20 I don't think you know that.

21 MR. WALLACE:

 You understand what problem we think we
22 have. I understand that we haven't got the
23 monitoring people up here.

24

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1 MR. HOUSEMAN: I don't know what problem you think you
2 have.

3 MR. WALLACE: The problem we think we have is this. The
4 problem is you've got local recipients who,
5 when told they had to spend money on private
6 attorney involvement, took staff attorneys,
7 sent them out into private practice and sent
8 the private attorney involvement money to
9 them. Now, monitoring people have told us
10 that that sort of thing has happened in a
11 couple of places, it doesn't involve the
12 private bar, you've got the same people
13 doing the same thing, they've changed
14 tacts. The monitoring people have told us
15 that is a problem, if it exists, it is a
16 problem and I want to deal with it. If
17 you've got, and we've got nobody here to
18 give evidence on it because we're away from
19 Washington. On hypotheticals if it is a
20 problem, and if we ought to deal with it,
21 have you got some language other than this
22 that you could propose that would deal with
23 it.

24

1 MR. HOUSEMAN:

I think so, let me, give me five minutes to
2 go try to construct something and hear some
3 testimony of some people on what the
4 practical consequences of what we think that
5 is.

6 MR. WALLACE:

By unanimous consent, we will table this
7 amendment probably until after lunch. It's
8 now after 11:00, we'll come back to it after
9 lunch and we'll see if there is some
10 alternative language. I say to everybody
11 here that I am prepared to be persuaded on
12 this problem. I think there probably is a
13 problem and I think it's one we ought to
14 deal with and this is the best way to come
15 up to deal with it under the circumstances.
16 By unanimous consent we are going to table
17 the motion and come back to it after lunch.
18 Any other amendments that anybody wants to
19 propose to 1614.1? Are there any amendments
20 that any members of the Committee wish to
21 propose to 1614.2?

22 MR. SMEGAL:

It seems to me that you need just a little
23 grammatical change in Subsection 4 of B,
24

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1 1614.2, right.

2 MR. WALLACE: Right.

3 MR. SMEGAL (a)(B)(4) it reads, " The joint PAI venture

4 must provide opportunity--". An

5 opportunity? The opportunity? Some

6 opportunity? Something in front of it.

7 MR. WALLACE: You can say it without any article at all

8 but if you want to say either an or the...

9 MR. SMEGAL: An.

10 MR. WALLACE: Okay. By unanimous consent, we just put an

11 in between provide and opportunity. Does

12 anybody have any more substantive concerns

13 with regard to 1614.2?

14 MR. HOUSEMAN: One of the comments that have made a point

15 that I have made in the past, or several of

16 the comments, we're talking in very

17 practical situations and I guess my question

18 is, because we hadn't had comments on this

19 section before, whether you want to

20 reconsider the adjacent issue. That would

21 mean if you don't, you don't. The comment

22 was, there were several comments from

23 programs in adjacent areas that said it

24

1 would be very efficient for us to be able to
2 work together. with a plan, with another
3 recipient, where the total amount of
4 combining the two grants, the total amount
5 provided in the plan will be 12.5%, of both
6 of the grants, so a total of 12.5%. We're
7 getting the same amount but maybe one grant
8 will have 10% and another grant will have
9 more, just because that's the most efficient
10 way to do that in adjacent service areas.
11 Nobody is talking about not each recipient
12 having the major contribution, I want to
13 make that clear. It's a bonafide
14 relationship. You have adjacent service
15 areas and under this you couldn't do that,
16 which you can do with a joint venture and
17 that's the issue. Several of the comments
18 raised that and pointed out why that would
19 make sense. There was a comment from George
20 on it, there was a comment from Iowa on it,
21 I don't have them all here, but there was a
22 couple on it that talked about that.

23 MR. WALLACE:

My recollection is we debated this

24

1 particular, I think we had a Committee vote,
2 on this particular issue.

3 MR. HOUSEMAN: You did, it's just that it's come up with
4 some people making some practical comments,
5 that's all I'm saying.

6 MS. BERNSTEIN: I was just going to suggest, and I still
7 think that that kind of thing can be covered
8 in the waiver section in terms of the income
9 averaging that we're talking about. For
10 instance, if programs that were adjacent had
11 a combined effort and one of them one year
12 had a 10% effort and the other had a 15%
13 effort, and the following year it was
14 reversed. I mean, if we're not talking
15 about major changes or major differences,
16 one program doing 20% and the other program
17 doing 5% in terms of the total, I still
18 think that this is covered in the other
19 areas. Frankly, I think it is more
20 important to emphasize the purpose of the
21 reg in terms of involving every program to
22 12.5%. As I see it, the bigger problem
23 area, which is covered in the reg, is

24

1 coterminous, when you've got overlapping,
2 that's a real problem. I think that
3 adjacent, I don't think that just because
4 this particular geographical areas touch
5 each other, you should, again, set up a
6 different system for them than you would for
7 others that might have one county.

8 MR. HOUSEMAN:

9 No, no. It is an area where, the language
10 was carefully drawn, so it was an area where
11 you had bar associations and you have an
12 area where service areas are within--Say,
13 one bar association has two service areas
14 and you work out an arrangement and just
15 accounting wise and mechanically wise it may
16 make much more sense, it's going to fall in
17 different. That's all, the comments point
18 out how practical situations would be
19 affected by going back to the version that
20 we had before the Committee vote.

21 MR WALLACE:

22 This is something that we debated in
23 Detroit. Ms. Bernstein stated her reasons
24 why she supported it in Detroit and any
members of the Committee at this point who

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wish to propose any amendments to this section may. Hearing no amendments offered by the Committee, apparently the Committee adheres to the position it took in Detroit. Any further discussion of Section 1614.2. Let's go on to 1614.3. Are there any proposed amendments from any member of the Committee would have to make to 1614.3. As you'll recall my opening remarks, I discussed a couple of concerns raised by the comments. I think those should be dealt with in the preamble when this is finally published. I don't see any real need to change the language here, but other members of the Committee very well may. The floor is open for amendments on 1614.3. Hearing none, let us move on to 1614.4, which has to do with procedure. That is the one that Mr. Houseman mentioned to us before about the practical problem of sending this to all your bar associations. Before I ask the Committee whether there are any amendments on this subject, it is one that Mr. Houseman

1 didn't address in any detail before. Let me
2 give you the opportunity to do that now and
3 to cover the concerns that have been raised
4 and the comments about sending this plan to
5 the bar associations.

6 MR. HOUSEMAN:

7 There is no question, and I don't think any
8 program is opposed to a requirement in some
9 form that they must share their annual plans
10 with relevant bar associations in their
11 service area. What this does is says you
12 must present it to all local bar
13 associations within the recipients service
14 area. It makes it a mechanistic,
15 bureaucratic requirement that you must do
16 this. Even if, as example, in Iowa, you
17 have 124 separate local bar associations. I
18 don't think anybody is opposed to a
19 requirement that the major bar associations
20 with whom you work, with whom you worked out
21 your PAI plans with, ought to be involved in
22 that process. What this does is goes
23 ostensively beyond that process. In Iowa
24 they have worked out the their PAI plan,

1 that bar association has worked with local
2 bar associations to develop that plan and
3 with representatives. I don't see why you
4 would want to force them to go through this
5 hurdle when what they ought to be doing is
6 sending it to the Iowa bar and sitting down
7 and working it out. If the Iowa Bar, which
8 is an independent, strong bar, has
9 problems, they'll tell them. As opposed to,
10 we have to send it to all 124 bars and that
11 is what this does. Now, it may be a way of
12 dealing with this was to say to present it
13 to--I would prefer to get rid of the thing
14 entirely, but there may be some language
15 changes we could make that would address
16 this concern.

17 MR. WALLACE:

18 Let me say my thoughts on the subject. One
19 of them is procedural and one of them is
20 more substantive. My concern is not just
21 that it be presented to the major bars with
22 whom you work, they obviously know about it
23 already, these things aren't composed in a
24 vacuum. My concern is that other bars with

1 whom you haven't necessarily worked, be at
2 least advised of it. The Iowa bar may very
3 well have been in close touch with the folks
4 in Sioux City and everybody in Sioux City
5 may be happy with this thing, but out of an
6 abundance the Legal Services Corporation
7 hasn't necessarily been in touch with them,
8 we don't know whether their views have been
9 fully considered by the Iowa bar or whether
10 they haven't. So, what we are requiring is
11 that you spend 22¢ for a stamp and send it
12 to Sioux City and see if they've got
13 anything they want to say about it. Send it
14 too 123 other places in Iowa. I mean,
15 you've got copying expenses and you've got
16 22¢ a stamp, but it's a plan that's going to
17 be proposed every year, it's going to be on
18 the funding application and we're talking
19 about copying expenses and postage
20 expenses. It may be that you'll get a great
21 idea from Sioux City that didn't get to you
22 or filter up through the Iowa bar. I just
23 don't see it as that great a burden. The
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MR. BOVARD:

practical effect may be that you never get any response from 123 of the bar associations, but you might. I think it's worth the postage to find out. Mr. Bovard. I just wanted to clarify the Committee's intention on one other thing. There were a large number of comments on what would be done if a plan were changed in mid year for some reason. It's my understanding that that would not necessitate this kind of communication, that all that is being asked is to almost sort of just a pro form of sending of the plans to every bar association in the case service area and that it's no further than that but that that is the requirement.

MR. WALLACE:

When you put your plan together for your refunding application, what you have to do once a year is send it out to people and see what they think of it. I don't think there's anything in here that should be interpreted as requiring general approval of mid year changes. This is a once a year

1 check of what we are up to.

2 MR. BOVARD: There was an impression in the field that
3 people had to go and meet with all of these
4 associations and do a lot of stuff like
5 that. All we're doing is we're talking
6 about mailing and notifying. Proof that the
7 mail went out, receipts or something.

8 MR. WALLACE: So, maybe it's not a 22¢ stamp, maybe it's
9 certified mail. Frankly, I don't care about
10 that. If somebody tells me I sent this to
11 124 bar associations and unless I've got
12 reason to disbelieve it, I'm going to
13 believe that.

14 MR. BOVARD: There was, by the way, one comment that said
15 that we should not take the word of local
16 programs that this was done. That we should
17 have OFS contact all the local bar
18 associations.

19 MR. WALLACE: I saw that and wondered who that was. I do
20 not want to put that burden on our staff
21 unless, somebody--Again, if somebody tells
22 me, "I sent it out to every local bar, and I
23 didn't get any comment on it." as far as I

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1 am concerned, I'm going to drop it there,
2 I'm going to say, "Thank you for going
3 through the motions." You might hear
4 something, you never know when you're going
5 to get a good idea.

6 MR. HOUSEMAN: Can some of this discussion and agreement,
7 and we all agree, be reflected in the
8 supplementary information?

9 MR. BOVARD: That's why I...

10 MR. WALLACE: Okay. That's the objective. If you want to
11 call a convention of every bar association
12 in Iowa and sit down and work it out, great,
13 the more input the better. We're not
14 requiring it. We are just saying to tell
15 people what you're doing and tell us what
16 they have to say about it. Any amendments
17 that anybody on the Board, in the light of
18 that discussion, or in light of anything
19 else, wants to offer to Section 1614.4?

20 MS. BERNSTEIN: I just have one small question on that. It
21 says, "...and shall document that each year
22 it's proposed annual plan has been
23 presented.." And you're saying their
24

1 statement that we sent it on X date, that
2 you would consider documentation.

3 MR. WALLACE: I'd forgotten the word document was there.

4 MS. BERNSTEIN: It just seems to me that if you are going to
5 leave the word document in there, and I
6 really think to some extent it is...

7 MR. HOUSEMAN: Document can mean that you can have a copy
8 of a letter.

9 MR. BOVARD: "This proposed annual plan was sent to the
10 following bar associations..." Then you
11 have, "return receipts showing that it was
12 sent to each...."

13 MR. WALLACE: But I wasn't going to require, I mean, the
14 way I said it, is that I wasn't going to
15 require return receipts. I still feel this
16 way and I...

17 MS. BERNSTEIN: If you feel strongly, I mean, there are
18 other ways of checking but it's not, it just
19 seems to me that again, when you're doing
20 regulations you try to make them clear as
21 far as what is going to be required and
22 that's the only reason I asked.

23 MR. HOUSEMAN: The requirement is document. It seems you
24

1 can document that by having carbons of the
2 letters, I mean-Xeroxes of the letters.

3 MR. WALLACE: I think that will do it. These programs are
4 going to be monitored and bar associations
5 are going to be talked to and if somebody
6 says "I never heard of the PAI requirement.",
7 that bears some looking into. Unless a
8 problem rears it's head I don't see any
9 reason to be worried.

10 MS. BERNSTEIN: That's fine, I just wanted to clarify it
11 because you had said nothing and we didn't
12 mention the document.

13 MR. WALLACE: Yes, sir. You have a comment.

14 MR. SCUDDER: Yes, my name is Steve Scudder, I'm the
15 Director of the New Hampshire Pro Bono
16 Referral System.

17 MR. WALLACE: Come on up because I think the microphone
18 won't pick you up back there.

19 MR. SCUDDER: The one question I would ask of the
20 Committee is that New Hampshire is a unified
21 bar, as I understand it there are 31 other
22 unified bar associations around the United
23 States and in that situation isn't it
24 implicit that if the New Hampshire State Bar

1 Association approves our pro bono plan, or
2 our private attorney involvement, that that
3 then we wouldn't need the approval of the
4 local bar association.

5 MR. WALLACE:

6 It isn't to me and that's what I was just
7 saying about Iowa. It may very well be that
8 the Iowa Bar represents the folks in Sioux
9 City but I think it's worth a stamp to send
10 it out to all the county bar associations
11 to make sure the unified bar is doing its
12 job right. We've got a unified bar in
13 Mississippi and they and I don't always see
14 eye to eye on things. As long as all we're
15 talking about is putting a letter in the
16 mail, I don't consider that to be a
17 tremendous problem. I don't know how many
18 counties you've got in New Hampshire, but
19 what I intend to do is not just the state
20 office deal with this, but that everybody
21 get a copy of it and say, "Have you got any
22 ideas that we ought to consider?"

23 MR. SCUDDER:

24 I would suggest to you however, that at
least in New Hampshire where the unified bar

1 is so very active and so concerned and
2 supportive of the Legal Services projects
3 that we do have here, that the issue is one
4 that the local bar associations isn't very
5 concerned about and won't have comments on.

6 MR. WALLACE:

Then they don't.

7 MR. SCUDDER:

8 Then the local bar associations, for the
9 most part, meet maybe once a year and don't
10 address substantive issues at all rather get
11 together so that they can have some
12 socializing and be together once in a while.

13 MR. WALLACE:

14 Then you won't get any response, it may not
15 do any good. I don't see how it does any
16 harm. If I thought that--I certainly don't
17 intend to require major conventions of every
18 county bar president in New Hampshire to go
19 over this thing line by line. You ought to
20 send it out to them and see if they've got
21 any comments. If unified bar is doing a
22 good job, you won't get any comments other
23 than, "We're doing a good job." That's
24 find, that's what we like to hear. That's
all that's involved here. Thank you, sir.

1 We are on, at this point, 1614.5.

2 MR. SMEGAL: Excuse me, Mike.

3 MR. WALLACE: Yes, sir.

4 MR. SMEGAL: If the chair would indulge me I would like
5 to go back to 1614.3. I don't think as fast
6 as the rest of you. If I may, you can rule
7 me out of order if you like. Let me just
8 tell you what I would like to have you all
9 consider. In that Section B, it seems to me
10 that we've got a horse mixed with three
11 rabbits. Subsection 1 calls for the joint
12 venture plan to be approved by the Office of
13 Field Services and it seems to me that the
14 next three Subsections are criteria by which
15 the OFS, in reviewing such a joint venture
16 plan, should determine whether it's going to
17 approve it or not.

18 MR. WALLACE: You're on .2, Mr. Smegal. That's 1614.2.

19 MR. SMEGAL: I'm way back, I'm so far behind you I am two
20 sections back. I'm on page 61.

21 MR. WALLACE Page 61 of the Board book.

22 MR. SMEGAL: Mike, I'm glad you're quicker at picking
23 things up. In any event, it seems to me

24

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1 that maybe what would be helpful, and I was
2 listening as the comments were made and I
3 read the material. If we were to move
4 Subsection I of 1614.2(b), up into the
5 introductory clause before the colon and
6 then set forth 2,3 and 4 as Subsections 1, 2
7 and 3, either criteria of which the Office
8 of Field Services would make their
9 determination of approval, I think we have
10 accomplished what we want to accomplish and
11 done what would relieve the concern that Mr.
12 Houseman, has been expressing on behalf of
13 some others. Now, having said that I have
14 some language, but I hesitate to go ahead
15 with the language unless you're going to
16 rule me in order to continue.

17 MR. WALLACE:

No, I've got no intentions of ruling it out
18 of order. If you want to propose language,
19 I understand what you're trying to do.

20 MR. SMEGAL:

I'm saying that the joint venture plan must
21 be approved by the Office of Field Services,
22 is the overwhelming aspect of this. Unless
23 they get approval, nothing else is going to
24

1 happen. There should be enough in that plan
2 in order for the Office of Field Services to
3 approve it and the things that should be in
4 that plan that should be clearly set forth
5 are the fact that 2,3 and 4 are going to
6 happen.

7 MR. WALLACE: Let's hear your language because I
8 understand what you're trying to do and I
9 don't have any conceptual problem with that.

10 MR. SMEGAL: The introductory portion of B which comes
11 down to "Delivery of legal services to
12 eligible clients, subject to..." At that
13 point I would introduce the language,
14 "Subject to approval by the Office of Field
15 Services." I would continue then with,
16 "Among the factors to be considered by the
17 Office of Field Services in reviewing and
18 approving any joint venture plan are
19 whether:" 1, 2 and 3 set out with a little
20 language change. So, in order to get your
21 joint venture plan in effect you are going
22 to have to have it approved by the OFS and
23 among the criteria to be considered in

24

1 whether they approve it or not are what is
2 now, 2, 3 and 4. Whether there will be
3 expenditures of 12.5% by each recipient,
4 whether there will be a bonafide participant
5 involvement and whether there will be an
6 opportunity to involve the private attorneys
7 throughout the entire joint service area.
8 In other words, those are criteria to get
9 the approval, I think the approval is
10 different than 2,3 and 4.

11 MR. WALLACE: I understand that. I understand the
12 technical concerns. Mr. Bovard.

13 MR. BOVARD: If we could go through the exact language on
14 that. As I understand it, let me read what
15 I think it is.

16 MR. WALLACE: Okay.

17 MR BOVARD: We go through, "The delivery of legal
18 services to eligible clients subject to the
19 approval by the Office of Field Services.
20 Among the factors to be considered by the
21 Office of Field Services in reaching a
22 decision, are the following."

23 MR. SMEGAL: Yeah, "among the factors are the following:.

24 MR. BOVARD: "Among the factors to be considered by the

1 Office of Field Services....".."in reaching
2 a decision...."

3 MR. SMEGAL: "....are the following:.1. Whether the
4 recipients involved in joint venture will
5 expend 12.5%, 2. Whether each recipient
6 will be a bonafide participant. 3. Whether
7 the joint PAI venture will provide
8 opportunity."

9 MR. WALLACE: Here's my concern on precise language. I
10 don't have any problem with moving 1 up
11 into the major clause. The way the second
12 sentence is phrased, "Among the things to be
13 considered...", What we have here says in
14 order to get approved, in order to be valid,
15 you must have all of these things. Approval
16 plus conditions. The way that this is
17 phrased under your suggestion would be a
18 difference. It would say you must be
19 approved and in deciding to approve
20 somebody, OFS considers the remaining three
21 conditions. Presumably, under that
22 language, OFS could, having considered these
23 three things, could approve it, even though
24 one or more of them was not met. Now,

1 that's a change from, that's a substantive
2 change from what we certainly have here.

3 MR. SMEGAL: Well, it stops at joint venture before it
4 starts if it's not going to comply. Either
5 you demonstrate your compliance sufficiently
6 to gain the approval of the OFS or you don't
7 go ahead.

8 MR. WALLACE: But that's not what the language says. It
9 says you can't go ahead unless OFS approves
10 it and in approving it, OFS must consider
11 these three things. You must consider these
12 things, but having considered them you may
13 approve it even though one of these three
14 things isn't met. That's not what the
15 language says now, that is what your
16 amendment would say.

17 MR. SMEGAL: What we talked about earlier in discussing
18 this was the fact that under the waiver
19 provisions all of these things could be
20 waived anyway. So, I'm suggesting if there
21 is a circumstance in adjacent areas where
22 one of the programs is going to have 10% and
23 the other program is going to have 15% for
24 whatever the reasons are, why don't we get

1 that up front and if OFS doesn't want to
2 approve it, let's not approve it to start
3 with. Let's not let him get out there for a
4 year and it turns out that one has a 10% and
5 one has a 15% and then we go through the
6 waiver provisions which have all kinds of
7 other ramifications.

8 MR. WALLACE:

Here's what you can do under the waivers.
9 Under the waivers I think you could get a
10 waiver under the expenditure part, which is
11 now 2 and would become 1 under your
12 amendment. I don't think that you can waive
13 good faith. You must be a bonafide
14 participant. I don't think you could waive
15 providing an opportunity for involving
16 private attorneys throughout the joint
17 service area. I think those two, at the
18 very least, ought to be cast iron
19 requirements that OFS and nobody else.

20 MR. SMEGAL:

Well, I don't think our Office of Field
21 Services is going to waive those. I don't
22 think. Do you think they would?

23 MR. WALLACE:

I don't think our Office of Field Service
24

1 would waive those, I certainly hope nobody's
2 Office of Field Service would ever waive
3 those, but I'm writing a regulation that's
4 going to be around for a while, maybe, and
5 what I would like to do is to say that at
6 least 3 and 4, good faith and broad scale
7 involvement, cannot be waived.

8 MR. SMEGAL: Fine.

9 MR. WALLACE: And so the way I would propose, I mean, I
10 like the first part you're doing, but after
11 it says, "Approval to be subject to the
12 approval of OFS", I would put in there
13 something that would say something to the
14 effect that it must be met. I mean, such
15 plans, we don't use the word plans in there,
16 do we.

17 MS. BERNSTEIN: We did.

18 MR. WALLACE: "Such a joint venture plan must meet the
19 following conditions in order to be approved
20 by OFS, such a joint venture plan must meet
21 the following conditions..", and then just
22 renumber.

23 MR. SMEGAL: Then you would say 3 and 4.
24

1 MR. WALLACE: I would say 2,3 and 4, but 2 is
2 automatically subject to waiver. Not if I
3 use must it isn't, is it Although, at the
4 end of 2 we could just say we'll take care
5 of that by saying, "provided that this
6 condition shall be subject to waiver under
7 the terms of 1614.6." I'm beginning to sound
8 like the Federal Register.

9 MR. SMEGAL: Maybe we can do it this way. "In order to
10 obtain approval by the Office of Field
11 Services, 3 and 4. Okay, we'd bring that
12 up, in other words, we'd bring that up to
13 the top and then,..."among other factors to
14 be considered by OFS in reviewing any joint
15 venture plan are whether...", and then just
16 put 2 there. That gives OFS the option of
17 determining that a plan looks good and may
18 involve 10% of one program and 15% of
19 another, which is a problem that we were
20 discussing earlier that I have come a long
21 way around to get back to it.

22 MR. WALLACE: I heard Mrs. Bernstein's comments before
23 when we discussed this matter and I'm going
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MS. BERNSTEIN:

to give her a chance to respond to that.

I guess that if the plan is such that there's not an intention for 12.5% on each participants part, that I have a problem with that. I don't think that goes into the waiver condition. I think that we ought to be encouraging the plan to use 12.5% from each service area when they are adjacent. If it's a situation that having planned to use 12.5%, they are unable to reach it, because they have some overlap and some attorneys that live close to the line or whatever and one gets more, you know, the attorney goes and volunteers in Essex County and he doesn't volunteer in--I think over the years those kinds of things would average out and the program is not going to end up being harmed in the long run by that because a waiver would be granted. At the end of the year if it looks like one program has 10% and the other has 15%. I think we're going about this not constructively enough when we don't mandate that they plan

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1 for the 12.5% expenditure. That's where I
2 think I am differing from you, Tom, if I'm
3 hearing you right and I really think that in
4 order for us to encourage each program to
5 get out there and rustle up some private
6 attorneys in their area, we should insist
7 that OFS, in order to approve a joint
8 venture, that part of that joint venture
9 plan says that 12.5% of the expenditures
10 from each service area, is going to be
11 expended toward private attorney
12 involvement. I think that it is a matter of
13 whether we put our regulation where the
14 philosophy is. As I understand it, I'm
15 willing for the waiver provision to come in
16 and help some programs out that may have
17 special problems because they're adjacent,
18 but I don't think that we want to set up
19 that as a way of not planning to expend it
20 at the beginning.

21 MR. SMEGAL

22 Well, the way this currently reads and the
23 trouble I'm having with it is, I don't see
24 what the Office of Field Services is going

1 to do. There is no criteria here for what
2 their approval is to be based upon. If
3 somebody comes in with a joint venture plan
4 and says, "We're each going to spend 12.5%,
5 we're both bonafide and we're going to give
6 private attorneys an opportunity to be
7 involved" and the Office of Field Services
8 says, "Here's my rubber stamp." I want to
9 give the Office of Field Services an
10 opportunity to review that in some substance
11 form and if they say this is not going to
12 work and we don't like it, we reject it, but
13 more importantly, I think, if two programs
14 come in and say here's our joint plan and
15 the realities of our geographical location
16 or our resource of attorneys from the
17 private bar is that one of them is going to
18 be at 10% and the other is going to be 15%,
19 I think we should leave it with the
20 discretion of our staff to say it's a good
21 program and we approve it.

22 MR. WALLACE:

Mr. Smegal, let me read this, it's not
23 everything that you want, but I think it's
24

some of what you want and some of what Mrs. Bernstein wants and it may get this taken care of. I'm going to read all of B, from the beginning. " In the case of recipients whose service areas are adjacent, coterminous or overlapping, the recipients may enter into joint efforts to involve private attorneys in the delivery of legal services to eligible clients, subject to the prior approval of the Office of Field Services. In order to be approved, a joint venture plan must meet the following conditions: (1) the recipients involved in the joint venture must plan to expend at least 12.5% of the aggregate of their basic field awards on PAI. In the case of recipients with adjacent service areas, 12.5% of each recipients grant shall be expended on PAI; provided, however, that the expenditure requirement is subject to waiver under Section 1606.6 of these Regulations; (2) Each recipient" (no change to that language) (3) "The joint PAI venture" (no

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change to that language) Now, what that does is to solve your structural problem by putting approval up into the first paragraph. It solves Mrs. Bernstein's concern that we are saying, before it's proved, they must plan to expend 12.5%. but as it works out, if it doesn't work out that way, that expenditure requirement may be waived like any other expenditure requirement under this part, under 1614.6. Which is where we are. So, we're saying, don't approve it if they come to you saying one of us is going to spend 10% and the other is going to spend 20%. Approve it if they are both planning to spend 12.5%, but if it doesn't work out that way, grant a waiver. Now, I will move that language. It may not make everybody happy and it may die. I'm doing the best I can.

MR. SMEGAL:

Mike, that's an excellent job. You write a lot faster than I do. The concern I still have though, seems to be there to a little extent. That is where the programs come in

1 recognizing that they aren't both going to
2 have 12.5% and I don't think we should tie
3 the hands of the Office of Field Services to
4 prevent legitimate, joint venture plans from
5 coming in and saying that member A is going
6 to do 10% and member B is going to do 15%.
7 If our Office of Field Services says it's a
8 good plan, it's going to involve the private
9 bar, it's constructive, it's leveraging, I
10 think we should give them the discretion to
11 say, without having to come back in after
12 and get a waiver, but say that we're going
13 to approve this, we understand it's not
14 going to be 12.5% and 12.5%, it's going to
15 be 10 and 15. I think all it requires is
16 to have another word and what you just
17 proposed, somewhere in that, take out the
18 word waiver and put in, "giving the
19 discretion to the Office of Field Services
20 when approving the plan, approving it with
21 the understanding that it's going to be a
22 10%-15%", or whatever it's going to be.
23 certainly not a horse and a rabbit but a 10%-
24

1 15%, or whatever. Just give them the option
2 of approving a plan that doesn't say it's
3 12.5% and 12.5% exactly.

4 MR. WALLACE: I understand what you're saying and based on
5 the discussion we've had previously and
6 discretion that I don't want to give them up
7 front. If it works out that way, I'm
8 willing to have it waived like anything
9 else. My motion would be that there still
10 be a good faith plan to do what we've stated
11 here. Now, that motion hasn't been seconded.

12 MS. BERNSTEIN: I second the motion.

13 MR. WALLACE: Now the motion has been seconded.

14 MR. BOVARD: May I read what I think...

15 MR. WALLACE: What you think I said? Okay, please do.

16 MR. BOVARD: Okay. "In the case of recipients whose
17 service areas are adjacent, coterminous or
18 overlapping, the recipients may enter into
19 joint efforts to involve the private
20 attorneys in the delivery of legal services
21 to eligible clients, subject to the prior
22 approval of the Office of Field Services.
23 In order to be approved, the joint venture
24

1 plan must meet the following conditions..."

2 You then go down to 2, which you do

3 verbatim to the semicolon, but you add..

4 MR. WALLACE: I'm sorry, I don't do it verbatim.

5 MR. BOVARD: That's where I missed.

6 MR. WALLACE: Start at the second line. "Recipients in

7 the joint venture must plan" Excuse me.

8 "The recipients involved in the joint

9 venture must plan to expend....."

10 MR. BOVARD: "Plan to....". Okay. "...expend at least

11 12.5% of the aggregate of their basic field

12 awards on PAI. In the case of recipients

13 with adjacent service areas, 12.5% of each

14 recipients grant shall be expended on PAI,

15 provided, however, that the expenditure

16 requirement of this paragraph is subject to

17 waiver under Section 1614.6."

18 MR. WALLACE: Is this a paragraph or is this something

19 else.

20 MR. BOVARD: This is a subparagraph.

21 MR. WALLACE: "...of expenditure requirement of...."

22 MR. SMEGAL: ".....such expenditure..."

23 MR. WALLACE: ".....such expenditure requirement...."

24

1 MR. BOVARD: "...such expenditure requirement is subject
2 to waiver under Section 1614.6." And then
3 the other two are verbatim.

4 MR. WALLACE: Just renumbered. That's all. That's the
5 motion, it's been seconded. Is there any
6 further debate on this subject.

7 MS. BERNSTEIN: Call the question.

8 MR. WALLACE: Question has been called..

9 MR. SMEGAL: Excuse me. I am going to vote for this
10 because I think it's an improvement. I
11 would like to go on record to say that I
12 think we should avoid getting into these
13 waiver circumstances that I think just bring
14 complexities to it, where we can. I think
15 this is a circumstance where we might be
16 able to simplify it. Mike, I think your
17 motion is a substantial improvement.

18 MR. WALLACE: I appreciate that, your reservation is due
19 and noted. With that, I think we can
20 probably take a voice vote. All in favor
21 say, Aye. Opposed? Hearing no dissent, the
22 motion carries. Let us get back to 1614.5.

23 SMEGAL: I promise I won't go back and revisit 3 or 4.
24

1 MR. WALLACE: If any of your further backing up is
2 constructive as this one, feel free to do
3 so. We made some progress. Now, 1614.5
4 prohibits revolving litigation funds. As I
5 stated at the outset, this is a confusing
6 section as the comments pointed out. Mr.
7 Bovard, would you read the language. Go
8 ahead and read A and B, C is the same and
9 then we'll add D, I guess. Go ahead and
10 read the whole thing.

11 MR. BOVARD: "A. A revolving litigation fund system is a
12 system under which a recipient
13 systematically encourages the acceptance of
14 fee generating cases, as defined in Section
15 1609.2 of these Regulations. By advancing
16 funds to private attorneys, to enable them
17 to pay costs, expenses or attorneys fees for
18 representing clients..."

19 MS. BERNSTEIN: It would be easier for all of us who don't
20 have the exact language, if you would go in
21 phrases because I'm sure people out there
22 are having as much trouble taking this down
23 as we are. If you would go in phrases and
24

1 assume it's going to be slow getting it on
2 the paper and then we'll have more
3 constructive discussions.

4 MR. BOVARD: "A. A revolving litigation system is a
5 system under which a recipient
6 systematically encourages the acceptance of
7 fee generating cases as defined in Section
8 1609.2 of these regulations, by advancing
9 funds to private attorneys to enable them to
10 pay costs, expenses, or attorneys fees for
11 representing clients. B. No funds received
12 from the Legal Services Corporation shall be
13 used to establish or maintain revolving
14 litigation fund systems." The rest is
15 stricken.

16 MR. SMEGAL: The rest of A was out after the insert,
17 starting with "funds".

18 MR. BOVARD: Yes. After the word "funds", it's totally
19 different. Everything else is stricken.

20 MS. BERNSTEIN: Before the word "funds".

21 MR. BOVARD: I'm sorry, after the word "which". We add
22 to this Section, Paragraph B. "Nothing in
23 this section shall prevent a recipient from
24

1 recovering from a private attorney the
2 amount advanced for any costs, expenses or
3 fees from an award to the attorney for
4 representing an eligible client."

5 MR. WALLACE: Now, having worked that out with Tom last
6 night, I will go ahead and move. Basically
7 what we have here is a substitute section to
8 1614.5, C stays the same and everything else
9 is changed as we've read. I would move the
10 adoption of that substitute 1614.5. Is
11 there a second.

12 MS. BERNSTEIN: There is a second.

13 MR. SMEGAL: How come I never get to second anything?

14 MS. BERNSTEIN: I'll withdraw.

15 MR. SMEGAL: I second.

16 MR. WALLACE: Let the record reflect that Mr. Smegal has
17 seconded that amendment. Is there any
18 discussion?

19 MR. SMEGAL: I just have a question. Having said this
20 before, though, I'm rather reluctant to
21 proceed. Eligible client, is one an
22 eligible client if one comes in with a fee
23 generating case?
24

1 MS. BERNSTEIN: Maybe. Because, as I understand it, there
2 might be a situation that's a fee generating
3 case but no private attorney is willing to
4 take it.

5 MR. BOVARD: Right. Or, it turns out that you don't
6 think it's a fee generating case but it
7 turns into one.

8 MS. BERNSTEIN: Or something develops that is a civil rights
9 issue or something else develops in the case.

10 MR WALLACE: What we have done here is, we have gotten
11 good comments and I agree with them, that
12 what we were trying to prohibit here was
13 already prohibited under Section 1609.
14 Revolving litigation funds are prohibited
15 under the existing legislation and the
16 existing regulations didn't want to get rid
17 of it altogether, we want to point out that
18 what we're concerned about here, is
19 systematic violations of 1609 and that
20 saying we're against systematic violations
21 of 1609, we don't say that you never advance
22 fees, we don't say that you never advance
23 costs and we don't say you never recover

24

1 them if we do. We are saying that a
2 systematic attempt to violate 1609, is a bad
3 thing. I think this clarifies what we
4 intend to do here and removes some of the
5 concerns that were raised in the comments.
6 Any further discussion of this amendment on
7 the Committee. Any comments on the
8 amendment from the floor? We've got one
9 people are happy with, I think. At that
10 point, are we prepared to vote? All in
11 favor of the motion say Aye. Opposed?
12 Hearing no dissent 1614.5 is amended
13 according to the motion. We are now on
14 1614.6 on waivers. Several waivers have
15 been suggested in the comments. I've stated
16 at the outset what my view is on the
17 waivers. What I'm going to do at this point
18 is to--I think Mr. Houseman, what I'll do is
19 ask you to go ahead and briefly make the
20 case for the waivers. We do have to break
21 in about five minutes, so I don't want to
22 put any amendments on the floor right now,
23 what I think I'll do before we break from
24

1 lunch, is let you make your remarks as to
2 what waivers and why you think we ought to
3 be considering adding at this point. We'll
4 have lunch time to think about them and
5 we'll come back and if there's any votes to
6 be had, we'll have some votes after lunch.
7 So, go ahead and tell us.

8 MR. HOUSEMAN: Fine. I think the major waiver issue is
9 what I call, appropriately I think, the
10 American Bar Association waiver language.
11 My comments, the first page of my comments,
12 which are in the Board book...

13 MR. SMEGAL: Page 87.

14 MR. HOUSEMAN: The purpose of this, just let me, so we are
15 all operating on the same procedure, I think
16 this is all clear. But, in Salt Lake City,
17 Paul Eaglin make a motion to adopt this.
18 Mike made a motion to table, it was
19 something like this, a slightly different
20 language. Mike make a motion to table this
21 and to reconsider this kind of a waiver.
22 So, we're back to reconsidering this,
23 because we hadn't in the deliberations in
24

1 Detriot, specifically talked about this kind
2 of particular language in the context of a
3 waiver. What I'm proposing and what the
4 American Bar Association proposes, and I
5 handed out the comments of the American Bar
6 Association to all of you, on this and other
7 issues but it addresses this in the
8 comments, is to build in flexibility on the
9 waiver by permitting a program and a bar
10 association or associations, to come up with
11 a plan. A plan that can demonstrate that
12 it will provide for effective, significant
13 involvement of private lawyers, providing
14 legal services to the poor. If they can
15 come up with a plan, and that plan can
16 demonstrate, presumably in this context to
17 the Office of Field Services, that it is
18 going to do that, then that program ought to
19 be able to get a waiver. As I understand
20 the objection to it from Mike, is that it
21 isn't concrete enough. I doesn't give the
22 language "substantial" which we had in
23 before, which* was vague -in some sense,
24

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1 "significant" and "effective" is as vague.
2 I don't know if it's as vague, I don't think
3 so, we could still play with the language
4 "economic and effective". I was trying to,
5 by using the word "effective and
6 significant", give some criteria by which
7 the Office of Field Services would review
8 any plan. That is, it has to be an
9 effective plan, it has to significantly
10 involve private lawyers, it just can't be
11 two lawyers or 1%, it's got to involve a
12 certain number. Leaving enough flexibility
13 so that there was some discretion in the
14 Office of Field Services, but some
15 discretion in local communities. The major
16 argument for this is that this builds in to
17 the PAI requirement, local bar and local
18 control and a local effort to attempt to
19 meet, in a good faith way, the requirements
20 of PAI. When programs are doing that, you
21 take them out from what I still consider to
22 be a relatively mechanistic 12.5% approach,
23 which we've adopted and we're not going over
24

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1 that again. The reason for urging this, is
2 that it is a way, suggested by the ABA,
3 consistent with the ABA's position, builds
4 local bar association involvement, it's got
5 to be a bonafide involvement and permits a
6 waiver if a plan can demonstrate that it is
7 going to, in fact, give good plans and
8 significantly involve private attorneys
9 providing legal services to the poor. There
10 may be an option of trying to read in here
11 some more specific requirements. I think
12 that is a mistake, I think any effort to do
13 so, besides what we already have in the
14 waiver that is now 1614.6, covers the really
15 concrete situation that is 12.5% of the
16 cases. The only other thing that has been
17 suggested is 12.5% of the attorneys, which
18 we can put in here. I think this does not
19 lock you in to that kind of detail, this
20 give more flexibility at the local program
21 level and at the corporation level. It
22 still does not get anybody out of the
23 "significant and effective involvement of
24

1 private attorneys in the delivery of legal
2 services." The argument ultimately is that
3 this proposal will build in the kind of
4 local control, the kind of local decision
5 making, the kind of strong relationships
6 between the local bar and the program that
7 we want, and permit a waiver in those
8 limited circumstances where the bar and the
9 program come up with a plan that can
10 demonstrate that it is effective and
11 significant. That is the main issue, we've
12 dealt with one of the other issues which is
13 the phase and time. I appreciate your
14 comments on that, I think that it takes care
15 of my concern and I think this is really the
16 issue that we ought to raise and I'll back
17 off, so to speak, the other waiver
18 proposal. There are some technical issues
19 in the waiver language, some of which you
20 are proposing which we'll get to later.
21 This is the substantive issue around waiver,
22 as I see it.

23 MR. WALLACE:

Leaving it at that, the chair in accordance

24

1 with the previously announced recess
2 schedule, we will now recess for lunch,
3 we'll be back here about 1:00 and address
4 this waiver issue when we get here. Thank
5 you all.

6
7 MR. WALLACE:

8 Let us reconvene the meeting. We've got a
9 quorum of this Committee present. When we
10 broke, Mr. Houseman had presented his views
11 on sort of the modified ABA proposal. This
12 stems from a resolution passed by the ABA
13 General Assembly in 1984. The latest
14 comments we have, come I think, from the
15 Standing Committee on Legal Aid and Indigent
16 Defense. It is based on that resolution
17 passed by the General Assembly and I think
18 the proposal that Mr. Houseman put in his
19 recommendation is also somewhat modified,
20 but that's where it comes from. Now, we've
21 heard the presentation on the subject, I
22 will state what continues to be my view. We
23 certainly believe that local bars ought to
24 be consulted in the development of a plan

1 and that is why we did what we just did back
2 in Section 1614.4, requiring they be
3 consulted. There certainly ought to be a
4 certain amount of flexibility here. I
5 believe the maximum amounts of flexibility
6 that this chairman is prepared to endorse,
7 is what we have in Waiver 6, as we presently
8 have it. This is in the judgement of the
9 governing body, which has consulted with the
10 local bar associations, it would not be
11 economical and efficient to use all the
12 money, so long as you are carrying a
13 specified portion of caseloads. I realize
14 that there is a certain amount of discretion
15 that ought to be left to people in deciding
16 what kind of waivers to grant. I don't want
17 to leave too much discretion to the staff
18 and I don't want to leave any more
19 discretion to local bar associations. I
20 want something concrete we can hang a hat
21 on, and I've got two ways to hang it and
22 somebody's shown me so far. One is on money
23 and one is on cases. If you get away from
24

1 that, I wouldn't give my staff any more
2 discretion to get away from those concrete
3 markers, I certainly don't think I would
4 give local bar associations that I wouldn't
5 give my staff. Local bars ought to be
6 involved but I don't think that unless local
7 bars can give me some concrete standard that
8 I haven't seen so far, that I want to give
9 them discretion that I wouldn't give the
10 staff. That's my view on this amendment and
11 it hasn't been changed since Salt Lake
12 City.. There are others on this panel, and
13 I know Mr. Eaglan was in the room. Mr.
14 Eaglan, I would be delighted if you would
15 sit in on the Committee because we're
16 discussing to motion that you made in Salt
17 Lake City, and that would be to add the ABA
18 waiver, or some form of it, to this
19 Regulation. I've already stated that the
20 reservations I had in Salt Lake have not yet
21 been satisfied sufficiently, to my point of
22 view, but there may be people on this
23 Committee...
24

1 MR. EAGLAN:

2 When I mentioned it to you at Salt Lake, we
3 were talking privately and you said that you
4 wanted more time to think about it. It was
5 my understanding you would consider it a
6 while and you said you would also have the
7 staff do some work on recommendations and
8 have fuller discussion on it.

9 MR. WALLACE:

10 And that's what we're doing. My view was
11 that the definition we saw in Salt Lake was
12 not sufficiently concrete. It says that it
13 provides for substantial involvement in the
14 local bar and if the local bar likes it,
15 it's okay. I want to have some more
16 concrete standards. What we've seen in the
17 proposal that Mr. Houseman has put before
18 us, takes away "substantial" and puts in
19 "effective and significant", which does not
20 add a lot more concrete nature to me. The
21 reservation I had in Salt Lake, having
22 thought about it, having reconsidered it, I
23 still have. It hasn't been solved to my
24 satisfaction, I'm not the whole Committee
and I'm certainly not the whole board and T1

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1 that's why on this point I am happy to open
2 it up for any comments that any members of
3 the Committee or the Board who happen to be
4 sitting in on this Committee, meeting may
5 have as to why we ought to go to some form
6 of waiver along the lines that the ABA did.

7 MR. EAGLAN:

8 One of the things that I thought that at
9 least was impressive to me when I made the
10 comment to you in Salt Lake City, is that
11 reading the wording of the ABA waiver, and
12 keeping in mind our preference for local
13 control, it seemed, by it's wording, to deal
14 with that very well. Where the program, PAI
15 plan worked up by the recipient in the bar
16 association, would be regarded as prima
17 facie compliance.

18 MS. BERNSTEIN:

19 I'm not sure, to tell you the truth, that we
20 can even legally delegate this. This is a
21 delegation--If we've made a decision that
22 12.5% needs to be done, to turn around and
23 say that we're going to take another non-
24 responsible, that has no fiduciary
relationship *with our programs, their

1 evaluation of a plan to be prima facie
2 evidence of their compliance with that
3 regulation, seems to be a bit far afield.

4 MR. SMEGAL: I'm a little confused. Let me see if I
5 understand correctly what we're talking
6 about here. Isn't it Subsection B of 1614.
7 Where are we now, we're talking about
8 adding..

9 MR. WALLACE: A 7th waiver to 1614.6.

10 MR. SMEGAL: Right. 1614.6C, which talks about a partial
11 waiver. We're talking about partial waivers
12 and the preamble to that partial waiver
13 section says, "When the recipient shows to
14 the satisfaction of OFS. LeaAnne was just
15 stating that somebody else is going to make
16 this decision. The decision is going to be
17 made by OFS, with respect to 1 through 6 as
18 they are now, plus this Subsection 7, if it
19 were added. Is that right.

20 MR. WALLACE: Well, what the language would do would be to
21 create a presumption. Now, I don't think
22 prima facie actually appears. Prima facie
23 did appear in the ABA resolution. In the

24

1 language that Mr. Houseman has, it is that
2 the recipient and the local bar can
3 demonstrate, again, to OFS, that it would
4 provide for effective and significant
5 involvement. I realize that the final
6 responsibility remains with OFS, but I don't
7 like leaving that much discretion to OFS.
8 I'm looking for something concrete, that has
9 been my objective all the way through the
10 arduous process of dealing with this
11 regulation and concrete usually means
12 numbers and I haven't got any here.

13 MR. SMEGAL:

14 Now that I'm up to the same speed that you
15 are up to, it seems to me that we have words
16 that require discretion already in the other
17 sections and this is no different. For
18 example, in C(1), the OFS is going to have
19 to determine to it's satisfaction whether
20 the population of qualified lawyers is too
21 small. I don't know what too small means.
22 Somebody is going to have to determine what
23 too small is. In the next section we have
24 the term "willing". When is a lawyer

1 willing to take on PAI cases? I don't know
2 what that means. The discretion, again, is
3 with OFS and I think if you go through here,
4 continuing over on page 73, you will see
5 that the other partial waiver provisions
6 all have language like that. They are not
7 limited to what you said earlier, Mike,
8 cases and money. They are limited to all
9 kinds of other conditions. What we have
10 here is another condition that can be
11 considered for a partial waiver. Now, it
12 seems to me that we can clean up this
13 Subsection 7 a little bit. There's too many
14 words in it. I would move the addition of
15 Subsection 7 to 1614(c)(6), to read
16 differently than it is set forth in Mr.
17 Houseman's material on page 87 of our Board
18 book. The point I would make is that each
19 one of these prior subsections had
20 discretion that we leave with OFS as we
21 would leave with OFS with respect to this
22 particular partial waiver provision.

23 MR. WALLACE:

We certainly do leave discretion with regard

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1 to each one of them. No doubt about it, I
2 don't see how you can get away from it
3 altogether. I've tried to minimize it. I
4 don't think too small is as nebulous a
5 concept as effective or significant would
6 be. Too small means that you just don't
7 have enough lawyers to get the work done.
8 That's a fact question. It's a fact
9 question that may be difficult to resolve,
10 but you know what it is you're looking for.
11 You're looking whether there's enough
12 lawyers to do the job. Same way with
13 willingness. It's a fact question of
14 whether or not those lawyers are willing to
15 do the work and it may be hard to resolve
16 that fact question, but somebody has got to
17 resolve it and that's what OFS is for.

18 MR. SMEGAL:

19 Well, we could certainly take care of that
20 if small is not indefinite to you, we
21 replace effective and significant with
22 large. Then we've got it. Large
23 involvement of the private bar. I don't see
24 where the words are the problem. It seems

1 to me that if we are going to leave
2 discretion with OFS in these other six
3 areas, this is no different. This is
4 another consideration that they would have
5 before them if the private bar and the
6 recipient have large involvement of the
7 private lawyers, I think you're right where
8 you are with Subsection 1.

9 MR. WALLACE:

10 We have defined what we mean, I mean, we
11 have defined a monetary goal to be 12.5%. A
12 monetary requirement to be 12.5%. All of
13 the discretion, the fact finding discretion,
14 the fact finding discretion has to do with
15 whether or not the private resources are
16 available to meet a concrete target. What
17 does is take away the concrete target. The
18 target is no longer 12.5%, it is effective
19 and significant involvement. I don't know,
20 I am not willing to give both fact finding
21 discretion as to whether or not you're
22 factually able to meet the target and policy
23 discretions as to what the target ought to
24 be to OFS. That is the qualitative
difference in discretion that it seems to

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1 me we're talking about here. I'd love to
2 get rid of discretion altogether, but I
3 don't know how to do it.

4 MR. SMEGAL: I don't see how you distinguish between the
5 discretion that would be in 7 and the
6 discretion that is also in 1, Mike. There's
7 no 12/5% in 1, it says "too small."

8 MR. WALLACE: The target of what you're trying to do is..

9 MR. SMEGAL: But there is a target overlying all of
10 these, still there.

11 MR. WALLACE: Too small to do what? Meet the 12.5%
12 requirement. What 7 does is to take away
13 the 12.5% requirement and substitute
14 something else, effectiveness and
15 significance. I'm not prepared to do that.
16 I will take away the 12.5% of the money
17 requirement and put in extraordinary
18 circumstances at 12.5% of cases requirement
19 and that's what we've already done in 6.
20 But 7 takes away any concrete goal and I'm
21 not prepared to do that. Ms. Bernstein,
22 you're trying to jump in.

23 MS. BERNSTEIN: We are revisiting something that we talked

24

1 about in Salt Lake. Once again, I remind
2 the Board that Reese Smith has been very
3 much in favor of private attorney
4 involvement. In his letter to you, he said
5 that we should not be considering 'whether',
6 in mandating the 12.5%, but 'how', in terms
7 of involving the local bar. That is the
8 distinction that we're trying to get to with
9 Tom is that we're saying here is the 12.5%
10 and we want all the involvement we can get
11 from the local bars and everybody that's
12 involved with private attorneys, in how this
13 is best going to be done. For us to
14 delegate the possibility of that being
15 whether you use the words prima facie or
16 waiver or not, but it certainly is going to
17 be construed that way by someone who wants
18 to push it, is that this, if we give this
19 kind of mutual assent on the part of our
20 programs, to something other than 12.5%,
21 then we are kind of negating the whole
22 12.5%. That's where I am agreeing with you
23 and I think Reese Smith agrees with you. We
24

1 want to involve the local bars in how to do
2 it, but we want to make it very clear that
3 it is not a question of their deciding
4 whether to do it. I think that's the point
5 of departure and I thought we had reached a
6 resolution. I realize we are revisiting a
7 lot of these issues, and that's fine.

8 MR. WALLACE:

9 This is an issue we specifically agreed to
10 revisit as a result of Mr. Eaglan's motion.
11 Having revisited it, I am still where I was
12 to begin with, but I'm not the only member.
13 Are there other members of the Committee and
14 the Board, because the Board will be
15 addressing this tomorrow, I expect, who want
16 to comment on the subject. Mr. Houseman,
17 you've been waiting patiently since you made
18 your opening remarks before lunch and I'll
19 let you address the concerns that have been
20 raised on the Committee.

21 MR. HOUSEMAN:

22 Well, two factual concerns. First, Reese
23 Smith speaks for himself, not for the ABA.
24 Secondly, his letter didn't say 12.5%, it
said 10% and he was quite clear about that.

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In terms of this issue, I think the arguments have been made and the question is, are you willing to give some additional discretion to your staff if the local bar association or associations, representing the majority of the lawyers in the area, can a program work out what they think is a good plan, and they can demonstrate to your staff that that plan is going to involve large involvement of private lawyers and this thing says they have to demonstrate it, the burden is on them, and I think I tried to remove the prima facie business completely. I just think that, in those circumstances which may be very limited, I think some of you think of this as some gigantic opening, I don't. I'm not even sure there are many programs that can take advantage of this. You're talking about a majority of lawyers in the service of bars. But, that in those circumstances, it seems to me that you ought to be able to give that kind of discretion and that's the bottom line. If it does not

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1 meet the concreteness that you want, I've
2 eliminated as many of the kinds of concerns
3 about the prima facie, that have been
4 involved.

5 MR. DURANT: What's your specific language?

6 MR. HOUSEMAN: It's--I don't care, we can deal with this
7 effective and significant, that was a way to
8 try to be as concrete as possible.

9 MR. WALLACE: I will say this, I think that you did work
10 on this, the language we've got is a lot
11 better than the ABA resolution, but it's not
12 good enough. I still think we need a
13 concrete target and we haven't got one and
14 that's where I find myself remaining.

15 MR. BERNSTEIN: I think, in my view, is that 6 with the
16 little ii, that would cover in the situation
17 that you are talking about because you are
18 providing that the governing board, and you
19 just mentioned the local bar, but you're
20 saying it has to be approved by the
21 Corporation. The distinction I see here is
22 that 6 mentions the 12.5% and yours
23 doesn't. So there is the implicit and

24

1 explicit goal of 12.5 being met. All of
2 this...
3 MR. HOUSEMAN: Of cases. I have had, as you know, problems
4 with that concrete standard which I think
5 raises a number of troubling definitional
6 questions on what a case is and secondly I
7 don't want to go back, I think it's a good
8 standard. I mean, there's two points, we
9 don't know how it's really going to play out
10 because it's new. Secondly, there's these
11 definitional problems and cases and there
12 may be other situations where a program in a
13 bar association have worked out an excellent
14 PAI plan and maybe they're not having 12.5%
15 of cases. Maybe they have more or less
16 cases, maybe they are doing a substantial
17 amount PAI, but the program cannot show that
18 it is spending 12.5% of it's funds and yet
19 you can look at that plan and you say, "My
20 God, this is fine. This is doing what
21 exactly we want it." Under those
22 circumstances, and there may be many, this
23 is trying to build in that limited
24

1 discretion, that's all it is.

2 MR. DURANT: How is it in your mind, that point addressed.
3 That point is addressed by being rejected,
4 it seems to me.

5 MR. DURANT: To the fact that there are a significant
6 number of..I'm trying to ask this
7 diplomatically.

8 MR. WALLACE: I realize what you're trying to do. You're
9 trying to ask me why I don't agree with
10 Alan. You don't have to be diplomatic, you
11 don't have time to be diplomatic. I mean,
12 my bottom line is this; that we have this
13 regulation and it historically has been
14 created because we believe that local
15 control, left to itself, doesn't produce
16 enough PAI's. In order to decide how much
17 PAI we are going to have, we are going to
18 give some flexibility, we're going to let
19 OFS make some decision, but I'm not prepared
20 to take away an objective standard. OFS,
21 we've got nice people at OFS and in the
22 future we may always have nice people at
23 OFS, but policy decision rests with us and

24

1 it seems to me that what we ought to tell
2 our staff to do is look for something
3 concrete. What we ought to look for
4 concrete to begin with is amount of money
5 and in extraordinary circumstances they can
6 look at something else concrete, which is
7 the amount of cases. I'm not going to cut
8 it loose to float in the stratosphere.

9 MR. DURANT:

10 Alan, I really think Mike was right. It
11 seems to me your point is addressed by--Say
12 for example the bar association and the
13 majority of the lawyers get together and
14 they come up with this and say that we can't
15 meet this 12.5%. It seems to me, just to
16 take the complete waiver sections, seems to
17 me that should then be demonstrated by those
18 efforts. If qualified private attorneys are
19 unavailable to carry out the programs, or
20 all the ones who are available can't or
21 refuse, or have conflicts, I assume this
22 gathering of people would show. Wouldn't it?

23 MR. HOUSEMAN:

24 No, there's a lot of other circumstances.
For example, you may have a program that the

1 best use of your PAI funds is to contract
2 either pro bono or otherwise, for some
3 lawyers for special expertise in a few major
4 cases and areas, say water rights or
5 something, where some other area of
6 expertise that the program doesn't have and
7 they take on several major matters. Under
8 the cases it's not 12.5% of the cases. You
9 may not get up because they do it pro bono,
10 12.5% of the funds and you may have some of
11 these other factors playing a role here.
12 It's not playing enough of a role to get a
13 waiver here, it's not quite playing enough
14 of a role to get a waiver there, it's a
15 perfectly bonafide effort, everybody is
16 working hard at it, everybody agrees the
17 effort is succeeding, and yet we're being
18 caught by technicalities of some figure or
19 12.5% of cases or money. I don't know if
20 there are things that fit within that
21 framework. I think there may be. I don't
22 think there are very many and all I am
23 saying is that if there are, we ought to
24

1 provide that flexibility.

2 MS. BERNSTEIN:

3 Let me say, if that's the circumstance that
4 you're trying to address, then I am dead set
5 against it because as my approach to this
6 private attorney involvement is that you try
7 to involve the greatest number of the bar in
8 all of the kinds of cases, not specialized
9 cases. It seems to be that there has not
10 been that bonafide effort and if what you're
11 saying is that the OFS would be able to turn
12 it down if they find that there is not the
13 bonafide effort and so forth, involve more
14 private attorney involvement in those
15 different areas, I think that they are
16 covered in all these other partial waivers.
17 The OFS can, under these other
18 circumstances, look at whether or not you've
19 only got five attorneys in your county and
20 they are unable to take cases in X areas,
21 and if this is going to be an impossibility.
22 I frankly think it is covered and I don't
23 see any point in creating another.

24 MR. HOUSEMAN:

There will be situations where you have a

1 lot of attorneys in a service area and
2 participating in a pro bono plan. The
3 program does not have to expend 12.5% and
4 AR's not 12.5% of the cases, maybe it's half
5 of the attorneys in the area. That is the
6 situation we are talking about and there are
7 situations that will come up and we just
8 don't have them covered. It's not the
9 situation where the program feeds out one
10 big case to somebody. I'm talking about a
11 bonafide, serious PAI plan that the local
12 bar, the Board and everybody has agreed to
13 and they can demonstrate to the OFS that
14 this is a legitimate, realistic plan.

15 MR. WALLACE:

16 Let me say this, I think we have all heard
17 where we are. Mr. Smegal, if you would like
18 to move the adoption of this, I'll second it
19 for purposes of getting a vote. Out of
20 deference to Mr. Eaglan, who raised this to
21 the full Board, out of deference to the ABA
22 who has obviously put some thought in this.
23 I am willing to have us vote on it but I'm
24 going to vote no. If you want to make the

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MR. SMEGAL:

motion, I'm going to leave that up to you.
Thank you, Mike. I will make the motion that we add to Section 1614.6(c) a Subsection 7, that I would amend slightly from what appears on page 87 of Mr. Houseman's material, or what appears on page 87 of our Board book, the first page of Mr. Houseman's material. My motion would be a Subsection 7, that reads as follows, "The recipient and the bar association or associations, representing a majority of lawyers in the service area, agree on a plan..." I would then delete the number of words following thereafter so that it reads, "...agree on a plan that.... provides for effective and significant involvement of private attorneys providing legal services to the poor."

MR. WALLACE:

I will second that as I have previously stated. We have had significant debate on this issue. We will do this by a roll call, the motion as stated by Mr. Smegal is to add Section 7, as a waiver, "the bar

1 associations or associations, representing
2 the majority of lawyers in the service area,
3 agree on a plan that provides for effective
4 and significant involvement of private
5 lawyers in providing legal services to the
6 poor." Mrs. Miller, how do you vote.
7 MS. MILLER: Aye.
8 MR. WALLACE: Mrs, Bernstein.
9 MS. BERNSTEIN: No.
10 MR. WALLACE: The chairman votes no. Mr. Durant.
11 MR. DURANT: No.
12 MR. WALLACE: Mr. Smegal.
13 MR. SMEGAL: Aye.
14 MR. WALLACE: The motion fails by a vote of 3 to 2.
15 MR. DURANT: May I say something, Mr. Chairman.
16 MR. WALLACE: You certainly may.
17 MR. DURANT: Mr. Houseman. If you can, since this is a
18 Committee vote and not a full Board vote, I
19 am open to seeing if you can--My reading of
20 what you've said and reading this, I think
21 that the concerns that you've raised fit
22 within the waivers that already are there.
23 I'm perfectly willing to be open and if you
24

1 can persuade me otherwise between now and
2 the, I'll reconsider my vote. In listening
3 to the debate, I honestly don't think the
4 examples that you're giving wouldn't be
5 covered by the existing waivers. If you can
6 show me that, I'll change.

7 MR. HOUSEMAN: Maybe you're right.

8 MR. WALLACE: Mr. Bovard, we discussed earlier this
9 morning about cleaning up the language on
10 Subsection 6, in order to save a few trees.
11 Would you like to read the language as we
12 last left it.

13 MR. BOVARD: We have two options, basically. We could
14 strike 1, and basically just created a
15 sentence, there wouldn't be any colon. We
16 could either retain the entirety of what is
17 now Subsection 2 or Subparagraph 2, starting
18 with the words, "the recipient has been
19 unusually efficient in the use of it's PAI
20 resources and consequently..." We can
21 include that or we can strike all of that
22 and just say, "Provided that the recipient
23 has handled and expects to handle at least
24

1 12.5% of cases brought on behalf of eligible
2 clients through it's PAI program."

3 MR. WALLACE: Tell you what. I think I'm going to move
4 just to save the maximum number of trees. I
5 think that Mr. Smegal was pointing out a
6 deficiency in bar input and whatever else
7 you have are all assumed in what we are
8 saying here. I would move to amend 6 as
9 follows, and I'll read the whole thing. "If
10 in the reasonable judgement of the
11 recipients governing body, it would not be
12 economical and efficient for the recipient
13 to expend its full 12.5% of Corporation
14 funds on PAI activities, provided that the
15 recipient has handled and expects to
16 continue to handle at least 12.5% of cases
17 brought on behalf of eligible clients
18 through it's PAI programs."

19 MR. SMEGAL: Second.

20 MR. WALLACE: It's been moved and seconded to save a lot
21 of trees. Is there any discussion on this
22 language? All in favor, say Aye. Opposed?
23 Hearing no dissent, that is adopted. Are

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there any other amendments or concerns that any member of the Committee has with regard to Section 1614.6?

MR. HOUSEMAN:

Mike, there is a very minor, technical thing.

MR. WALLACE:

On page 73. You didn't like my language, that I proposed. What I think we mean under 4, would meet most of my concerns if you add after "encumbrances", the phrase "When added to projected expenditures." It would read like this, "The recipient uses a fee for service program whose encumbrances, when added to projected expenditures, would meet the requirements but its actual current expenditures do not meet the requirements." That means that you are looking at both encumbrances and expenditures. That you're looking at what they projected expenditures are. Then the rest of it follows. That meets my concerns about what I was trying to address in my other language, which you didn't like and I've tried to come up with another way.

MS. BERNSTEIN:

Take that over again, what's the wording.

1 MR. HOUSEMAN: "The recipient uses a fee for service
2 program whose encumbrances when added to
3 projected expenditures would meet the
4 requirements but it's actual current
5 expenditures do not meet the
6 requirement..." It's got more to it, but I
7 wouldn't change it. The only thing I am
8 adding is ".....when added to projected
9 expenditures..." Which is I think, what you
10 mean.

11 MR. WALLACE: I think it is, too. I'm wondering what the
12 difference is here between projected
13 expenditures and current. I realize that we
14 are doing this prospectively. You are doing
15 this in the middle of the year and you are
16 projecting your expenditures and your
17 encumbrances and you realize you are not
18 going to make it.

19 MR. HOUSEMAN: No, when you add your encumbrances and your
20 projected expenditures it looks like...

21 MR. WALLACE: You would make it.

22 MR. HOUSEMAN: It's just when you look at your
23 expenditures, you realize you're not going
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to make it. The rate you are expending, you are not going to make it. If you add your encumbrances to that and at that rate project, because you don't know what your actual current expenses are going to pan out to be. You can say I don't project it as the issue. That's all I'm saying.

MR. WALLACE:

I understand what you're doing and I think I agree with it. I think Mrs. Bernstein had a question.

MS. BERNSTEIN:

I had a question because the way that, when you do it the way you're doing it, I think that there is a question as to whether the encumbrances could have been for a previous grant year.

MR. HOUSEMAN:

No.

MR. WALLACE:

Do we have a definition of encumbrances someplace, or is that an accounting term that everybody but me understands.

MR. BOVARD:

I have a definition. I assume it is an accounting term that everybody understands.

MR. WALLACE:

We have talked about encumbrances as if we did understand them, that these were

1 expenditures to which we are committed. The
2 problem that you're having, Mrs. Bernstein,
3 I think is not adding projected
4 expenditures, it's deciding what ought to
5 fall within the term "encumbrances."

6 MS. BERNSTEIN: I agree.

7 MR. WALLACE: Let me say this. This may be something we
8 will have to revisit later. I am satisfied
9 with the amendment you are offering, it
10 doesn't add any new problems and it
11 clarifies where were. We may have to
12 readdress at a later date, what
13 encumbrances mean. We are not prepared to
14 do that here today. I didn't think there
15 was any real doubt about it. That's
16 something that...

17 MS. BERNSTEIN: What I thought it meant would have included
18 projected expenditures. That's why I am
19 questioning it now.

20 MR. WALLACE: This is projected expenditures for this
21 year.

22 MS. BERNSTEIN: I understand, but I assumed we were talking
23
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1 on a fee for service situation that you
2 maybe had planned for X number of cases in a
3 divorce area at \$100 a case to go out and
4 that you were encumbering this amount of
5 money and you know you're going to have
6 plenty of cases. That's the reason I'm
7 questioning it, because what I had thought
8 this meant before, now brings into question
9 of whether or not we're...

10 MR. BOVARD: What if you put, "Whose current encumbrances
11 and projected expenditures for the current
12 fiscal year, would meet the requirement."

13 MR. WALLACE: Thank Mr Mendez and Mr. Wentzel, or whoever
14 owns this book. "Commitments in the forms
15 of orders, contracts and similar items that
16 will become payable when goods are delivered
17 or services rendered."

18 MS. BERNSTEIN: That's why I thought that we had covered
19 it. I am concerned that it is going to
20 throw into question...

21 MR. HOUSEMAN: Let me explain what my problem is. When you
22 say encumberances, what the--We all agree on
23 what we want to accomplish, let me be quite

24

1 clear. So, all I am trying to do is say, if
2 you technically read this, what it says is,
3 look to encumbrances alone. What you're
4 really saying is you look to expenditures
5 and encumbrances and if that meets the
6 requirement because the expenditures don't.
7 That's all I'm trying to add here, a
8 technical amendment.

9 MR. WALLACE:

I understand the concern and I understand
10 why we're doing this. This makes it better
11 than it was before. It may not solve the
12 definition of encumbrances. I think I just
13 moved that, did I hear a second.

14 MR. SMEGAL:

Second.

15 MR. WALLACE:

Is there further debate on this amendment.
16 If no, we will vote. All in favor, say
17 aye. Opposed? Hearing no dissent, 4 is
18 amended as ordered. Any further on 1614.6?
19 Let's go on to 1614.7. I just want to say
20 one thing about C, on that section. I had
21 problems with that in Detroit. Comments
22 have problems with it. I'm not going to go
23 through that fight again. If somebody on
24

1 the Committee wants to offer an amendment to
2 change C, I'll probably support it. We
3 considered that in Detroit and we went the
4 other way on it. Mr. Smegal?

5 MR. SMEGAL:

6 I want to go back to A there. You got by me
7 a little bit. I was listening to you very
8 carefully this morning when you described
9 what these various provisions called for. I
10 think we could have the reporter go back and
11 read the transcript, if you would insist,
12 but you used the language "recipient fails
13 without good cause", I wrote that down and
14 noticed in A that isn't what it says. I
15 think it should say that because I think
16 that is what you said and I think that is
17 what we all mean. We've got the words,
18 "without good cause" in A, but they're down
19 bridging the second and third line and I
20 think they should be up in the beginning.
21 "If a recipient fails without good cause to
22 comply with the expenditure required by this
23 part." Take the words out there, "fails to
24 seek a waiver". You were describing this

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MR. WALLACE:

whole thing before we started, had those words "without good cause" right up there in the beginning.

If I did, I apologize because when I worked on this originally I specifically intended not to put it there. This is where I am trying to limit the discretion of the staff, I don't want them deciding whether or not they failed to meet the requirement and have good cause for failing to meet the requirement. I want them to answer concrete questions. Did they meet the requirement? If they didn't, then they have the discretion question. Did they have good cause for not seeking a waiver? I don't want to go into every single detail of the program to determine whether they had good cause for not meeting the requirements. If they didn't meet the requirement, they should have asked for a waiver. If you didn't ask for a waiver, why not. If there was good cause for not asking for the waiver, then this Subsection A applies.

1 Mr. Bovard. Would you read B as we
2 discussed it this morning.

3 MR. BOVARD: "The withholding of funds under this Section
4 shall not be construed as a termination of
5 financial assistance under part 1606 of
6 these Regulations or a denial of refunding
7 under part 1625 of these Regulations."

8 MR. WALLACE: Before I make that motion, I want to ask you
9 to revisit what we discussed this morning
10 about what happens to recovered funds when
11 they are withheld for non-compliance. We
12 thought we had decided this morning that
13 they automatically, under the accounting
14 guide, went back into PAI. Is there anybody
15 on the staff, is that right or is that
16 wrong. Do we need to clear that up or don't
17 we. Ms. Francis, come on up.

18 MS. BERNSTEIN: Gail is not the---Fred is the one that I
19 talked to this morning and I think that part
20 of this question is they would be dealt
21 with as the same way as any other funds
22 that earn income. They would be dealt with
23 as under the accounting guide, that they-

24

1 --Pepe, you've been working with that real,
2 real closely, but as I understand it, they
3 would go into the account that earned the
4 money. If it's the PAI account that had it
5 in earnings, it would go back to the PAI. If
6 it was another account that had earnings, it
7 would go into that. It's a matter of which
8 account had the earnings.

9 MR. WALLACE:

If that is beyond doubt, that's fine. If
10 it's not beyond doubt, we can deal with it
11 here. We've got the Chairman of the Audit
12 Committee and we've got Ms. Francis and I
13 don't see Fred. Yeah, I see Fred. Is this
14 the unanimous sense that we do not need to
15 deal with this issue here, that it can be
16 handled in the Audit Guide, or is it not the
17 unanimous sense of the staff and the
18 responsible people.

19 MR. MENDEZ:

I think we can handle it in the Audit Guide.

20 MR. WALLACE:

The chairman says we can handle it in the
21 Audit Guide and I'll be happy to defer to
22 him on that point. I will move then,
23 precisely what Mr. Bovard just read.
24

1 "Withholding funds pursuant to this Section
2 is not to be construed as termination of
3 financial assistance under part 1606 of
4 these Regulations, or a denial of refunding
5 under part 1625 of these regulations."

6 MR. HOUSEMAN: "...shall not be construed..."

7 MR. WALLACE: Sorry. Is there a second to that motion.
8 It has been moved and seconded. Is there
9 debate on this Section. Hearing none, all
10 in favor say aye. Opposed? Hearing no
11 dissent, that is adopted. Now, going back
12 to take off the table Section 1614.1(b),
13 When we broke we put this on the table. Mr.
14 Houseman we asked you if you were able to
15 get together over lunch and draft some
16 language that might solve the problem we
17 think we have with a minimum of trouble.
18 Have you got some language for us?

19 MR. HOUSEMAN: The answer is no. I tried and I frankly the
20 attempted effort seemed to create for me
21 more problems, at least in this quick
22 effort, than I was able to solve by the
23 language.

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1 MR. WALLACE: Hold on, I think she needs to flip her tape
2 here.
3 MR. HOUSEMAN What about the definition of private lawyer.
4 MR. WALLACE: And the application of the Ethics in
5 Government Act or non-application of the
6 Ethics in Government Act.
7 MR. HOUSEMAN: I'm having troubles understanding it's
8 impact on this issue as it is framed.
9 Frankly, the problem with all of this is
10 that is has come up at the last moment and
11 we are trying to impose a definition and an
12 Act that we don't have the slightest idea of
13 what it's impact is. I've tried to read it,
14 I obviously can't go and read the case law
15 on it and I can't say one way or the other,
16 because I don't have time to go, I don't
17 have access to anything that will tell me
18 the answer to the impact of this on
19 programs. It may be that this is something
20 that is not going to be a major problem and
21 we can live with it. It may be that it is
22 going to create major problems. I have
23 tried to read it and understand it and I'm
24

1 not sure it's going to create major
2 problems, but it is a highly complicated
3 Act, it uses a lot of words in order to get
4 somewhere.

5 MR. DURANT: Alan, let me ask you a question.

6 MR. HOUSEMAN: So, in my view it would be that what you
7 ought to do is to defer this issue. You
8 ought to pass the reg's, work on a
9 definition of private lawyer and we ought to
10 try to do it at the next Committee and add
11 it on when we have to.

12 MR. DURANT: Let me offer a suggestion. I think the way
13 Mr. Wallace has phrased this, this isn't
14 effective until January 1 of next year. Is
15 that correct?

16 MR. WALLACE: That's the language.

17 MR. DURANT: If that's passed and we go through the
18 process or publishing that seeking comments,
19 that will then provide a response that I
20 know you will comment, I hope you will, and
21 a variety of other people will as well, in
22 terms of the implications or the impact.

23 MR. WALLACE: That would have to be two separate actions
24

1 which we would pass. We would pass it,
2 publish it, and we would have to have a
3 separate publication proposing to take it
4 out, I guess.

5 MR. HOUSEMAN: Republish it.

6 MR. WALLACE: Republish it identically, just like
7 everything else we've been working on.

8 MR. HOUSEMAN: Or you could say, this was an issue that we
9 have decided on...

10 MR. WALLACE: Subject to...

11 MR. HOUSEMAN: I don't think you should do that. Assuming
12 you are going to do it, at least let's try
13 to look at this and understand what it
14 means. I think the way to do it is not to
15 put it in there, but if you're determined to
16 put it in I think your version is possibly
17 the best of all compromises under the time
18 we are under. Let's look at what this means
19 and doesn't mean and we can deal with it
20 then.

21 MR. WALLACE: My distinguished Board chairman is wise and
22 conciliatory as always. I would agree with
23 that sentiment. Given the time frame and
24

1 consequences of not having something in by
2 the first of the year, I would like to go
3 ahead and do this and I would like to begin
4 immediately the process of publication to
5 see whether we need to change it or take it
6 out or keep it in.

7 MS. BERNSTEIN: Republishing just that one.

8 MR. WALLACE: Not republishing the whole set, just asking
9 for comment by whatever means is appropriate
10 on this issue and revisiting this issue
11 immediately so if we are going to change it,
12 we can do it in January instead of in August
13 and get cracking on it.

14 MR. HOUSEMAN: I think it would be real helpful, as much as
15 I am uneasy about this suggestion. If we
16 are really going to get into these horror
17 stories that we've got to deal with, let's
18 get the horror stories on the table. Let's
19 see what we're talking about here and what
20 the real concerns are and I don't know, even
21 from what we said what they are, and that
22 was the problem I was having in drafting
23 because it was too hypothetical, it was too

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abstract and I wanted to draft something specific and clear.

MR. WALLACE:

There will have to be some care in this because I don't know. I think the Directors have access to information that is not, and ought not to be public about individual problems and individual programs. I think that we ought to get as concrete as we can consistent with the rights of any programs that may be involved.

MS. BERNSTEIN:

I think we could have something like Mr. Flowers presented regarding lobbying.

MR. WALLACE:

We will work on that and we will get concrete problems that we are dealing with. Now, this motion is before the Board and I will read it. This is to add a Subsection D, at the end of 1614.1. "As of January 1, 1986 the term private attorney, as used in this part means an attorney who is not a staff attorney as defined in Section 1600.1 of these Regulations. In circumstances where the expenditure of funds, with respect to a private attorney, could violate the

1 provisions of the Ethics in Government Act,
2 18USC-Section 207, if the Corporation were a
3 federal agency, such funds may not be
4 counted as part of the expenditures required
5 by Subsection A of this Section." That is
6 the motion, it has been moved and seconded,
7 taken off the table. Is the Committee
8 prepared to vote.

9 MR. SMEGAL: That would be Subsection D.

10 MR. WALLACE: All in favor say, Aye. Opposed? The motion
11 is adopted. Before the chair asks for a
12 motion to recommend 1614 to the Board, as
13 amended today, Mr. Durant has a further
14 comment.

15 MR. DURANT: I had a conversation with Meg Connally of
16 the Boston Volunteer Lawyers Project when
17 this came up. She raised some thoughtful
18 concerns regarding that definition and
19 that's why, among other reasons, I requested
20 that we do it in the manner so that we would
21 get comments and I would ask Ms. Connelly if
22 you would prepare some of your comments so
23 that we can be aware of those before really
24

1 taking a final decision prior to January 1st.
2 MS. CONNELLY: I'd be happy to.
3 MR. WALLACE: The chair will entertain a motion to
4 recommend Part 1614 as amended today to the
5 Board for adoption. Is there such a motion.
6 MS. BERNSTEIN: I make that motion.
7 MR. WALLACE: Is there a second.
8 MR. SMEGAL: I second it.
9 MR. WALLACE: Is there any further debate? All in favor
10 say, aye. Opposed? Hearing no dissent it
11 is adopted. At this point, what the chair
12 would like to do, having promised to give
13 Mr. Mendez his Committee ten minutes ago, is
14 to recess this Committee meeting until 9:00
15 tomorrow morning. Mr. Mendez has asked us
16 not to do anything on questioned costs until
17 we have heard what he has to say about the
18 Audit Book. At 9:00 tomorrow morning we can
19 come back and decide if there is something
20 we want to do, do we want to have a meeting
21 on the 25th, do we want to forget all about
22 it. I think we ought to take some time
23 tomorrow morning and decide what course, if
24

1 any we want to take on questioned costs in
2 light of what happens here in the next few
3 minutes this afternoon. I am sure Mr.
4 Mendez would join me in inviting all members
5 of my Committee who are not part of his
6 Committee to stay here for the audit
7 discussion, because it will be most relevant
8 to what we have to determine with regard to
9 questioned costs. At this point, if there
10 is no dissent, the chair will declare this
11 Committee meeting in recess until 9:00
12 tomorrow morning. So done. Thank you all.
13 The New Hampshire Legal Assistance, is it
14 New Hampshire Legal Assistance, Tom, that's
15 been giving us the technical help on this?
16 Tom is about to drive off to Concord to the
17 Office of New Hampshire Legal Assistance, to
18 use their equipment to type up what we just
19 voted on so a clean copy will be before us
20 tomorrow for the whole Board to see. They
21 have been most cooperative in the technical
22 problems we've got with putting this
23 together and I know Mr. Bovard wants to
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thank them and I want to thank them and I am
sure the whole Board thanks them for their
assistance in getting us through this
process today. I appreciate it. Thank you
very much.

1 MR. WALLACE: This is a committee meeting of the Operations
2 and Regulations Committee of the Board
3 of Directors of the Legal Services Corporation,
4 recessed yesterday afternoon and being
5 reconvened this morning. The thing we
6 have on our agenda at this point, is
7 the question of cost regulations. It
8 should be no surprise to anybody who
9 sat through the last Committee meeting,
10 this has to do with provisions applicable
11 to audits and accountings of each of
12 our recipients. It is not the Chairman's
13 intention to try to vote on this today,
14 given the fact that we've just asked
15 for another two weeks of meetings and
16 consultations with regard to the whole
17 audit book. What it is my intention
18 to do is to convene my Committee in Washington
19 in two weeks and to work on this and
20 to work on this regulation and to adopt
21 it...not to adopt it, but to make a recom-
22 mendation to the Board at that time.
23 The Board would be in a position to act

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in California, in November, as a result of what we do on the 25th in Washington. I want to highlight what I think are the primary issues involved in current staff draft in the Board book, points of some contention. The first point of some contention, it seems to me, is the extent to which we can or should question the costs of non-LSC, non-public funds, under 1010(c) of the Act. The staff draft presently applies to LSC funds and non-public funds. We need to determine the extent to which it is appropriate for us to question the expenditures of non-public funds. There is a provision in the Act saying that these funds cannot be used for any purposes forbidden by this Act, if they were LSC funds. We need to understand and determine the extent of our authority and the extent of our responsibility under that provision. We need to decide at what point we would like to cut off the approval process.

1 because we require certain purchases,
2 certain leases of a certain magnitude
3 to get prior approval. The current regulations,
4 I think, are Five Thousand Dollars, the
5 amount we suggested when we printed it
6 in the Federal Register as Five Thousand
7 Dollars. The current staff draft would
8 be Ten Thousand Dollars. That may or
9 may not be appropriate and that's one
10 of the things we want to talk about.
11 Another item of some controversy is going
12 to be the extent to which this Board
13 wishes to permit our funds to be used
14 to retain outside counsel to represent
15 recipients in situations that are adverse
16 to us, whether they're law suits, whether
17 they're negotiations, whatever they are,
18 to what extent do we wish to permit our
19 funds to be used. We have general restrictions
20 on hiring of consultants. We do not
21 give organizations a blank check to hire
22 any consultant they want. At a certain
23 magnitude, that has to be approved by

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us. When those consultants are being used to sue us, or in a position adverse to us, there is an obvious ethical difficulty with us passing prior approval on the lawyers that are going to sue us. Is the alternative just to give a program a blank check to hire anybody they want, at any magnitude? Is it to give them no check at all, to hire nobody to sue us at any magnitude? The current staff draft takes the bottom approach, which is: No funds shall be used by a recipient to hire counsel in a matter adverse to us. That may be where we wind up. It may wind up somewhere in the middle. But that is a major issue that we will have to resolve in Washington. I would say the next major concern is the question of time limits, especially in the approval process. We have received many comments from the field, suggesting that our approval process takes too long. That may or may not be the case. I do believe that

1 in any approval process, there ought
2 to be time limits and there ought to
3 be time limits that our corporation staff
4 can live with. I am asking our corporation
5 staff to tell us what time limits they
6 can live with and it would be my intention
7 to put those time limits in the regulation
8 and to live with them. There is a final
9 concern as to whether or not we're going
10 at this backwards and this is a concern
11 that's been raised by Mr. Williams and
12 if you look at the draft of Chapter Four,
13 in the audit book, you look at this,
14 you can see the extent to which the approach
15 differs. The audit book takes the approach
16 that nothing is permitted until it is
17 proven to be eligible for all the following
18 reasons: This approach is that something
19 is permitted until it is questioned and
20 then it's illegal unless you can carry
21 the burden of proof, unless the recipient
22 can carry the burden of proof on the
23 same substantive issues. Mr. Williams
24

1 and I discussed that at the Committee
2 meeting yesterday, as to whether there
3 was a practical difference between those
4 two approaches. I do not know yet whether
5 there is a practical difference between
6 those two approaches, but I am asking
7 the staff, between now and the 25th,
8 to tell me if there is, because if we
9 need to reverse the polarity on this
10 regulation and to say everything's illegal
11 until proven legal, than I'll do that
12 and I'll be happy to do it on the 25th,
13 but I would like to see a proposed draft
14 out of my staff a week in advance of
15 that and I would like people who have
16 made comments on this matter, to have
17 access to that draft a few days before
18 the hearing so we can talk about it.
19 If there's going to be a draft from the
20 staff, that reverses polarity on this,
21 let's get it in the next week. I want
22 to see it and I want people who have
23 displayed an interest in this matter,
24

1 to have an opportunity to see it, so
2 we can wind it up on the 25th. If there's
3 not going to be such a draft, fine.
4 I'm happy to work with the one I've got,
5 two weeks from now when we get to Washington.
6 That summarizes what I think are the
7 major issues here. I'll first ask our
8 Assistant General Counsel, Mr. Bovard,
9 if I've overlooked anything of major
10 importance that he wants to call to the
11 Committee's attention, at this time.

12 MR. BOVARD:

13 I'd just like to point out that you have
14 copies of my summary of the comments
15 on the earlier draft in the federal register
16 and that, although Mike highlighted a
17 number of points of contention, in the
18 staff draft that is here, we've worked
19 out, we attempt to respond to the general
20 tenor of those comments. In particular,
21 we've added, on page 3 of the draft,
22 page 25 of the Board book, language pertaining
23 to the purchase of library volumes and
24 that sort of thing which was not clear

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before and that came up frequently in the comments, perhaps the most major complaint was the failure of the Corporation to approve things in a timely fashion. We've added the approval of the proposed expenditure section which was not in the previous draft. We have, on page seven, listed a number of factors that the Corporation will use in determining what, once something has been determined to be ineligible, what kind of resolution to make of that situation, to provide guidelines both for the Corporation and for people who may be attempting to point out why they shouldn't have to cough up the full amount. We have added some more provision, with respect to the appeal process. If you'll notice, on page ten we talk about, 'The appeal shall be based on a written record, submitted by the appropriate LSC official.' Those are some of the changes we've made in response to comments. I think that's all I wanted to say

1 MR. WALLACE: All right, Mr. Houseman, I'm going to
2 ask you the same question, I asked Mr.
3 Bovard. I don't want any of us to argue
4 our positions today. We'll do it in
5 two weeks but I want the public and the
6 Committee to have an idea of what the
7 problems are and if we've neglected to
8 state some areas that you think are important
9 for concern, please tell us where you
10 think we ought to be focussing.

11 MR. HOUSEMAN: Yes. I think there are three. I don't
12 think they rise to quite the same level
13 of the ones we've discussed earlier.
14 One has to do with LSC discretion. In
15 a number of places in the draft, you
16 used the term 'shall' instead of 'may'
17 and you have limited, in other ways,
18 the discretion of staff to act, which
19 I don't think you mean to do. And I
20 think we ought...I think some of it's
21 very technical but some of it goes to
22 criterion standards that apply. The
23 second issue is whether the standards

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1 that currently are found in the staff draft,
2 or at least some of the standards that are
3 currently found in the staff draft at
4 1630.7(b), that is the resolution, whether
5 there should be some of those that in fact
6 should be applicable to the decision process
7 at 1630.6. I'm not sure all of them would
8 be, but I think some of them may be and
9 that's an issue. Third, there is a question
10 of derivative income that is in the staff
11 draft. For example, under 1630.7(a), and I
12 think there may be some problems with that
13 and we ought to take a look at that. Those
14 are the three. There are some other minor
15 issues but those are the three issues that I
16 see. The only other thing is, there's a
17 number of little things but in terms of big
18 issues, the only other thing that I note is
19 I am not clear how consultant contracts for
20 client related activities ought to be
21 treated. They may not be covered at all by
22 this, either whether they are attorneys that
23 we hire through a judicare program or a
24 contract or whether they are an expert
witness that is hired for a case.

LEGAL DEPOSITION SERVICE

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MR. WALLACE:

1 Let me tell you what I think is the case and
2 what I think I intend, subject to what I
3 hear over the next two weeks. I think all
4 consultant contracts, even client consultant
5 contracts, are covered. They're approved
6 like anything else, if they're not covered I
7 thought they were and I intended them to
8 be. My intent can change based on what's
9 told to me and the Committee intent may
10 change. Given some--I think back to the
11 testimony we had a month ago in North
12 Carolina. I'm sure that everything anybody
13 in North Carolina ever did for a client was
14 perfectly legitimate but they could have one
15 client and decide they want to go out and
16 spend \$100,000.00 to hire Tommy Boggs to
17 lobby for them. It may be perfectly
18 legitimate, it may be client related, but
19 I'd still want to know if somebody wanted to
20 spend \$100,000.00 on a client related
21 expense. I don't think clients get blank
22 checks. My clients don't get all of the
23 expert witnesses they'd like to have. They
24

1 they'd like to have, they can't afford them
2 and we may need to pass judgement on that
3 too. If it's not covered, my initial
4 intent would be to cover it.

5 MR. HOUSEMAN:

6 There's one other thing that I'm not sure
7 anybody; and this may just be a technical
8 problem and it may be a very substantive
9 problem, in the staff draft on page 31 of
10 the Board book, at the bottom, or nine at
11 the top. In 1630.7(c), it talks about the
12 implementation of organizational or
13 personnel changes that as I read this, the
14 Corporation could require. We have
15 proposed some language which would leave the
16 ultimate decision making to the local board
17 but still keep the Corporation, still give
18 the Corporation some powers here. In terms
19 of organizational or personnel changes at
20 the local level, we're talking about now.
21 I think that may be an issue. The final
22 thing that I would say in terms of this
23 overview is that I gave yesterday, all the
24 Board members, a very quick memorandum that

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1 I prepared late Tuesday night on private
2 funds. I will review that memo. If I have
3 left something out or it is inaccurate, I
4 will get a new one to you and I gave you a
5 copy of the comments that we submitted, not
6 what's in the Board book, I gave you the
7 other side of it, which, because of the
8 Board book publication, we didn't get over
9 in time to get in the Board book. I think
10 you should review some of our comments and
11 this memo and if there is any other
12 information that you want around some of
13 these issues that I can provide, let me
14 know and I'll do the best I can to provide
15 them.

16 MR. WALLACE:

Mr. Singsen.

17 MR. SINGSEN:

18 Yes, just a very technical thing. In the
19 draft audit guide, in Provision 2-1.9(2),
20 you don't even need to look at it, this is
21 really just calling it to staff's attention
22 because I think they need to advise you.
23 There is a new approval area having to do
24 with over runs on cost reimbursible

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contracts. Where the audit guide says there has to be an approval provided by the Corporation before you can spend money and it will be a disallowed cost if you don't get approval. It may be, if they want to go ahead with that approach, that it belongs in this regulation.

MR. WALLACE:

Okay, I think I see staff taking notes on that and if you need to add that in there okay.

MRS. BERNSTEIN:

Since we're throwing things out that we may be arguing when we get to the substance on this, let me just say in a general sense, without getting into a lot of details, that it would be my approach that we should conform more closely to the other grant-making processes in other federal budgeting funding entities, agencies or federally funded corporations. We should take the approach that documentation is required before anything is considered to be eligible. I'm just throwing those out as general principles that I intend to or tend

1 to be concerned with.

2 MR. WALLACE: And I'll certainly be delighted to see that
3 when I see what it is that other federal
4 grant-making entities do.. I haven't seen
5 it, I don't know it, but I'm looking
6 forward to being educated on it in the next
7 two weeks. When we were in Salt Lake on
8 this process, I think it was primarily Mr.
9 Valois and Mr. Mendez that had requested
10 our staff put together a report on
11 essentially the volume and the size of
12 questioned costs and sort of give us an
13 idea of what sort of problems we're facing
14 here, so we have an educated idea of where
15 to put the cutoff line. Gail Francis is
16 here, I think that I've got a copy of the
17 report, I hope most everybody else does.
18 If you would be so kind as to summarize for
19 us what it is that you found out as a
20 result of the request put forward in Salt
21 Lake, I'd appreciate it.

22 MS. FRANCIS: Certainly. Good morning, ladies and
23 gentlemen. I am Gail Francis, Manager of

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the OFS Grants and Budget Unit. One of the several duties of my office is responsibility for the resolution of the questioned costs matters. As Mr. Wallace mentioned, a member of my staff, Patrick Nalley, appeared before this Committee at the August meeting in Salt Lake when the proposed questioned costs regulation was originally introduced. My purpose today is to report back to the Committee on outstanding issues raised at that meeting and to respond to other questions you may have about the questioned costs procedure. As the September 6 minutes, or from the September 6 Board book that is where the August Board Minutes are contained, Mr. Mendez and Wallace were concerned whether the ceiling of LSC's approval requirement for personal property, should be lifted from \$5,000.00 to \$10,000.00 and if the large number of questioned costs were clustered in that bracket. Please note that the ceiling is consistent and

1 originates with the limits established in
2 the current and draft audit guide. The
3 results of our research are contained in
4 the October 8 memorandum that should have
5 been provided to members of the Board
6 yesterday. When Patrick spoke to you in
7 August, we were relying on the questioned
8 costs list circulated bi-monthly and we
9 were using the June 30 statistics, the
10 August 30 statistics didn't change very
11 much so we refer back to those in terms of
12 this discussion. Following page 4 of the
13 memorandum is Exhibit 1. Here you see
14 there were, I believe, 94 incidents that
15 were questioned cost lists on that June 30
16 list. Eleven of those items related to
17 purchase of personal property and that 5 of
18 the 11 items are between the five and ten
19 thousand bracket; the other 6 are over
20 \$14,800. The average cost was around
21 \$27,000 and the median was \$14,868. The
22 median defined as the middle incident in an
23 ordered list of occurrences. The Exhibit
24

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1 also shows the breakdown of the 15
2 consulting contracts that were listed on
3 the June 30 list because they lacked
4 approval. Not reflected on the Exhibit are
5 five real property purchases which were
6 also lacking in LSC approval. To expand on
7 our analysis, we polled four regional
8 offices to obtain information about the
9 number and type of approval requests
10 received during the preceding 12 months.
11 This data is reflected in Exhibits 2A, B
12 and C. The C items are consultant contracts
13 and average around \$7,400.00. The items
14 noted at the bottom, where there is no
15 dollar, is because there was no ceiling
16 place, there was probably a time period as
17 opposed to a dollar ceiling. We had some-
18 -L are the leases and the P items on B and
19 C are the purchases, they average around
20 \$21,000.00, the median being \$12,000.00.
21 We noted that raising the dollar limit to
22 the proposed \$10,000.00 amount would result
23 in a cut of about one third of the number
24

1 of transactions that the Corporation would
2 have to process. While this would reduce
3 the paperwork burden for both the programs
4 and the Corporation staff, that there is a
5 reciprocal trade-off in terms of LSC's
6 oversight of these type of issues. I did
7 an addttional--I had also raised--It's not
8 reflected in the memo, but estimate that if
9 it was raised to \$10,000.00 it's around
10 thirty-five percent fewer transactions. If
11 we were to raise it to \$15,000.00 we'd cut
12 it about half, if we were to raise it to as
13 much as \$20,000.00, there would be seventy-
14 percent fewer types of transactions like
15 this that the Corporation would be subject
16 to approval requirement. It's been raised
17 by Mr. Houseman earlier and throughout the
18 discussion on the questioned costs, process,
19 the approval deadlines. This has been a
20 larger problem, really, then the dollar
21 ceiling. It is the capacity of the
22 Corporation to process these requests. I
23 think that the time limits, which are
24

1 specified in the current staff draft are
2 deadlines that we can live with and operate
3 under. The last Exhibit is, in fact the
4 category of questioned costs where there
5 are more incidents which are unreasonable
6 and unnecessary costs. There are 32 items
7 here, the average cost is around \$2,500.00;
8 the median \$665.00 and the most current
9 penalties. There are other things here
10 where lack of documentation, just a little
11 bit of everything is thrown in here.
12 Lastly, it was my understanding that there
13 was some, or there were questions raised at
14 the August meeting about the category of
15 questioned costs labelled as 'other'. That
16 was a single incident which involved a
17 subgrantee that had not reported it's
18 expenditures. It is my understanding that
19 the primary recipient program is taking
20 legal action in that case. That's the end
21 of my report, are there any questions.

22 MR. WALLACE:

I thank you, I think the report is clear
23 and I think it gives us the kind of
24

1 information that we were looking for. Any
2 members of the Committee have any questions
3 of this witness. Mr. Bovard.

4 MR. BOVARD: Am I wrong in my understanding that the
5 unreasonable and unnecessary accounts for
6 the greater proportion of the questioned
7 costs...

8 MS. FRANCIS: In terms of individual incidents, yes.

9 MR. BOVARD: In terms of individual incidents. That
10 just sort of--In terms of transactions,
11 that's the bulk apparently, according to my
12 understanding and I think that was one
13 point that should be raised

14 MR. WALLACE: Not necessarily dollar volume but total
15 number of transactions which is mostly
16 unreasonable and unnecessary.

17 MS. FRANCIS: Yes, sir.

18 MS. BERNSTEIN: Just while you're here Gail; I think it's
19 important for the rest of the Committee and
20 anybody that is still with us, to
21 understand a little bit of the structure in
22 the Corporation in terms of how this
23 proposed reg impacts on the Corporation in
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terms of its functions. As I understand it, and you correct me if I'm wrong, the approval process would go through Field Services but any of the compliance aspects of it go back through monitoring of Audit and Compliance. We are in a situation of you saying that your office can live with it but if your office is unable to, if your office screws up, I'm not meaning to imply that you would, but if your office screws up, we've got another aspect of the Corporation that is detrimentally affected. I would just ask, and I don't see Fred in the room, but I would just as that at our next meeting, we try to get some sort of an assessment as to whether or not, as an overall Corporation, if there is a feeling that we can truly live with it. Or, whether the track record is such that we are going to be tying the hands of one division by the actions of another division. It's always frustrating to not be able to do your job because someone else

1 is failing to do their job. Do you see
2 what I'm saying. I think that structurally
3 it is important for us to recognize that
4 we're dealing not with one division of the
5 Corporation here.

6 MR. WALLACE:

7 Let me say this, and I see Mr. Williams
8 coming in and I'll ask him to come forward
9 and answer the question that he didn't hear
10 Mrs. Bernstein ask. I will say what my
11 thoughts are on it. I think it is
12 important to have some kind of time limit
13 that everybody understands. I don't much
14 care what that time limit is, it would be
15 nice if it was as short as possible, but I
16 think folks in the field who want to get
17 things approved and want to live with the
18 process, will be able to factor in to their
19 decision making time frame, how long
20 we're going to take to do it. It doesn't
21 necessarily matter how long it is, as long
22 as they know how long it is. Whether it's
23 30 days or 60 days or 90 days, they are
24 just going to have to plan that much, the

1 field will have to plan that much farther
2 in advance in order to deal with us. I
3 don't want to give us time limits we can't
4 live with, I do want to give us time limits
5 that we can live with and that the field
6 can count on being complied with. Mrs.
7 Bernstein, if you would restate your
8 question.

9 MS. BERNSTEIN:

10 I'm not sure it's entirely fair to Fred to
11 put him on the spot since he's now going to
12 answer a question that was proceeded by 15
13 minutes of discussion that he missed.
14 Gail, in the course of her report, said
15 that she felt that the time limits were, in
16 the staff draft, something that they could
17 live with in terms of the approval. I
18 asked for a clarification structurally from
19 the standpoint that one division of the
20 Corporation is in charge of giving these
21 approvals and another division of the
22 Corporation has to live with their success
23 or failure and I said that I thought it was
24 important for us to get some feedback from

1 the division that deals with the monitoring
2 audit and compliance aspects of this in
3 order to know whether or not you feel that
4 these are realistic time limits and whether
5 or not this is the approach that we should
6 be taking in terms of looking at the
7 Corporation in trying to handle this. Not
8 only for the recipients benefit but for
9 management, practical management as well.

10 MR. WILLIAMS:

11 I would say that in my short time here, I
12 have seen serious management problems
13 associated with this area of the
14 Corporation's business. Simply from the
15 PAG comments on the regulations on the
16 Audit Guide, it is clear that at least one
17 regional office had extraordinary problems
18 in terms of dealing with these things. I'm
19 not sure of the exact delegations of
20 authority under the present reorganization
21 for making these approvals. I'm not sure
22 where they are.

22 MS. FRANCIS:

23 My understanding is that it would fall in
24 Mr. Williams area, in that while it was a

1 Field Services responsibility, that under
2 the new reorganization, it becomes a
3 Monitoring Office responsibility.

4 MR. WALLACE: Your office has been doing these things in
5 the past.

6 MS. FRANCIS: No, sir. They were done by the regional
7 offices.

8 MR. WILLIAMS: Therefore, until we have addressed the
9 management problems associated with being
10 sure there is adequate staff properly
11 trained to deal with these things, it is
12 difficult to assess what exact time frames
13 are appropriate. My instinct, looking at
14 those, the last version of this proposed
15 the time frames looked reasonable to me at
16 this time. However, I'm not sure, I have
17 not had time to carefully assess them. I
18 would like to make one general comment,
19 however. I don't believe that management
20 problems are appropriately dealt with
21 through the regulation rule-making
22 process. I think it's a general principle
23 that things that can be done by a

24

1 regulation, you should not ask congress to
2 do my statute.. Things that can be done by
3 management should not be done by
4 regulations. The CFR and the Federal
5 Register should not be cluttered with
6 general directions to staff as to how to
7 conduct business in the overall--I suspect
8 it would not be difficult to find in Davis'
9 Treatises on Administrative Law and
10 Administrative Conference, the United
11 States reports, that this is not the sort
12 of thing that should ordinarily be dealt
13 with through the rule-making process,
14 rather through the ordinary giving
15 directions to staff as to what the
16 management would like the staff to
17 accomplish.

18 MR. WALLACE:

19 I will say, and you and I, I think, are
20 going to find we have a conflict of
21 perspective on this. What may work in
22 managing, what may be an efficient way of
23 managing business is not a way to manage a
24 government and since Schechter Poultry is

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1 one of my favorite cases of all time, I
2 think everything should be done by
3 statute. If not by statute, by
4 regulation. That's what politics is about
5 even though people keep telling me we're
6 non-political. I think people ought to be
7 able to pick up the CFR's and see what the
8 rules are that we are playing by and they
9 ought to be able to live with them.
10 Everybody needs to know when they are
11 dealing with the government, what the rule
12 is. My frustration in dealing with the
13 government is that you usually don't and
14 the part of the government that's working
15 for us, in my perspective, is going to have
16 some rules and is going to live with them
17 and I'll make those rules as loose and
18 lenient as may days as we need to live with
19 properly. My own intention is, you're
20 going to have rules and people can pick
21 them up and see what they are. That's the
22 way I approach this job and that will be my
23 intention in working with these
24

1 regulations. If the staff seriously thinks
2 that these time limits are too short, tell
3 me and I'll try to give you some more time
4 within reason. I think things ought to be
5 in rules where people can read them.

6 MR. HOUSEMAN: Mike, there's one other issue that I left
7 out.

8 MR. WALLACE: I'm sorry, go ahead and say what it is.

9 MR. HOUSEMAN: If this is done.

10 MR. WALLACE: I think it is. Mr. Williams, if you've got
11 a response to make or any further on that
12 but over the next two weeks that's what
13 we're going to be looking for because this
14 Committee is going to meet on the 25th and
15 I think it would be my intention to set
16 some time limits at that time. That's
17 something that I think the staff has got to
18 give me a position on what it can live with
19 over the next two weeks. Anything further
20 on this issue? Mr. Houseman, I'll let you
21 state your final point and then I'm going
22 to give Mr. Durant his Board.

23 MR. HOUSEMAN: Another issue, which I don't think was
24

1 flagged as much in our comments as it
2 should have been, is how far back in time
3 you can go on the questioned costs. Some
4 of these are back to '80 and '81 and I
5 think we ought to just talk about that.
6 I'm not sure we need a hard and fast rule.

7 MR. WALLACE: I've got a GAO report here that goes back
8 to '80 and '81 and I may want to go back
9 that far.

10 MR. HOUSEMAN: I know, I'm just saying that's an issue.

11 MR. WALLACE: I understand that's an issue. With that,
12 if there is no further business from the
13 Committee, this Committee will stand
14 adjourned until the 25th in Washington and
15 Mr. Durant can have his Board.

16 Meeting adjourned

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