

ORIGINAL

LEGAL SERVICES CORPORATION
COMMITTEE ON THE PROVISION FOR THE DELIVERY
OF LEGAL SERVICES MEETING

June 12-13, 1989
Commences at 9:00 a.m.

Hyatt Regency Woodfield Hotel
Regency Ballroom
1800 E. Golf Road
Schaumburg, Illinois 60173

Present:

J. Blakeley Hall, Esq.
Hortencia Benavidez
Paul Eaglin
Lorain Miller
Claude Swafford
Basile J. Uddo
Robert A. Valois

Staff present:

Terrance Wear, President
Maureen Bozell, Secretary
Timothy Shea, General Counsel & Vice President
David Richardson, Comptroller

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I N D E X

	PAGE
Presentation of John Pensinger	19
Presentation of Charles Moses	64
Presentation of Rob Elgin	94
Summarization of Newletters and Mailings	104
Comments Summarization by Timothy Shea	106
Presentation of Professor James Meeker	114
Presentation of Professor Steven Cox	163
Presentation of Lonnie Powers	189
Presentation of Professor Steven Cox	199
Presentation of Jim Newhart	217
Presentation of Gary Johnson	241
Presentation of Dwight Loines	248
Presentation of Jill Shinn	252
Presentation of Mary Drolett	261
Presentation of Rosie Newsome	270
Presentation of Janice Brown	273

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M O T I O N S

PAGES:

4, 5, 15

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P R O C E E D I N G S

9:10 A.M.

1
2
3 CHAIRMAN HALL: This is the meeting of the Committee
4 on the Provision for the Delivery of Legal Services. On the
5 committee and present are Hortencia Benavidez, Basile Uddo, Bob
6 Valois and myself. I think we have a quorum with that.

7 The first item is approval of the agenda as written in
8 the book. I will ask for a motion to approve that.

M O T I O N

9
10 MR. VALOIS: So moved.

11 CHAIRMAN HALL: An aye for a second.

12 MS. BENAVIDEZ: I second that.

13 CHAIRMAN HALL: Is there any discussion?

14 (No response.)

15 CHAIRMAN HALL: Hearing none, all in favor signify by
16 aye.

17 (A chorus of ayes.)

18 CHAIRMAN HALL: Against by nay?

19 (No response.)

20 CHAIRMAN HALL: The ayes have it. The agenda is
21 approved.

22 The next item we have is approval of the minutes as

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1 written, the minutes of March 24, 1988. I have not read the
2 testimony of those minutes. I was not on the board when those
3 were taken.

4 M O T I O N

5 MR. VALOIS: I believe I presided at that meeting and
6 I move that they be approved.

7 CHAIRMAN HALL: Is there a second?

8 MS. BENAVIDEZ: Second that.

9 CHAIRMAN HALL: Is there any discussion or changes?

10 (No response.)

11 CHAIRMAN HALL: Hearing none, I will ask for a vote.
12 All in favor of approving as written signify by yes.

13 (A chorus of yes.)

14 CHAIRMAN HALL: Opposed no.

15 (No response.)

16 CHAIRMAN HALL: Hearing none, the minutes of March 24,
17 1988 are approved as written in the book.

18 The next thing we have which is the main reason we are
19 here is the consideration of the competitive award system for
20 LSC grants. I am not the sharpest on procedure of order, but I
21 did want to say something about that briefly at this point.

22 As everybody knows there is a move on to stop the

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1 Legal Services Corporation from conducting any hearings such as
2 this or doing anything until -- on competitive bidding,
3 considering it or putting money into it or anything until the
4 Bush administration has appointed a new board.

5 I think the Senate has approved language that would
6 put that into effect. It is now to go to the HOuse. My
7 understanding is that the House will not approve that language,
8 but I do not know. They might.

9 I think until they do, after today's meeting, the
10 proper thing would be to wait and see whether they tell us we
11 can go on or whether they tell us we cannot. If they do not
12 take a vote on it until after we are all gone, then fine.

13 I think that today is probably as far as we should go
14 on that. I do not think it is as far as we have any authority
15 to but I think it is as far as we should have. I feel like we
16 are kind of out in the middle of traffic and we have got a car
17 full of people and we cannot just stop dead center in the
18 highway.

19 We need to go on and pull over to a spot where we can
20 stop. That is why I think we should go ahead with today's
21 hearings and take some testimony on this proposed regulation. I
22 would say also that I do not intend to ask for it to be voted on

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1 today, which you all probably know.

2 I would not vote on it today if we did have a vote on
3 it, if we could even vote on it. I do not think there would be
4 any amendments. I would like for these hearings and this
5 testimony we take today to be mainly in the nature of
6 exploratory.

7 (Mr. Perle's comments show that there is a lot of work
8 that needs to be done on it. I think there is a possibility
9 that what has been proposed would be changed so drastically, it
10 might be something new.

11 Anyway, saying that, a lot of people have come today
12 to testify and I think we should go ahead as far as that goes
13 and that is what I intend to do.

14 MR. UDDO: Mr. Chairman?

15 CHAIRMAN HALL: Yes.

16 MR. UDDO: I want to say a couple of things on the
17 record, too. I think we are in an awkward position because of
18 the language that was proposed by Senator Rudman in this past
19 Senate clarifying what I think the appropriate committees
20 intended with their committee language last year that referred
21 to the process whereby we could consider competitive bidding for
22 delivery of legal services.

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1 I think probably where there are some flaws in the way
2 we have approached this really relate back to the way this got
3 on the table here today. I want to just clear that up for the
4 record.

5 Personally, I don't think we should have a regulation
6 before us today. When it was mentioned to me several months ago
7 that there was a thought of having some hearings on competition,
8 my reaction was in general kinds of discussion ask people to
9 come, give their thoughts and ideas.

10 What they had to say about it would not be violative
11 of the committee language and it would be an opportunity to
12 generate some discussion. So I was surprised when a regulation
13 came out proposing a competitive bidding system. That wasn't my
14 understanding of what we were going to do.

15 I think that that really created some of the problems
16 that we've got right now. It appears that we're trying to get
17 something all the way up to the edge and then when a new board
18 comes in they are just going to take it and adopt it and make it
19 their own.

20 So I think that we should not be considering a
21 specific regulation. There shouldn't have been one proposed.
22 If we were going to have hearings on competition, it should have

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1 been, in principle, inviting people to give some thoughts about
2 the whole idea of competition as a way of delivering legal
3 services.

4 We got a regulation in front of us. My reaction to
5 that is, if we're going to go on with the hearings today -- and
6 I understand what you're saying, Mr. Chairman, that we're at a
7 point where we've got a bunch of people here and we ought not
8 just stop the meeting at this point and I can understand that
9 and be sympathetic with that.

10 If we are going to have these hearings, I really think
11 that you ought to ask the people who comment to really, as much
12 as possible, direct themselves to this bigger question of
13 competition, really make it exploratory as you said.

14 I agree with you. I would not vote for this
15 regulation today. I don't know that the regulation could ever
16 be put into a form that would make it acceptable. I don't know
17 that we should spend a lot of time directing comments to a
18 particular part of this regulation or change this word or that
19 word.

20 I don't think we are anywhere close to wanting to do
21 that. We should really direct our comments to a very broad and
22 general discussion of competition as a way of delivering legal

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1 services.

2 I think that technically we can go on because the
3 House hasn't passed the language that the Senate has passed. I
4 think it's pretty clear that the sentiment is against doing
5 this, the congressional sentiment is against doing this.

6 I don't think you, Mr. Chairman, take that lightly. I
7 don't take that lightly. I think that we ought to make that
8 clear on the record; that we are at a point where we feel like
9 we have to give the people here a chance to talk.

10 I think that that ought to be understood as a
11 practical justification for going on and not one that is
12 intended to ignore the fairly clear sentiment at least of the
13 Senate and what might ultimately become the sentiment of the
14 House.

15 So with those qualifying remarks, I guess we could go
16 on. I would just want to try to keep the discussion very
17 general and not keep it to this particular regulation because I
18 think that is going to be a waste of time.

19 CHAIRMAN HALL: Thank you, Basile. If there is not
20 any others -- and I agree with what you say. A lot of the
21 comments have said that the comment time is too short or it's
22 too early or we shouldn't be here today anyway and I'm in

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1 somewhat agreement with that in a lot of action by Senator
2 Rudman.

3 MR. UDDO: Let me ask a question and we may use
4 General Counsel's opinion on this. I'll put it in the form of a
5 motion if necessary. I would move that the regulation be taken
6 off the table and that this hearing only direct its comments to
7 the general question of competition and take the regulation off
8 the table all together.

9 That way there is no doubt that this regulation can't
10 be put into effect and no doubt that we're not trying to put
11 this regulation into effect. Just have a general discussion on
12 competition.

13 CHAIRMAN HALL: Well, we don't have any authority to
14 put it into effect anyway.

15 MR. UDDO: I understand. I'm talking about -- I guess
16 we wouldn't.

17 CHAIRMAN HALL: We don't -- we'd intend not to at this
18 time but we have no authority to.

19 MR. UDDO: Could I get a General Counsel's opinion as
20 to whether or not we could just remove the regulation from the
21 table and have a general discussion on competition or are we
22 stuck with this regulation and we have to have comments on the

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1 regulation?

2 MR. VALOIS: If I may address some of the questions
3 that have been raised this morning, I certainly agree not to
4 vote this regulation out of this committee today if that's what
5 I hear Professor Uddo talking about.

6 Quite frankly, I think that all of the discussion is a
7 little bit premature. I think that having a regulation on the
8 table, so to speak, serves the purpose of permitting us to
9 address the competition idea in the form of a regulation.

10 I don't think there is any question but that we're not
11 prepared to vote for something as new to this corporation as
12 competitive bidding. I'm happy to listen to all the testimony
13 that is presented along those lines. I think it's unnecessary
14 to take this regulation off the table.

15 MR. UDDO: I would just like General Counsel's
16 opinion. Bob calls me Professor Uddo when he's made at me and
17 not agreeing with me.

18 MR. VALOIS: I'm not mad at you. I think you just go
19 a bit too far. I mean, you seem to be operating under the
20 presumption that we're going to pass this regulation out of this
21 committee and ^{through} threw the board tomorrow in the face of what
22 Congress is talking about.

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1 You and Blakeley both recognize that Congress hasn't
2 quit their proceeding. They are not finished talking. Until
3 they are, I think it's a bit premature for you or Blakeley to
4 try to guess what they are going to do.

5 The purpose of this hearing as I understood it was to
6 generate comment, to listen to comment, listen to ideas about
7 the whole system of competitive bidding. I don't know why we're
8 getting into procedural wrangle about whether to take the
9 regulation off the table or not take it off the table. What's
10 the difference?

11 MR. UDDO: I'll tell you what, Bob, because we don't
12 know what Congress is going to do. If the House does not
13 approve the language and the board believes that it can
14 implement something along these lines or at least approve a
15 regulation for implementation by a new board, regulations sort
16 of take on a life of their own around here.

17 Once it's out there and it's a regulation and you say
18 this is what we're thinking about, it becomes increasingly more
19 difficult to get substantial changes in that or maybe take a
20 different tact.

21 I think that we should be at the point where we're
22 only talking in principle about competitive bidding and not

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1 about a specific regulation that next month we may find out
2 we're in a position to go ahead and act on that regulation.

3 I don't think this regulation ought to get that kind
4 of serious treatment. That, I think, is pretty premature. I
5 think the bigger question of competitive bidding ought to be
6 discussed in general terms without having a regulation sitting
7 there that we might find ourselves voting on in a meeting or
8 two.

9 I don't think this regulation ought to be on the table
10 at this point. That's what I told Mike when he asked me how I
11 felt about hearings on regulations. It's not a change in my
12 position.

13 It's been my position all along that if we could find
14 something good in competitive bidding that helps delivery of
15 legal services, let's do it. The thought that we are already
16 facing a regulation, to me, is premature.

17 CHAIRMAN HALL: Let me recognize Tim Shea and see if
18 he can give us a yes or no answer on that. Then I'll let you
19 make your motion if you want.

20 MR. SHEA: If I may, let me restate what I understand
21 the question to be. I think the question that is cast to me is
22 whether it's legally permissible for this committee to consider

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1 competition perhaps in the abstract before dealing with this
2 specific rule.

3 The answer to that is it seems to me the question
4 really depends on whether that is within the notice provisions
5 of what the purpose of this meeting is. I note that the federal
6 register indicated it was consideration of competitive award
7 system of LSC grants.

8 I might also add from a practical point of view, I
9 don't know that there is anything that would or should preclude
10 the board from bifurcating its analysis; that is to deal with
11 the competition principle and then to proceed from there to what
12 the shape and form of that should be.

13 Is it permissible to address the question in principle
14 at this time for the committee? The answer is, I think it's
15 well within the ambit of the notice. As to whether it's a good
16 idea, that's of course for the board members to decide.

17 M O T I O N

18 MR. UDDO: I take that to be a qualified yes.
19 Therefore, I am going to move that we bifurcate the discussion
20 and that this specific regulation not be considered today and
21 that the comments today be directed toward the general principle
22 of competitive bidding for the delivery of legal services.

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1 That's a motion.

2 MS. BENAVIDEZ: I'll go along with that.

3 MR. UDDO: I have a second.

4 MR. VALOIS: Well, again, I don't have any plan for
5 voting for this regulation today. Insofar as the regulation
6 will direct this committee's attention to certain notions about
7 competitive bidding, I think it is quite a good thing to
8 consider it within the ambit of our discussion.

9 If you are now -- by this motion you intend to say
10 that there is nothing in this regulation, this proposed
11 regulation, that we can take testimony on or we can ask
12 questions about or whatever, if that is the intent of it, I'm
13 going to vote against it.

14 MR. UDDO: Let me clarify the intent. The intent is
15 that this regulation not be the focus of discussion. If someone
16 wants to talk about it, I don't have any problem with that. I
17 am not trying to preclude that.

18 I don't think it should be the focus of discussion
19 indicating after this meeting that we have had public hearings
20 on this regulation. I don't want at this time public hearings
21 on this regulation which then, frankly, moves it to the stage
22 where we could actually go ahead and vote on it at the next

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1 meeting and publish it.

2 I don't think we should have public hearings on this
3 regulation today. I think we should have general discussion
4 about competition if we want to have that and the regulation can
5 be -- we can hold hearings on specific regulations.

6 It's not just the regulation; it's also the
7 competition manual which is cross reference in the regulation.
8 So I think if we are going to talk about those specific things,
9 I'd rather do that at a different time, a time when we know what
10 the full sentiment of the Congress is.

11 After we've gotten the point of saying we've already
12 talked about competition and we think there's enough merit there
13 to move onto something specific. So that's what I'm intending.

14 CHAIRMAN HALL: If there is not any further
15 discussion, I think it's ready for a vote. Your motion again?
16 Will you please state it and we'll take a vote on it.

17 MR. UDDO: My motion is that we do not -- that we
18 bifurcate the competition matter as noticed and only discuss the
19 question of competitive bidding for the delivery of legal
20 services in general as an idea, as a proposal, as an alternative
21 and not this specific regulation today, not discuss this
22 specific regulation today.

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1 CHAIRMAN HALL: Are you saying you want to take this
2 proposed regulation off for today?

3 MR. UDDO: I guess you could put it that way. Take it
4 off the table so that we are not holding public hearings on this
5 regulation today.

6 CHAIRMAN HALL: I'm going to call it for a vote. Ms.
7 Benavidez, how do you vote?

8 MS. BENAVIDEZ: I second that.

9 CHAIRMAN HALL: You vote with Mr. Uddo?

10 MS. BENAVIDEZ: Yes.

11 CHAIRMAN HALL: Mr. Uddo?

12 MR. UDDO: Yes.

13 CHAIRMAN HALL: Mr. Valois?

14 MR. VALOIS: No.

15 CHAIRMAN HALL: The chairman votes no. I believe it
16 is then tied at two apiece. It fails.

17 Let's go forward now. Somebody from LSC -- Bob, are
18 you going to come forward or Tim Shea and discuss the summary of
19 the '89 Appropriation Provision authorizing competition? Is
20 there going to be a brief discussion on that first?

21 MR. SHEA: Yes, there will. I think it will be--
22 there are three subject matter experts here; Rob Elgin from the

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1 Office of Policy, Charles Moses from the Office of Field
2 Services and John Pensinger from the Office of General Counsel.

3 They will describe the issue of authority in part.
4 They will also address the purport of the rule. Then at some
5 point I will discuss the comments that have been submitted. At
6 this point I think I should recede to them.

7 CHAIRMAN HALL: Which one of you all are going to
8 begin?

9 PRESENTATION OF JOHN PENSINGER

10 MR. PENSINGER: Yes, sir. Good morning. For the
11 record, my name is John Pensinger. What we are talking about is
12 the language that appears in Public Law 100-459 regarding the
13 competitive award system.

14 Basically, that language provides that a board of
15 directors of the Legal Services Corporation appointed after
16 January 20, 1989 and subsequently confirmed by the Senate is
17 authorized and required by the Appropriations Act language to
18 implement and develop a system for competitive award of grants
19 to be effective after September 30, 1989.

20 Basically, that is the authority upon which we are
21 proceeding at this time. Under that authority the current board
22 would not be in a position to either develop or implement a

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1 competitive awards system.

2 The reason why we are proceeding as we are is because
3 of the fact that it is now June 1989 and the attempt we have
4 made is to proceed with explorations and research into what
5 would be required in order to eventually develop a competitive
6 system for the award of grants or contracts.

7 In line with that, that's why we have developed this
8 advanced notice of proposed rule making which was the subject of
9 the board motion a moment ago. I think at the outset we should
10 make it clear that basically this is not a draft regulation as
11 such or proposed regulation; it's basically a draft of a
12 proposal.

13 It's an advanced notice. The primary purpose of it is
14 for comment, for discussion. It's also my understanding that if
15 this was an actual regulation that was to be eventually
16 promulgated, it would be in front of the Ops and Regs Committee
17 rather than the Provision Committee.

18 CHAIRMAN HALL: Let's clear that up because that is
19 important. You are saying that these hearings today on this
20 draft proposed regulation would not satisfy the requirement for
21 hearings on a regulation before implementation?

22 MR. PENSINGER: Yes, sir, that's my understanding of

1 it; that this is primarily for discussion. This is not a
2 proposed regulation. It's an advanced notice of proposed rule
3 making.

4 MR. UDDO: So my motion was really moot then because
5 my concern about this satisfying the requirement for hearing on
6 this regulation, you are saying I don't have to worry about it.

7 MR. PENSINGER: Right, yes, sir. As I understand it,
8 it's the wrong committee and this is not really a draft
9 regulation. This is just an advanced notice for proposed rule.

10 MR. UDDO: Why is it before this committee?

11 MR. PENSINGER: To tell you the truth, I don't know.
12 I will refer to Charlie on that one.

13 MR. MOSES: It's before this committee because
14 obviously as the Committee for the Provision of Legal Services
15 it is a concept that this committee would deal with. So it's
16 basically here to receive public comment --

17 MR. UDDO: On the concept.

18 MR. MOSES: Well, the concept -- what we did was we
19 had something that was put out to begin discussion.

20 MR. UDDO: Maybe we should repeat that for Bob since
21 he was out of the room.

22 MR. VALOIS: I appreciate that.

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1 MR. UDDO: John said that this regulation could not be
2 promulgated on the basis of these hearings because it would
3 really have to go through the Ops and Regs Committee.

4 MR. VALOIS: I didn't know that was in doubt.

5 MR. UDDO: You should have told me that. I wouldn't
6 have made the motion.

7 MR. VALOIS: I tried to tell you.

8 CHAIRMAN HALL: Go ahead.

9 MR. PENSINGER: Thanks. Basically, what I will
10 address, hopefully briefly, is the draft proposed advanced
11 notice of proposed rule making, the -- Part 1633. Overall, it's
12 divided into two parts.

13 One is a general part dealing with the issue of
14 competition and transition to a competitive award system. The
15 second part deals with the peer review and negotiation of a
16 competitive grant or contract awards.

17 I am trying to go through this without going through
18 every single line in it and just touch on the high points of the
19 regulation. Basically, the regulation requires that the
20 competitive award system be implemented over a three year
21 transition period.

22 Once the award system is in effect, the system will be

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1 based on a three year cycle. In the course of implementing the
2 system, it is hoped that there will be a smooth transition to
3 the new award system because it will take three years to
4 implement it.

5 It would take approximately twelve contracts, twelve
6 grants each month over the three year system -- that's an
7 average because there are approximately 323 LSC grantees. Now
8 what the regulation proposes is that the basic document to start
9 the process running would be a solicitation which would be
10 promulgated in the service area and hopefully applications would
11 be received in response to that solicitation.

12 When the applications are received, an internal --

13 MR. UDDO: John, I'm not clear on what that
14 solicitation would look like.

15 MR. PENSINGER: Well, my understanding is it would
16 basically be a rather -- I don't want to say thick document, but
17 it would have a substantial amount of information in there
18 setting forth -- it's an LSC request for applicants who would be
19 willing to handle the delivery and provision of legal services
20 in that particular area.

21 It would also state the evaluation factors for award
22 of a grantor contract to that applicant. It would also require

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1 that the applicant provide information regarding the budget he
2 proposes to use, his organizational structure, the background of
3 the employees, both attorneys and support staff working there.

4 Overall, it would also most likely explain that in the
5 past, there was another provider. These were the priorities for
6 the other provider. Does this applicant want to follow those
7 priorities or does he in fact have a separate needs assessment
8 that would show there are other priorities that should be
9 addressed in that particular area?

10 MR. UDDO: Is the intent that the solicitation would
11 be for a bid on the entire delivery package? I mean, you are
12 looking for one bidder on delivering all the legal services in
13 that service area or is it by kind of service or kinds of cases.
14 I guess that's what I'm not clear about.

15 Is it just saying you are looking for someone to step
16 in the place of the grantee or is it saying these are the
17 different areas where we provide legal services and you can bid
18 on the whole thing or you can bid on a part of it?

19 MR. PENSINGER: That's the thing. A lot would depend
20 on how the service area is determined and defined. It is
21 possible under this proposed reg or I should say draft proposed
22 reg that in the event there would be more than one responsible

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1 and responsive applicant, that it could be divided.

2 For example, if there was an applicant who said he
3 could specialize in domestic cases whereas another applicant
4 said he was willing to handle the range of cases, then at that
5 point it would be possible for the peer reviewers to decide that
6 they would split the service in that area.

7 In other words, it would be the same amount of money;
8 it would just have to be divided between the two. The one
9 applicant could conceivably be awarded a grant to handle just
10 domestic cases.

11 The other applicant would be awarded a grant to handle
12 the range of cases.

13 MR. UDDO: Could you have five applicants or five
14 different areas of expertise?

15 MR. PENSINGER: Well, personally I think that would be
16 too much. I would personally think that no more than two to
17 three. At that point you would have it would seem to me too
18 much of an overlap in the area.

19 MR. UDDO: John, how can you say that? I mean, there
20 are some geographic areas -- for instance, five would not be too
21 many for New York City; would it?

22 MR. PENSINGER: Well, for New York City, I think

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1 that's probably right. In other words, you could have more than
2 two to three, I guess. I am thinking more in terms of the local
3 more rural type of areas in which it would be, I would assume,
4 not cost effective to have five or six grants just for one
5 service area.

6 MR. UDDO: We might be talking about two different
7 things. I'm not talking about five different providers, each
8 one doing the whole range of services. I'm talking about
9 different areas of expertise.

10 In any area, could you get five? Not more than one of
11 them does more than one area of expertise.

12 MR. VALOIS: Is there something in this draft proposed
13 almost reg that says that you could not break up the service in
14 an area to five specialties; one person for domestic, one person
15 for housing, one person for something else and so on?

16 MR. PENSINGER: No, sir. There is nothing that says
17 you couldn't have that. It does say that you could have two or
18 more providers. I would assume personally that a lot would
19 depend on how the applicants are raided and the administrative
20 requirements involved in handling that many service providers in
21 an area.

22 As you mentioned New York City, it is conceivable that

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1 there could be as many as five in New York City.

2 MR. VALOIS: There could be as many as fifty; couldn't
3 there?

4 MR. PENSINGER: Well, that's possible.

5 MR. VALOIS: How many burroughs are in New York? I
6 have forgotten.

7 MR. PENSINGER: There are five that I know of.

8 MR. UDDO: It seems to me you could have five or more
9 anywhere. Small towns could have five or more because I just
10 don't know that you're going to find bidders who feel that their
11 expert at the whole range of things that we deliver legal
12 services for.

13 Just using New Orleans for example, I don't know too
14 many law firms that would do all the things that we do from
15 domestic to housing to consumer to welfare benefits to social
16 security benefits.

17 I don't know of any firm in New Orleans that would be
18 able to handle the array. It seems to me -- New Orleans is a
19 relatively small city. It seems to me that you would have to
20 expect that you would have numerous providers in the service
21 area.

22 It would be unlikely, I think, that you would find any

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1 one provider that would feel capable of doing them all which
2 raises another question. Does the solicitation say anything
3 about what sort of qualifications are expected of the applicant
4 or the bidder, substantive qualifications?

5 Do they have to have experience in housing law to be
6 able to bid on a housing package or experience in social
7 security law to bid on that?

8 CHAIRMAN HALL: Well, I think that's another section.
9 Isn't there a section in there --

10 MR. UDDO: I think it's the evaluation section. I
11 guess I'm asking does the solicitation say that these are the
12 people that should bid, people who have X amount of years
13 experience or handled X number of cases in this particular kind
14 of substantive area of law.

15 MR. MOSES: Excuse me one minute if I can jump in
16 here. There might be -- and I've noticed this in the comments
17 we've received and I just want to clear it up for this meeting--
18 - there might be a misconception between the difference between
19 contracting with a law firm and competitive bidding.

20 Competitive bidding as it is envisioned in the
21 regulation would open up the bidding for service delivery in any
22 service area to the entire spectrum of different service

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1 delivery methods.

2 Contracting with law firms, law firms putting in for
3 specific contract awards, would be feasible. It would be
4 possible under the regulation. At the same time, it would be
5 possible under the regulation for the existing service provider
6 to put in its proposal as a competitive proposal to do that.

7 It would be possible for the Bar Association to put in
8 a judicare proposal to run through the Bar Association. There
9 are a variety of different types of providers that could put in
10 for operation of a legal services delivery mechanism in any
11 given service area.

12 I'm not sure that you are operating under that
13 misconception, but I wanted to clarify that.

14 MR. UDDO: Maybe I am because of 1633.1(b) that says
15 this regulation governs the selection of grantees. It says
16 private attorneys including law firms at a professional
17 corporation, professional associations or non-profit
18 corporations are eligible to apply for grants or contracts
19 providing legal service under the competitive awards system.

20 Private attorney come together in a variety of ways.
21 I'm not sure; does that include bar association? Does that
22 definition include a bar association? It sounds to me like it's

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1 directed towards law firms.

2 MR. VALOIS: Non-profit corporation.

3 MR. MOSES: Or professional associations. It was
4 written in such a way -- the eligibility criteria we worked for
5 a long time on whittling down what we wanted the eligibility
6 criteria to be.

7 The whole concept behind the eligibility was to make
8 it as broad as possible not to make it as narrow as possible.

9 MR. UDDO: Let me ask you this, then. Let's say that
10 -- in other words, what you're saying is that there's a variety
11 of people that can bid including the existing provider.

12 MR. MOSES: Correct.

13 MR. UDDO: How would the existing provider -- how will
14 you evaluate -- let's say the existing provider bids on all the
15 services which would make sense, the whole array of services
16 that they've been doing, but nobody else bids on the whole
17 array.

18 You've got one group that bids on a low piece here and
19 another group that bids on a low piece there. How do you
20 compare that? Do you just take the best bid for each individual
21 and add them all up and decide whether that's better than the
22 comprehensive bid of the existing provider? Can you compare

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1 those kinds of bids?

2 MR. MOSES: At that point, what you would do -- and of
3 course that would be up to the Peer Review Panel as they are
4 making their evaluations of the bids that have come in. So you
5 might be skipping forward a little bit to the manual.

6 MR. UDDO: I don't see that the manual or the peer
7 review process really takes into consideration whether there's
8 any benefit to one person or one group doing the whole thing as
9 compared to four or five doing it.

10 In other words, I don't see it in the evaluation that
11 you get some edge because you are taking the whole thing. Did I
12 miss that? Is that in there that even if you may not have the
13 "lowest bid" or "best bid," you get an advantage because you're
14 willing to do the whole thing and we acknowledge that there are
15 some advantages to trying to keep as much of it in one package
16 as possible?

17 MR. ELGIN: Those economies would have to be taken
18 into account in a peer review process.

19 MR. UDDO: Do you get points for that in the peer
20 review system? I don't recall whether you get points for that
21 or not.

22 MR. ELGIN: It would go towards your programmatic

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1 merit of the proposal which is in the review criteria.

2 MR. VALOIS: Let me ask a question. Is there any
3 presumption that one service provider per area is better than
4 two service providers per area?

5 MR. MOSES: This proposal is not designed with a
6 presumption that one service provider is better, no.

7 MR. VALOIS: Is there any contrary presumption that
8 two are better than one?

9 MR. MOSES: I think that we've operated under the
10 presumption and we believe that the ability to have multiple
11 service providers in an area is good because it creates a
12 dynamic that will help to keep all of the funded service
13 providers functioning at top capacity.

14 They always are in competition. Now, I should say
15 that when I'm talking about a multiple service provider here,
16 we're talking about from the corporation perspective, meaning a
17 multiple funded parties.

18 In many instances, in most instance, you currently
19 might have multiple service provision meaning that there might
20 be different elements including the private attorney element
21 under the PAI reg that the corporation already has.

22 The difference between this proposal and that is that

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1 all of that system is set up under one individual that receives
2 the funding. So there is no dynamic for that individual from
3 its funding source to maintain its peak capability.

4 Here is you have multiple service providers from a
5 funding capacity, they would be in competition with each other.
6 They would know that there would be another provider against
7 whom they could be compared at any given time. Every three
8 years it would come up.

9 MR. UDDO: How is that true, Charlie? I mean, if the
10 bid is granted on the basis of case type, they are not really in
11 competition. One bidder is doing domestic cases and one bidder
12 is doing housing cases. They are not really competing for the
13 same kind of case; are they?

14 CHAIRMAN HALL: Basile, you are going to have
15 competition in some areas that you're not going to have in
16 others.

17 MR. UDDO: I know, but they're telling me that the
18 general presumption is that there's going to be competition, the
19 dynamic of competition constantly out there to sort of keep them
20 all finely honed and cost effective.

21 I don't understand how that's going to work because I
22 hadn't heard anything yet that said you're going to have

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1 competition based on providers providing same kinds of cases at
2 the same time where you can look at one and say applicant--
3 what do you call it once they win? -- provider A is doing
4 domestic cases in New Orleans and provider B is doing domestic
5 cases in New Orleans and A is doing a better job.

6 Is that part of what you envision coming out of this?

7 MR. ELGIN: That's a possibility. You can compete on
8 various dimensions; the service dimension or the geographic
9 dimension. Where you do have competition for that one
10 dimension, then we would expect relatively more efficient level
11 of service.

12 MR. UDDO: So why don't we require it? Why don't we
13 require that --

14 MR. ELGIN: That's why we're here.

15 MR. UDDO: Yes, I know. What I'm saying is if that is
16 really what you believe in, we ought to require that there be
17 more than one provider in an area.

18 MR. ELGIN: Per service dimension.

19 MR. UDDO: Per service area or per geographic area,
20 however you want to do it. It seems to me that what you're
21 telling me is the more the merrier.

22 MR. VALOIS: Let me state it a different way. Rob,

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1 would you think it's a fair statement that there be a greater
2 number of people, for instance, in New Orleans who would bid for
3 doing all the landlord and tenant law than there would for
4 people who would bid to do all of the provision of legal
5 services in New Orleans?

6 MR. ELGIN: That would depend obviously on the amount
7 of expected landlord/tenant disputes. There's a lot of rent
8 controlled housing in New Orleans than I would expect that to
9 happen.

10 MR. UDDO: There's none.

11 MR. VALOIS: Let me try another example, a bad
12 example. Isn't it likely there would be a greater number of
13 people who would bid only to do all the domestic work in New
14 Orleans than there would be to do all of the provision of legal
15 services?

16 MR. ELGIN: Yes, I believe that is so just given a
17 direction towards specialization in the service provision, yes.

18 MR. VALOIS: The finer the heart, the greater the
19 number of people likely to be able to compete on that.

20 MR. ELGIN: Right.

21 MS. BENAVIDEZ: I have a question. How would clients
22 know where to go to get help?

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1 MR. ELGIN: Do you want to answer that, Charlie? I
2 would expect just through general advertising, the same way that
3 our service providers let the public know that they are
4 available for services. Any potential or actually successful
5 applicant would provide that same kind of --

6 MR. VALOIS: Our state has a referral service,
7 Hortencia, that can be directly referred to the proper place.

8 MR. UDDO: Referred by whom?

9 MR. VALOIS: Bar associations.

10 MR. UDDO: How do they get to the bar associations?

11 MR. VALOIS: Lawyers referral. They are going to get
12 there somehow by some other lawyer, quite frankly, frequently
13 that say call a lawyer's referral.

14 MR. UDDO: When you say advertising, is that going to
15 be part of what is going to be asked for in the bid?

16 MR. EAGLIN: That would be in a public notice or
17 public awareness. It would be part of someone's budget.

18 MR. UDDO: What they've got to do is budget --

19 MR. EAGLIN: The same way that it's part of current
20 provider's budgets.

21 CHAIRMAN HALL: Basile, there are a lot of details
22 that need to be worked out in all these things. I mean, I think

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1 that's what you're telling us here.

2 MR. UDDO: I don't know. If we're talking about the
3 specific regulation, I guess we've got to go through each one of
4 these things and ask specific questions about it.

5 CHAIRMAN HALL: No, we don't have to.

6 MR. UDDO: Did they ever get finished with their
7 presentation?

8 CHAIRMAN HALL: Yes.

9 MR. UDDO: On the assumption that you want me to be
10 general about this specific proposal, I'll do that. That's what
11 I was trying to get away from in the beginning, the whole idea
12 of being wedded to this regulation. Go ahead.

13 MR. PENSINGER: Thank you. I believe I was about to
14 briefly mention the three year transition provision. Basically,
15 what this would require is a three year period that would not
16 actually commence until three months after the beginning of the
17 competitive award system.

18 At this point, it's envisioned that it would take
19 approximately three months to offer the solicitation, go through
20 the review process and make an ultimate selection of a provider
21 or providers for a service area.

22 Current LSC grantees would receive grants for periods

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1 of anywhere between three months and thirty-nine months
2 depending on where they fall in the order of selection for
3 transition to the competitive award system in that particular
4 area.

5 The next highlight is the selection criteria. At this
6 point we have listed in here six proposed criteria to be used by
7 the peer reviewers and the evaluation of applications received
8 in response to these solicitations.

9 MR. UDDO: Where is this, John?

10 MR. PENSINGER: This is 1633.5. There are six
11 criteria listed there. To basically sum it up, it is a matter
12 of the peer reviewers looking at the application to see what
13 types of cases the applicant proposes to handle and whether or
14 not the applicant has the capability to handle those types of
15 cases.

16 By capability, the organizational capability as well
17 as the manpower and the budget projected that is realistic to
18 handle the types of cases that the applicant says he wants to
19 handle.

20 MR. VALOIS: If I can interrupt you this time,
21 organizational capability I understand, I think, what that
22 means. Does that include what Professor Uddo was asking about

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1 before -- and what I'm asking you about now because I'm
2 interested in it too -- qualification of the individual
3 providers? Is that included in this phrase organizational
4 capability?

5 MR. PENSINGER: Yes, sir. As I understood it, this
6 number five criteria is a matter of looking at the background,
7 the prior skills, prior experience of the applicants.

8 MR. VALOIS: Okay, that answer it.

9 MR. PENSINGER: It's not only the applicants but
10 hopefully the paralegals who would be supporting the attorneys
11 who would be providing the direct service.

12 MR. UDDO: Where is it that you refer to conclude that
13 that's what is taken into consideration? I'm asking that
14 because I haven't seen it and I would like to know that that is
15 in there.

16 MR. VALOIS: I don't think you will find it. If you
17 turn to page 29 of the board book also where we have the manual,
18 it repeats under review criteria six elements. It is the fifth
19 element. It says the applicant demonstrates organizational
20 capability.

21 MR. UDDO: That obviously -- it doesn't say what John
22 said. It repeats organizational.

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1 MR. VALOIS: I would suggest that somewhere down the
2 road there would be some reference to the background or some
3 qualifications of the persons within the applicant's
4 organization be taken into account.

5 MR. MOSES: If I might add one thing here, too, these
6 are the general selection criteria that we have put in here.
7 You'll note that the selection criteria says that it will be
8 more specific in the actual RFP or solicitation that is issued
9 in each area.

10 Those are the types of specific things getting toward
11 quality a service provision, the programmatic elements linked to
12 service provision and the organizational capability that would
13 be demanded and the specifics for each area.

14 MR. VALOIS: I heard what you said, but tell me
15 whether there is anything in the proposed competition manual or
16 the proposed regulation which says that one of the criteria for
17 successful bidders will be the qualifications of the individual
18 attorneys and paralegals who make up that bidding organization?
19 Is there anything in here that talks about that?

20 MR. MOSES: It talks about it but it doesn't say it in
21 that wording.

22 MR. VALOIS: Where does it talk about it?

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1 MR. MOSES: It talks about it if you look under the
2 review and selection criteria that are discussed.

3 MR. VALOIS: You are talking about 1633.5?

4 MR. MOSES: 1633.5, correct.

5 MR. VALOIS: Where does it talk about it in there
6 other than in 5 which we've already discussed?

7 MR. MOSES: Right, the whole idea of quality provision
8 -- I think if you look at 3, 4, and 5, each of those have to do
9 with the ability to provide quality staff maintenance, that is
10 quality staff in direct provision of legal services.

11 It is quality staff in the management structure so
12 that you have the management capability and also quality in the
13 organizational capability.

14 MR. VALOIS: I don't see the word staff in here. I
15 see in 3 we talk about programmatic elements. Is one of the
16 programmatic elements quality in staff?

17 MR. MOSES: It would be qualifications.

18 MR. ELGIN: It doesn't say that in the regulations.

19 MR. MOSES: It does -- that can certainly be added.
20 That's what was intended when it was written.

21 CHAIRMAN HALL: I think Bob may have an answer to it.

22 MR. ELGIN: It doesn't say that in the reg or the

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1 manual, but it does give authority to issue a programmatic or a
2 staff sheet in the solicitation to get the relative information.

3 MR. VALOIS: If I wanted to bid on one of these
4 proposed contracts or awards and I knew that I had some special
5 skill to offer and you were considering it, I shouldn't have to
6 look at some unpublished document to find that out.

7 You need to put it in the reg or put it in the manual
8 and make it available to the public.

9 MR. MOSES: More importantly, what would end up
10 happening is it would be put in the direct solicitation so that
11 people would know. That can be rewritten.

12 MR. ELGIN: That is what I mean.

13 CHAIRMAN HALL: Charlie, instead of defending the
14 language in here, wouldn't it be eccentric just to say that one
15 shouldn't be in there?

16 MR. MOSES: Or it should be rewritten because that is
17 the idea that was involved when it was originally written. It
18 can be redrafted.

19 CHAIRMAN HALL: The crux of the matter is getting
20 somebody to qualify. There is no need to hedge around and say
21 this kind of says and that kinds of says it. That one should be
22 in there and say it specifically. I don't think you all

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1 disagree with that.

2 MR. MOSES: No, we don't.

3 MR. EAGLIN: My point was just that when you seek
4 information about this and receive a solicitation, you'll
5 receive a package.

6 MR. VALOIS: Why would I seek information if I hadn't
7 the foggiest idea whether I was qualified or not?

8 MR. ELGIN: That's a point well taken.

9 CHAIRMAN HALL: I'm sorry, John, go ahead.

10 MR. PENSINGER: Okay, to go through some of the more
11 procedural parts of the regulation, the regulation does provide
12 that if the applicant was a prior LSC grantee, the past written
13 evaluation such as monitoring reports could be used in the
14 process of evaluating that applicant for another award.

15 It also says that there is a typo in the federal
16 register because under 1633.6(e), it was supposed to have said
17 approximately twenty-one days prior to the final date for
18 submission of applications, the corporation may hold a
19 conference for perspective applicants.

20 There was a typo when it was sent over the federal
21 register. The regulation also provides that in the event there
22 is some sort of technical or minor non-compliance with the

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1 solicitation, that the applicant would be given seven days to
2 amend; in other words, in essence, a cure notice to correct the
3 application and forward it back to the corporation within seven
4 days.

5 That applicant could then still be considered for the
6 competition.

7 CHAIRMAN HALL: Let me stop you there. You are at a
8 point now where your fixing to go into a lot of this part about
9 the president of the LSC having so much discretion to do all
10 these things.

11 As you address some of these sections in here, if you
12 have any ideas on why it was written that the president should
13 have so much discretion as you go along, I would like to hear
14 about it. You'll find that was done --

15 MR. PENSINGER: The reason why that was done is
16 because in 1007(e) of the LSC Act itself, it says that grants
17 and contracts are made by the president. The problem is that
18 that is what the statute says.

19 By regulation, we can't overrule the statute itself.
20 What we've tried to do here is provide an independent peer
21 review system that provides advice to the president. Under the
22 statute, they can't, in essence, override the president's

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1 decision.

2 CHAIRMAN HALL: It says he is authorized to do that.

3 MR. PENSINGER: Right, yes.

4 CHAIRMAN HALL: Okay.

5 MR. MOSES: On that issue, I would add that the
6 regulation, in trying to provide deference to the Peer Review
7 Panel, has noted that if the president deviates from the ratings
8 of the providers that the Peer Review Panel has provided him,
9 then the president needs to write a written justification for
10 his final funding decision as to why it deviated from that
11 rating category.

12 CHAIRMAN HALL: Who judges his justification? I know
13 no one does under this proposal. It seems like that is kind of
14 an empty remedy to hold him in check if all he has to do is
15 write down why he didn't do it.

16 I didn't mean to interrupt your presentation, Charlie.
17 You can go ahead.

18 MR. PENSINGER: Thank you. At this point, briefly,
19 the peer review procedure is the basic evaluation of the
20 applications that are received in response to the solicitation.
21 As I mentioned before, before the applications are evaluated by
22 the peer reviewers, there is an initial review of the

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1 applications by the LSC staff to determine whether the
2 application is responsive to the solicitation and the applicant
3 is given the cure period if in fact there is a minor or
4 technical non-compliance with the solicitation.

5 The peer reviewers will evaluate the applications
6 based on the six criteria listed before as well as I mentioned
7 1635.5(b). There is also specific selection criteria that we
8 noted in each solicitation because of the particular service
9 area, that type of thing.

10 The peer reviewers will evaluate the applications.
11 They will determine a summary rating for each application. What
12 this basically involves is a numerical score that will be
13 assigned to each application.

14 Based on the numerical scores, then the applicants
15 will receive a ranking. The ranking will determine, hopefully,
16 whether or not the applicants will be considered for
17 negotiation.

18 Since it is a numerical score based on an evaluation
19 that is not an exact measure because it is each peer reviewers
20 own viewpoint of how he rates a particular application, then the
21 top applicants will be selected for negotiation.

22 At this point, the negotiation will be conducted by

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1 the LSC staff with the people receiving the highest score.
2 There is also in the process -- I should say, the Peer Review
3 Panel will consist of at least three peer reviewers. That is
4 the minimum number.

5 In the event that it is a solicitation and it receives
6 a large number of applicants, then there will be a larger Peer
7 Review Panel. Once again, the minimum number is three peer
8 reviewers to look at any application.

9 I realize the draft proposed reg does mention the
10 qualification of peer reviewers that are rather general and
11 there are, as stated here, some more specific details stated in
12 the competition manual.

13 The peer reviewers will be paid based on the
14 appropriate LSC consultant's rate. Finally, the final review
15 will be conducted by the president because once again, under
16 1007(e), the president is the one who has the authority to enter
17 into the contract.

18 Even under the current system, all grants are made in
19 the name of the president who actually signs off on the grants.

20 CHAIRMAN HALL: Can I ask Tim -- Tim Shea, how do you
21 feel about that? Would it be a violation of the act 1007(e) to
22 make some of the president's decisions on that subject to board

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1 approval?

2 MR. SHEA: On specific awards?

3 CHAIRMAN HALL: Yes.

4 MR. SHEA: That would be more problematic. I don't
5 think there is anything in principle that would prevent the
6 board from constraining the president's exercise of discretion.

7 CHAIRMAN HALL: You don't think that would be a
8 violation of the act?

9 MR. SHEA: No, in principle. I don't know that the
10 more difficult proposition would be the board itself reviewing
11 specific awards.

12 CHAIRMAN HALL: Because we can't sit here every day
13 and do --

14 MR. SHEA: That's a practical problem, but even more a
15 problem of the board gives policy direction and that's really--
16 that's an administration matter. An award, a specific award,
17 is a matter of administration.

18 I think the board could constrain how the president--
19 and in a regulation, that is precisely what the corporation
20 does, one that governs at least the president, was constrain how
21 the staff, including the president, exercised the discretion
22 that is available to the corporation generally.

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1 That could be done in such a way that I suppose the
2 board could write a regulation that says that the highest bidder
3 must get the awards.

4 MR. VALOIS: You mean the lowest bidder?

5 MR. SHEA: The lowest bidder, excuse me. The board
6 could do that and that surely would constrain the exercise of
7 discretion of the president. I don't think there would be any
8 dispute that that's well within the authority.

9 Getting into specific awards is really -- it goes
10 beyond the matter of policy direction and into administration.
11 That's, I think, more problematic. That may well be beyond the
12 purview of the board. I'd have to give that some more thought.

13 CHAIRMAN HALL: It may not be realistic.

14 MR. VALOIS: One of the questions that arises, it
15 seems to me, is whether there's anything in the regulation that
16 says the lowest qualified bidder should ordinarily receive the
17 award. Is there anything in the regulation that says that?

18 MR. SHEA: I don't recall.

19 MR. MOSES: No, there's not.

20 MR. VALOIS: Is that something we want in the
21 regulation rather than buried in the manual someplace? Is that
22 an important criteria? Let's start there.

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1 MR. PENSINGER: Just so I'm clear on what you're
2 saying, do you mean the lowest in terms of cost not the lowest
3 in terms of rating?

4 MR. VALOIS: The lowest in cost, yes.

5 MR. MOSES: Cost is a factor. It should be a factor
6 but it should not be the determining factor.

7 MR. VALOIS: No, I said lowest qualified bidder. That
8 permits me take other criteria into effect.

9 MR. MOSES: Exactly.

10 CHAIRMAN HALL: Can you think of any instance where
11 the president wouldn't approve the lowest qualified bidder? I
12 don't mean to put you on the spot.

13 MR. MOSES: If the Peer Review Panel has rated the
14 bidder as qualified, if the bidder has been able to go through
15 and obtain the highest rating possible or the highest rating
16 among all of the applicants, I would think that that person
17 under those circumstances would receive the award, yes.

18 CHAIRMAN HALL: Under what circumstances?

19 MR. MOSES: Under the circumstances that that lowest
20 bidder had in fact met not only a cost criteria according to the
21 review committee but also the quality criteria that the review
22 committee is looking for.

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1 Now in the instances where the lowest bidder might be
2 a lower bidder but if the Peer Review Panel is not satisfied
3 that that bidder has sufficient quality or experience to provide
4 good quality legal services, all he has is a lower price --

5 CHAIRMAN HALL: Then he's not a qualified bidder.

6 MR. MOSES: He's not a qualified bidder. He would not
7 be receiving the award.

8 CHAIRMAN HALL: Well, can you think of any instance
9 where you have the lowest qualified bidder where that bidder
10 should not get the award?

11 MR. PENSINGER: It would seem to me it is possible
12 that in making this evaluation, the Peer Review Panel could look
13 at an application and see that there is such a gap between two
14 bidders, that the ones bid is so low that it is unrealistic.

15 In other words, they realize that nobody could handle
16 cases for that said price. If there were to enter into a grant
17 with this applicant, all you would have is problems and you
18 would probably have to replace him.

19 MR. VALOIS: In governmental procurement activity, do
20 you not cure that risk by a bond? Isn't that what you do?

21 MR. PENSINGER: Yes, sir, I assume the performance
22 bond or the payment bond.

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1 MR. VALOIS: A company says I'll do all the landlord
2 and tenant cases in New York City for \$10,000 a year and he's
3 qualified -- we're not asking you to have a criteria that says
4 he'll get it every time because everybody knows he can't do it
5 for \$10,000. Do you cure those problems with performance bonds?

6 MR. PENSINGER: In a government contracts setting, I
7 know they do have performance bonds. I also know from my
8 limited experience in that area that they don't always work.
9 They are also usually an administrative nightmare when a
10 contractor is unable to perform.

11 MR. VALOIS: I guess what is sort of lurking behind my
12 questions -- I'll let everybody else speak for themselves -- is
13 whether or not the discretion afforded the president is
14 reviewable or unreviewable or whether it's complete or whether,
15 by regulation according to Tim's discussion, the board wants to
16 control the discretion afforded the president in some more
17 restrictive manner. I think that's what's lurking behind a
18 number of these questions.

19 CHAIRMAN HALL: It is. That's a good reason for not
20 restricting it which would be, as Tim pointed out,
21 administrative and procedural problems. It just seems dangerous
22 in any situation to have it come down to one guy who has an

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1 absolute say.

2 I know there are benefits to it and reasons that you
3 must do it that way sometimes. If you all ever have the
4 opportunity to reconsider this and to work on it further, it
5 seems like that should be one of your considerations.

6 I know you probably can't give me an answer right now
7 on the spot here, but it seems to me like there ought to be
8 something in there that is a little bit stronger than if he
9 doesn't like it even though they are the lowest qualified
10 bidder, even though they have done the work before and done it
11 satisfactorily, that if he doesn't like it he can X them and
12 give a written report saying I didn't like them.

13 They wore grey ties and they out of here. It seems
14 like there ought to be something that is a little more strong on
15 that. That's my only concern.

16 MR. VALOIS: You've got one further step. You can
17 either establish a review procedure or anticipate some lawsuits.
18 I don't, quite frankly, know how you would sue the president of
19 a government corporation, off the top of my head, for engaging
20 in arbitrary capricious action to be exercised at his
21 discretion.

22 I know how to do it if it's a government agency, but I

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1 don't know exactly how you would do it with a government
2 corporation.

3 MR. MOSES: One thing that it might be useful for you
4 to understand is that discretion that we are talking about
5 current exists with the president in all those instances when we
6 currently do any type of bidding process.

7 I can think of two right off hand where we normally
8 would do bidding. The first is all of the law school grants are
9 currently put out on competitive bid. The decision is and
10 always has rested with the president after the peer review
11 process has taken place.

12 The advisory peer review decisions are given to the
13 president and he then makes the final decision. The second
14 instance in which this currently exists is where we might have a
15 service provider that for one reason or another is no longer
16 providing service in an area.

17 It might be a defunded service provider. It might be
18 a provider that has given up its grant. In that instance, we
19 would normally have a competitive bid put out for the service
20 provision in that area.

21 The president would have the discretion to make the
22 decision as to who would ultimately be funded under that. Even

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1 now, the president has that --

2 MR. VALOIS: It is a little different from a
3 competitive bidding situation.

4 CHAIRMAN HALL: We're talking about different scales
5 of competitive bidding. I just can't help but believe that
6 there's got to be -- law schools, I don't know what percentage
7 they are but they are important programs. On the overall scale,
8 they are certainly not a --

9 Mr. Shea, do you have a comment before we move on?

10 MR. SHEA: Well, not necessarily. I will only make
11 one rather simple point and that is it is certainly well within
12 the purview of the board to leave, to give the president some
13 sort of specific parameters.

14 If the president is going to take the lowest bidder,
15 then he's got to meet some sort of threshold or there's got to
16 be specific reasons why he'd depart from taking the lowest
17 responsive bid.

18 There may be only some limited circumstances where the
19 board feels that he can do that. Maybe the limited circumstance
20 might be that the lowest bid is unrealistic or some other
21 circumstance. That's perfectly permissible for -- put in any
22 rule that -- that wouldn't get the board into passing on

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1 specific awards.

2 MR. VALOIS: I don't want to and I don't want any
3 court to have to review specific -- go through the review
4 procedure all over again. I think that would be a waste of
5 everybody's time.

6 I guess I would like to see this section strengthened
7 which discusses discretion -- I'm trying to find it now --

8 MR. PENSINGER: Yes, sir. That's 1633.9(f), I assume.

9 CHAIRMAN HALL: I don't know how much of a burden it
10 would be on the board to review only this situations where the
11 president doesn't give the award to the lowest qualified bidder.

12 I don't know if that's going to be a great number of
13 times or it's going to rarely happen or what. That waters it
14 down a little bit and gives a lot of control to it. It takes a
15 lot of control away from one person.

16 MR. VALOIS: See, this is the reverse I think of what
17 we're talking about. Beginning with the however, should the
18 president determine to fund an applicant that has not been
19 assigned to the highest category of summary ratings.

20 He may have under this provision as I understand the
21 manual and the proposed reg, you may have three or four people
22 for instance who receive relatively high rankings and to say why

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1 we do not want them to award it to the lowest qualified bidder
2 who has received among the highest rankings.

3 MR. ELGIN: I get your point now. That takes a lot of
4 discretion away. That just puts it in there as a rule. I don't
5 have a problem with that.

6 MR. VALOIS: When this regulation gets rewritten, as
7 it surely will, I would propose that that be included somewhere;
8 that the president shall -- in the even the president does not
9 award the contract to the lowest qualified bidder, then the
10 president shall issue a written report explaining such award or
11 something along those lines.

12 CHAIRMAN HALL: Then that will be reviewable somewhat.

13 MR. PENSINGER: Yes, sir. I would assume the only
14 entity that could really review the president's decision would
15 be the board of directors or a committee of the board.

16 MR. VALOIS: I don't know about that. I don't know
17 how you would -- Tim?

18 MR. SHEA: I have some reservations about that
19 principally on the practice. I suppose there could be other
20 mechanisms. I think we will just have to give that some more
21 thought. I don't know whether it's practicable and I don't know
22 whether the board would be departing to its proper roles in

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1 looking over the specific decision.

2 CHAIRMAN HALL: Tim, who decides to defund a recipient
3 now if --

4 MR. SHEA: The president does. What happens is there
5 is an administrative proceeding. There is a hearing, maybe
6 perhaps a paper hearing or more typically a live hearing before
7 an administrative law judge or hearing examiner.

8 The hearing examiner renders a decision. There is an
9 opportunity for appeal to the president. The president renders
10 what is an APA act, administrative procedure act, parlance a
11 final agency or in this case a final corporate decision.

12 That's judicially reviewable under a standard of
13 review that is blackened to administrative procedure act review
14 for arbitrary capricious decision making although it is not
15 itself subject to administrative procedure since we're not an
16 agency.

17 CHAIRMAN HALL: Thanks, Tim. John.

18 MR. PENSINGER: Thank you. That's all I really have.

19 MS. BENAVIDEZ: I have a question. Will the providers
20 be monitored?

21 MR. PENSINGER: Will they be monitored? Yes, ma'am.
22 I believe they would be. In this case, the monitoring would be

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1 in terms of whether they are complying with the act as well as
2 their performance; in other words, in terms of the quality
3 service they are providing to the eligible clients.

4 MS. BENAVIDEZ: Well, will more people be employed to
5 do that job since we have 100 and some programs? Then there has
6 always been trouble with the money.

7 MR. PENSINGER: That's out of my area of expertise. I
8 think that's probably a policy decision for the president of the
9 corporation and the director of monitoring, audit and
10 compliance.

11 MR. UDDO: It's a good question. You could have 1,000
12 people to monitor or 1500.

13 MR. MOSES: In fact, you could do that now too.

14 MR. VALOIS: Do what?

15 MR. MOSES: You could also have 1,000 or 1500 to
16 monitor.

17 MR. UDDO: Well, we don't. With this system, you
18 almost invite the multiplication of grantees. That's part of
19 the purpose of it. So in terms of number of "grantees" or
20 "providers" that would have to be subject to some kind of
21 monitoring, it's a good question. It's going to be a lot more.

22 MR. MOSES: I think that -- in fact, among the three

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1 of us we have discussed this. There will be changes and there
2 should be changes in the monitoring process if there is a
3 competitive system.

4 Exactly what those changes would be would be worked
5 out as you worked through the system. Certain issues that come
6 to mind would be the appropriate schedule for monitoring of
7 people, making sure that at a minimum you have a monitor to make
8 sure reports are in prior to the next competition so that if
9 they submit for bid, that report on their quality of service and
10 on their ability to provide service within their previous bid
11 would be available for the Peer Review Panels.

12 So there are a slew of issues as you are saying that
13 would have to be addressed in the monitoring aspect. We did not
14 attempt to address those here. We recognize, however, that
15 that's an issue that has to be taken care of.

16 MR. VALOIS: Let me ask a couple of other questions,
17 slightly different. Do we know of any other government
18 corporations that put legal services out for competitive
19 bidding?

20 MR. MOSES: Of the other government corporations that
21 have money available for legal services for the indigent, the
22 primary one would be Title III and Title IV in HHS,

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1 Administration on Aging funds.

2 The Administration on Aging does put out money for
3 competitive bidding for provision of legal services. State area
4 agencies on aging also have competitive bidding. To give you a
5 description of how the money works in the Administration on
6 Aging money, they have basically two distinct types of grants
7 that are made.

8 One is made from the national office, I believe it's
9 Title IV money. That is done directly on a competitive basis.
10 In fact, we recently had somebody from our office who was
11 invited to sit on a Peer Review Panel for one of those grants
12 from HHS.

13 The primary amount of funding that the Administration
14 on Aging gives goes from the national office to state area
15 agencies on aging. The states are then responsible for getting
16 the money to localities who invariably have a bidding system.

17 The different localities work their bidding system
18 differently so there is no one regulation saying you must do
19 this or you must do that.

20 MR. VALOIS: Does the Social Security Administration,
21 for instance, or the Postal Corporation -- let's take the Postal
22 Corporation which isn't a corporation -- does it engage in

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1 competitive bidding for any services supplied to the Postal
2 Corporation, not to others but to the Postal Corporation?

3 MR. PENSINGER: Let's see. I can find out. You're
4 asking about a specific agency and I'm not sure.

5 MR. VALOIS: I'd like to know what other government
6 agencies, what government agencies put out their services to
7 bid?

8 MR. PENSINGER: There are -- I believe it's
9 approximately 39.

10 MR. VALOIS: There are approximately 39?

11 MR. PENSINGER: Approximately 39 different agencies,
12 39 or 40 that do use a competitive bidding process.

13 MR. VALOIS: For services supplied to that agency or
14 to others, to third parties?

15 MR. PENSINGER: To services provided to that agency.

16 MR. VALOIS: The agency itself. Are there other
17 agencies which offer -- have competitive bidding for services
18 supplied to others, meaning recipients of --

19 MR. PENSINGER: Well, certainly -- you mean federal
20 agencies; correct?

21 MR. VALOIS: Yes.

22 MR. PENSINGER: I know, for example -- and this is

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1 again a limited perspective -- the Department of Education when
2 they provide grants also to law schools, they usually -- this
3 past year I think they had five or six million dollars worth of
4 grants that they put out on a competitive bid basis also.

5 MR. VALOIS: Are there state agencies who do the same
6 thing? I'd like to get some idea about the experience of others
7 and then I'm going to ask you how that compares to what we're
8 proposing.

9 CHAIRMAN HALL: I'd like to know what types of
10 services too because legal services is -- I guess every service
11 is a little bit different, but legal services are one of the
12 major types of services, I would think, and the most difficult
13 to provide.

14 I think you have to be extremely careful in choosing
15 who you provide that type of service whereas you might not in
16 some other. I might be wrong. That seems to be one of the
17 major problems that we have here.

18 MR. ELGIN: I was going to include what we felt were
19 the most closely analogous services in the contracting for
20 public defender service.

21 CHAIRMAN HALL: Can we go on then? Let's go on and
22 have Charlie give us his on the manual, if we could.

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PRESENTATION OF CHARLIE MOSES

1
2 MR. MOSES: Basically, we've talked about a lot of the
3 issues because, as Mr. Uddo noted, the manual and the regulation
4 are very much intertwined. We did feel, however, that there
5 would need to be a type of codification for internal use
6 basically or for use of the peer reviewers to try and establish
7 the peer review system.

8 I would direct the board's attention onto page 69 of
9 the Provisions Committee book. If you look on page 69 -- I
10 apologize. We are supposed to have an overlay -- we have an
11 overlay and we're supposed to have an overhead projector which
12 for some reason or another did not make it into the room today.

13 If you look on page 69, you will see basically a flow
14 chart of the competitive bidding process. Because we are trying
15 to remain somewhat general in this discussion today, I will just
16 discuss several of the key elements that have been discussed and
17 are on this flow chart.

18 You will notice that after the solicitations are
19 issued, we have provision for on-site bidder's conferences.
20 There has been some misunderstanding about what a bidder's
21 conference is, but essentially this gets to the question that
22 both Mr. Valois and Mr. Uddo were asking as far as a provider in

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1 a local area being able to understand what he would be bidding
2 on.

3 What we're proposing is that in those areas that there
4 appear to be the most competition or potentially in all areas,
5 essentially, that there would be a bidder's conference at which
6 time people who are interested -- interested parties would be
7 able to come and ask specific questions about the solicitations
8 so they would have the answers to their questions given to them
9 at the conference.

10 That would enable them to then formulate their
11 application in response to a full understanding about what the
12 solicitation is asking for. Basically you will see that there
13 are three different levels of review that we are having here.

14 The first level of review, the technical review is
15 exactly what it says. It is designed exclusively for minor
16 technical problems that would prevent an application from being
17 considered unless they were corrected.

18 These are things such as forms that are specified to
19 be included in the solicitation and for some reason or another
20 are not included. The technical reviewers, once they determine
21 that there is a problem, would immediately give notice to those
22 individuals and give them an opportunity to cure so they would

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1 have at least a seven day notice and opportunity after notice to
2 correct any minor technical problem that might occur.

3 The peer review, I think we've discussed rather
4 extensively, at least as extensively as we probably want to
5 discuss today, but I would note that it is important when
6 looking at the peer review process to also look at the review
7 criteria that would be established, the review criteria that are
8 established because those are the criteria that will be included
9 in the solicitation.

10 They are the criteria that the reviewers must apply.
11 If you look -- again, that would be in 1633.5(b) of the
12 regulation. It would be on page 5 of the Peer Review Manual.
13 These criteria -- granted there might need to be some redrafting
14 of them and that would be no problem.

15 I think that the important thing here is that the
16 general census of the criteria is to look for quality and
17 experience of the service providers, to look for exactly the
18 types of case services that the providers not only think are
19 appropriate for their area but are proposing to do, and to look
20 at the management structure and organization to make sure that
21 they have the ability to implement what their bid says they want
22 to do.

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1 Finally, we also look at costs. As we discussed
2 earlier, cost is of course a factor but you'll notice cost is
3 only one of six different factors that are being considered. I
4 think that is very important to understand here.

5 MR. UDDO: Let me ask a question about that. I take
6 it you are going to determine the amount available for a service
7 area based on the per capita in the census and the per capita
8 formula?

9 MR. MOSES: Well, after the 1990 census, we propose to
10 do that. A lot of decisions on the amounts available would of
11 course depend upon the exact timing of when this proposal or a
12 similar proposal or any proposal for competitive bidding is
13 implemented.

14 MR. UDDO: You mean there can an amount of money
15 available to a service area? That's going to be determined
16 at --

17 MR. MOSES: There would be an amount of money and that
18 amount of money available would be noticed in the solicitations
19 so that any potential offeror would know exactly what he was
20 bidding on or at least what he had the opportunity to bid on.

21 MR. UDDO: If it is one pool of money, what do you do
22 when you start having again five different people bidding on

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1 different portions of the delivery system and they don't know
2 exactly what proportion of the, say, million dollars has been
3 allotted for domestic cases and they give -- what did they think
4 was realistic there. You get a variety of bids and you can't put
5 them together in any way that would lessen the amount of money
6 you've got available.

7 MR. MOSES: Essentially at that point, what you would
8 do is you have a variety of bids. You start to examine each of
9 those bids. The peer reviewers would look at those bids as far
10 as the reasonableness of the costs.

11 They would be rated by the reviewers and sent on to
12 the president for his review.

13 CHAIRMAN HALL: Charlie, does the manual address his
14 question? Does it say -- are you telling us now what should be
15 in there to cure the problems he has presented or is it
16 presented in the manual already?

17 MR. MOSES: I think that it actually is presented in
18 the manual under the negotiations section. What we have
19 established is the authority for the president, after looking at
20 the bids, the offerors, that the Peer Review Panel have given to
21 the president, the president has the authority to then say well,
22 we want to do some best and final negotiation with these

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1 individuals.

2 There would be a negotiation period at which time the
3 contract --

4 MR. VALOIS: Is this a negotiation of all of the
5 bidders or with one of the bidders?

6 MR. MOSES: It would be a negotiation with only those
7 bidders as directed by the president from the list provided to
8 the president by the Peer Review Panel.

9 CHAIRMAN HALL: Then that wouldn't apply to the point
10 of procedure at which you are then. You couldn't use that
11 provision for negotiations to address a problem that Professor
12 Uddo has presented.

13 What's confusing me in this is it seems like with
14 every problem that is presented, it seems like there is -- it's
15 already in here or you already have an answer to it. It seems
16 like you don't refer to that section.

17 I mean, a lot of these problems that they are
18 presenting, shouldn't your answer be "we haven't addressed that,
19 but yes, that needs to be in there. Let's put something in
20 there on it"?

21 MR. MOSES: I can certainly say that needs to be in
22 there. We had thought that we had addressed the issue.

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1 MR. UDDO: You anticipated that problem, where you've
2 got a certain amount of money and none of the bids when you
3 tried to piece them together fit within the amount of money
4 you've got.

5 MR. MOSES: We had anticipated it. That's why we put
6 in the provision for best and final negotiations.

7 MR. UDDO: You don't generally get to that point until
8 you've got bids that you think are your best and final bids;
9 when you start negotiating those specific ones.

10 MR. MOSES: That's correct.

11 MR. UDDO: At a much earlier stage, you could run into
12 this problem where you just can't piece together a group of bids
13 that fits within the amount of money and you rebid it. I don't
14 think that's an answer; it's just a problem.

15 CHAIRMAN HALL: That problem needs to be addressed
16 earlier before you get to the negotiations; doesn't it?

17 MR. VALOIS: It seems to me either need to do that--
18 if you change the bid conditions through negotiations, it seems
19 to me you are obliged to rafter the solicitation and change the
20 conditions by negotiation.

21 You put out a bid and you don't get responses for the
22 whole thing. Then you negotiate with four people out of six and

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1 you say -- you change the conditions. There may be somebody
2 else who wants to bid on the changed conditions, so you either
3 need to rebid it based upon the changed criteria -- and you need
4 to allow for that somehow.

5 MR. ELGIN: Is it my understanding that you are
6 suggesting that we have an expected number for -- expected
7 percentage for each type of case that we might get in a service
8 area?

9 MR. VALOIS: No, my numbers were purely hypothetical.
10 You all are designing this system, not me.

11 MR. UDDO: You can anticipate that. You could look at
12 a service area and say X percentage of the needs in this area is
13 domestic and X percentage is housing or whatever and have some
14 idea how that gets divided up.

15 MR. ELGIN: Right -- crossed on the various types of
16 cases and then a portion out.

17 MR. MOSES: In fact, that can easily be done. In the
18 development of any solicitation package for an area, because
19 everything would be tailored in a solicitation to the specific
20 area involved.

21 You can have an analysis not only of what the existing
22 priorities, service priorities are in an area. You have an

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1 analysis, the capability to see what the service dimensions in
2 the past three or four years in that area have been.

3 So you have, overall, all a general idea of what to
4 expect coming in from that area.

5 MR. UDDO: Let me ask you another question. It is not
6 really related to the manual but in a rough sense related to the
7 cost part of this. Has anyone calculated what is likely to be
8 lost in terms of loss pro bono efforts or in terms of lost
9 grants that other organizations make to grantees that would not
10 be made to private attorneys who are successful bidders?

11 Has anyone calculated that? I think pro bono is going
12 to be close to dead under this system. I don't imagine that one
13 private attorney next door to another is going to do for free
14 what the guy next door is getting paid to do on some kind of a
15 bid system.

16 We talked about this this morning. I think that it is
17 the admonition toward doing pro bono work is the responsibility
18 of a private bar as a kind of sense of public service and
19 camaraderie and people get out there and do it.

20 I think you've got to anticipate that this is going to
21 knock a dent in pro bono.

22 CHAIRMAN HALL: Basile, I think the answer to your

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1 question -- there is nothing in here that addresses that.
2 That's one of the tremendous problems of switching over to
3 competition. That needs to be addressed, but I don't think it
4 is in here.

5 MR. UDDO: I'm just trying to see if there's something
6 they can throw out as thoughts about that and lost grants where
7 grants, I think, aren't going to be awarded to private attorneys
8 that may have been awarded to existing grantees.

9 CHAIRMAN HALL: Yes, Rob.

10 MR. ELGIN: When you have essentially the same amount
11 of funds going to an area, why would you expect a reduction in
12 pro bono? We have a set of funds that are going to an area for
13 service to the indigent.

14 It just happens that the services are being provided
15 by a non-profit entity which has relations with the bar,
16 relations with other --

17 MR. UDDO: You said non-profit?

18 MR. ELGIN: Yes, our grantees, our current grantees.
19 Why does the fact that some of these funds, obviously not all,
20 are going to a for profit firm having impact on the pro bono
21 effort that is being provided now? I can't see that that would
22 be a big problem.

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1 MR. UDDO: I think the answer to that is because, at
2 least the lawyers that I know that do pro bono work, really view
3 that as a service commitment because the grantee is non-profit,
4 because they see this organization out there trying to deliver
5 these legal services and have been convinced that there is a
6 need for additional assistance.

7 Once it becomes sort of privatized and competitively
8 bid, I think you lose a lot of that, call it, emotional appeal.
9 It's my prediction that at least in a lot of service areas, I
10 don't know about everywhere, but in a lot of service areas you
11 are going to lose a lot of your leverage.

12 New Orleans is one of the last cities in there country
13 to come to pro bono efforts. So it's a fairly recent occurrence
14 in New Orleans I have to say. I'll tell you that it was sold to
15 New Orleans lawyers by introducing them to the demands on NOLAC,
16 New Orleans Legal Assistance Corporation, and exposing them to
17 the kinds of needs of what is now terribly economically
18 depressed community has.

19 People were brought into it as a service commitment to
20 help out this non-profit organization there, NOLAC. It was a
21 hard sell even at that. I just think a lot of those people who
22 have made the commitment are going to begin to feel that well,

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1 now it's privatized.

2 It's competitively bid. Just the money they're saving
3 through competition will just get them more grants and things
4 will be covered better and work out better. It's sort of an
5 emotional think if my office is next door to a guy that is
6 getting paid to do it and they are asking me to do it for free.
7 He's going to be less motivated to do it for free.

8 MR. MOSES: I think that is not a full answer to your
9 question, but it is at least a starting point for us to start
10 looking for an answer to your question. Is the impact that
11 compensated systems have on pro bono?

12 There currently are a number around the country of
13 compensated delivery model systems that are in fact operating in
14 conjunction or in the same cities where pro bono systems are
15 operating.

16 I don't see that there would be any difference in the
17 impact on pro bono from this type of bid system than it would be
18 with the compensated delivery model.

19 MR. UDDO: Charlie, let me just say this. If anyone
20 ever hopes to sell a competitive bid system to bar associations
21 around the country, to ABA and to the Congress, all of which I
22 think are going to need to support this if it's ever going to

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1 happen, it's going to take more than our sense that it's not
2 going to hurt pro bono.

3 I think that is going to have to be something that can
4 be demonstrated. The cost of losing pro bono support has to be
5 factored into any competitive bid system that is going to be
6 sold as a more cost effective way of delivering legal services
7 and I think grants too.

8 I mean, the United Fund Grants and these other
9 organizations that award grants to current providers, I guess a
10 lot of that is going to dry up. Maybe they will award them to
11 private attorneys; I don't know.

12 MR. MOSES: The one thing that I would say on the
13 issue of grants -- and this goes toward what the nature of that
14 grant is -- it is my feeling -- and we haven't discussed this
15 among ourselves. That did come up in some of the comments we
16 were going to be looking at that issue.

17 The grant, any grant that is given for the provision
18 of legal services is given for the benefit of the clients. It
19 is not given necessarily for the entity. A granting agency is
20 still going to have the same concern about the benefit of the
21 clients.

22 The only difference is that the individual that might

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1 be providing service to accomplish that purpose that the
2 granting agency is concerned with might be different. It might
3 be the same.

4 It just all depends upon the results of the
5 competitive bid process as to who would be the individual that
6 would be working in a particular service area.

7 MR. UDDO: I think that needs to be explored. I
8 suspect some of those organizations only award grants to non-
9 profit organizations and may not be able to award them to
10 private attorneys.

11 So there may be some very practical obstacles even if
12 they wanted to continue to assist the client to allowing them to
13 do that. I think those are big questions here.

14 You are talking about a lot of the money in the system
15 when you talk about pro bono and grants and things like that
16 maybe being dried up or not being available for whatever
17 reasons.

18 I don't think this is ever going to be saleable if we
19 just sort of say we think that is not going to be a problem. I
20 think that's got to be demonstrated.

21 Then my last big overall cost question is, has anybody
22 plugged numbers into this system? Has anybody calculated what

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1 this system is going to cost in terms of what sounds to me like
2 a creation of some addition of bureaucracy in the corporation
3 with the whole peer review system and the like?

4 What are the plans for plugging in some dollar figures
5 on this if it is ever going to be seriously considered in terms
6 of what new costs are we taking on? What do we anticipate in
7 term of savings?

8 I mean, are we going to ever reach the point where
9 somebody is going to be able to say, these are the numbers, and
10 it makes sense on the numbers?

11 MR. MOSES: Well, one thing that should be understood
12 when you deal with any type of cost estimate from an end side
13 standpoint is essentially what you are doing is you are changing
14 over from one system to another.

15 We currently have a grants process system that is in
16 operation. As we implement this system, that system will no
17 longer be necessary. So you would be taking the expenses, the
18 cost that you are putting in to the existing system and shifting
19 it over to the new system.

20 I believe the budget, the Office of Field Services for
21 delivery of ongoing grants is somewhere around \$800,000. That's
22 off the top of my head but it's a ballpark figure. That would

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1 be shifted over. I think that would be a rough estimate of the
2 cost.

3 MR. UDDO: Why won't you need that? Why won't you
4 need an Office of Field Services?

5 MR. MOSES: No, I didn't say you wouldn't need an
6 Office of Field Services, but what you would be doing is
7 shifting the work that would be taking place within the Office
8 of Field Services from the current structure of grant funding
9 and refunding, the year end process of refunding for everybody's
10 review.

11 You would be shifting it from that to this monthly
12 competitive cycle. So that money would be shifted over and you
13 are looking about \$800,000.

14 CHAIRMAN HALL: Charlie, Jim, I think, had something.

15 MR. UDDO: Can I just finished getting an answer to my
16 question?

17 MR. ^{Wootton}~~WOOTEN~~: This is in answer to your question
18 whenever you are finished.

19 MR. UDDO: Okay, let me just finish the -- so that
20 shifts some money over. What about the -- is there a point at
21 which you are going to project the expense associated with the
22 hiring of these peer review people and possibly increasing the

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1 number of monitors because you may have, as I said, two or three
2 or four or ten times as many grantees to monitor than we have
3 now?

4 Is there some point when those kinds of projections
5 are supposed to be made?

6 MR. MOSES: There have been very, very competitive
7 projections made. At this point, I'm not really sure that I
8 would be able to tell you with any certainty what those are
9 other than to say I believe the corporation budget which was
10 sent to Congress for this coming year projected that it would be
11 approximately \$1 million expense for competitive funding.

12 Correct me if I'm wrong, I was not involved in the
13 budget process.

14 MR. UDDO: I mean, you're saying that even if we need
15 to double the size of the monitoring office, a million dollars
16 would cover that?

17 MR. MOSES: I don't think that that was involved in
18 that.

19 MR. UDDO: That was kind of a like a one time expense,
20 shift over expenses or expenses that might be associated with
21 making the transition. That is not a projection of long term
22 costs that might be associated with this; is it? I don't know

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1 where the figure came from.

2 MR. WEAR: Mr. Chairman, if I might just add one
3 thing. The million dollar figure was mentioned by the panel.
4 It was a cost that we associated with switching over and getting
5 the system up and running.

6 We haven't done any cost figures as to an increase in
7 the monitoring costs. I do not envision that this process was
8 going to cost a great deal more than what we are now spending.
9 We will be spending additional funds for peer review panel.

10 As you point out, if the number of grantees increases,
11 there will be some additional costs in the monitoring area.
12 That is not a point that has been considered yet. I think that
13 all these points that you and the others and indeed when we hear
14 from Mr. Houseman later are all very good.

15 I think they will all be very helpful to help flesh
16 this out. This is at this point a very scaleful sort of outline
17 and we hope through these meetings to try to put some flesh on
18 it.

19 MR. UDDO: Jim, do you want to say something? Please
20 don't call me Professor Uddo. I'm really starting to get
21 paranoid now.

22 MR. VALOIS: He accused me of being mad at him when I

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1 addressed him by his full title this morning.

2 MR. WEAR: Sorry.

3 MR. VALOIS: I was relieved to hear the chairman
4 address him similarly.

5 MR. UDDO: So did the president, so I'm paranoid now.

6 MR. ^{Wooten}WOOTEN: Basile, I'm glad to see you here. Thank
7 you and appreciate you coming up from the south where everybody
8 does things in a manner of honor. My point was that I have had
9 a fair amount of experience with trying to use creative ways of
10 creating partnerships.

11 I think what you're talking about really is the
12 partnership that exists between the legal services providers now
13 and the bar. I think that this has the potential of actually
14 increasing that because instead of looking at how much you are
15 going to lose in the way of pro bono involvement or how much you
16 are going to lose in the way of grants, I think you ought to
17 look at what ought to be a requirement in here which is that
18 they are graded on the basis of what kind of arrangements they
19 have for pro bono, what kind of arrangements they have for
20 grants in matching funds.

21 When you are actually doing the peer review, what you
22 are really looking at is the total amount of resources that are

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1 going to be available to meet the legal needs of the eligible
2 clients in the area.

3 My experience has been if you open that up and you
4 allow for a lot of creative solutions, a lot of times you
5 actually increase the amount of resources instead of decrease
6 them.

7 For instance, if -- and you know, there's a lot of
8 obvious hostility on the part of the current grantees for the
9 idea of competition because it might mean that they are
10 dislodged as the provider.

11 I think there is concern about going from something
12 that is done on an eleemosynary basis to something that is done
13 on a profit basis. I could spell that, Professor.

14 MR. UDDO: I'm impressed that you used it.

15 MR. WOOTEN: I think the current grantees will have an
16 advantage. They are going to have an advantage in terms of
17 expertise. They are going to have an advantage in terms of what
18 their needs are.

19 They are going to have an advantage in terms of the
20 contacts they've already made in the foundation world and in the
21 bar world in being able to say that there is a group that is
22 willing to work with them either on financially or pro bono

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1 basis.

2 So I think it would be a mistake to look at
3 competition as likely to end up with just Joel Hyatts out there
4 or clones of Joel Hyatts doing the Jiffy Lubes of the legal
5 world.

6 I don't think that is the likely result of
7 competition. I don't think there is anything in what has been
8 so far that would drive it in that direction particularly.

9 MR. UDDO: Jim, I would agree with you that the
10 current grantees are going to have a distinctive advantage if
11 weight is going to be given to the amount of pro bono and grant
12 involvement that can be brought into the system in their bid.

13 That is not in here right now. There is nothing in
14 here right now that suggests any weight would be given to that.
15 So I would disagree with you if this were the proposal. I don't
16 think there is any requirement that anybody showed that they are
17 going to be able to keep pro bono involvement in grant
18 involvement.

19 Without that, I think it will be discouraging. I
20 think you are right. If that becomes a condition for winning
21 the grant, I think that the current grantee would have an
22 advantage.

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1 Secondly, though, I think if you make that a condition
2 I think you are clearly going to discourage private attorneys.
3 If there is any thought here that this is going to get small or
4 even medium size or even large law firms involved in it, when
5 you tell them that in addition to delivering legal services you
6 are going to also require that they show that they can get
7 additional grant money matching grants and some sort of pro bono
8 commitment or effort, I think that you are going to find a lot
9 of law firms or private attorneys are going to be discouraged.

10 I agree with you that it is an important point, but I
11 don't think it is easily resolved because I think going in one
12 direction you are going to discourage a lot of people from
13 bidding if that is what the point of this is and if you go in
14 the other direction you are going to lose a lot of grant pro
15 bono money.

16 Would you agree with me that that is an issue and that
17 we need something more than our visceral reaction to it if this
18 is ever going to become a reality? It's going to have to be
19 thought through, studied and somebody is going to have to say
20 this is the way it's going to be done. If it's done that way,
21 we can project within certain parameters this is what is going
22 to happen.

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1 MR. WOOTEN: Well, I think it ought to be looked at
2 more closely and we will. If you look at the criteria in there
3 now in management and resources as part of the judging criteria,
4 you would be allowed as a peer viewer and as making a decision
5 on that to do that now. It is not as spelled out as it could
6 be.

7 MR. UDDO: Jim, before you got here we were told that
8 that provision was also going to assure that the attorneys that
9 were going to do the work were qualified to do the work and
10 specify their qualifications.

11 I'm telling you, you are sure putting a whole lot of
12 faith in that very broad statement about management and
13 organization. It seems to me that if this is ever going
14 anywhere that is going to have to be a lot more specific than
15 management and organization includes qualifications of the
16 attorneys involved, experience in the fields that they are
17 bidding on, pro bono and grant efforts.

18 When I read it, none of those things came to me. So I
19 think that that would have to be much more detailed before you
20 could rest on that part of the judging criteria.

21 MR. VALOIS: Can I ask one question Mr. Wooten brought
22 to my attention? I guess before -- if we ever have another

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1 hearing on this, I would like to have two sets of numbers. One,
2 how many attorneys are presently within the legal services
3 system? Second, how many former members there are.

4 I think we have an awful lot of graduates of legal
5 service programs, people gone on for other reasons, gone
6 elsewhere. The reason I'm asking is that obviously those people
7 are potential bidders.

8 I suspect there are a bunch. I would just like to
9 have some handle on that, how many former legal services
10 attorneys there are.

11 MR. WOOTEN: We think there are 4,178, I think, is the
12 fact book number for how many are in the system now. I don't
13 know what the --

14 MR. VALOIS: I'm sorry that Professor Uddo -- I'm
15 still not mad -- left because I guess I disagree a little bit
16 about this pro bono efforts. I just don't think it would have
17 the drastic effect that he does.

18 People are interested in providing legal services to
19 the poor. Private attorneys are not going to be turned off, in
20 my opinion, at least to the extent that Basile is concerned
21 about, by the fact that somebody else in the private bar has
22 been awarded a contract to do all the tenant cases.

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1 Everybody knows that those -- you have to be dedicated
2 to do that kind of work. Nobody is going to get rich doing that
3 work. The fact that my private attorney neighbor has been
4 awarded the contract to do tenant cases in Raleigh would not
5 prevent me from continuing to do private pro bono work.

6 I don't think it's going to have that same effect, but
7 I think it's well to think about it. I think we need to present
8 some evidence, if any there is, on the subject.

9 MR. MOSES: One other thing that probably should be
10 addressed here, as I'm sure other people will say after we leave
11 the table, the peer review process is in many ways dependent
12 upon the quality of the peer reviewers that you have.

13 I think that that is a very valid point. In fact,
14 what we tried to do was to begin to make a stab at establishing
15 some standards and criteria for not only who should be allowed
16 to participate in the peer review process but also those people
17 who would have conflicts of interest and possibly should not be
18 allowed in any particular instance to participate in the peer
19 review process.

20 What we have done is to establish a pool of peer
21 reviewers that from which pool based on individual experience,
22 knowledge, knowledge of localized areas and that type of thing,

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1 a peer review panel would be put together for each solicitation
2 that is issued by the corporation.

3 I think it is important to note that the panelists
4 qualifications here will allow for specialized knowledge of the
5 area of legal services in the specified type addressed. It will
6 allow for generalized knowledge of the practice of law in
7 related legal fields and also, which is very important, prior
8 experience in evaluation selection, administration or management
9 of public service grants or contracts.

10 What this does is bring into the pool of peer
11 reviewers those entities, those individuals that experience a
12 specialized knowledge on the entire field of potential providers
13 under the solicitation.

14 That is what we try to get. At the same time, we have
15 gone to great lengths to attempt to address the issue of
16 conflict of interest and identify those individuals -- if you
17 look on page 4 of your peer review manual which would be page 28
18 of the committee book.

19 We have identified eleven specific categories that we
20 feel would provide a conflict of interest for a peer reviewer.
21 I won't sit here today and say those are all of the categories.
22 There is obviously -- this board will have some suggestions.

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1 MR. VALOIS: I have one now, number 12, any other
2 reason which would provide a conflict of interest, a catch all.

3 MR. MOSES: The idea here is to try and maintain the
4 independence of the peer review panel. The quality and the
5 independence of the panel are what would be most important for a
6 valid competitive system.

7 MR. UDDO: Charlie, on page 5 or what I've got here,
8 what do you all mean by the review by persons with a diversity
9 of background -- the peer review panel is supposed to be made up
10 of people with a diversity of background --

11 MR. MOSES: Essentially, what we are trying to do is
12 make sure that no peer review panel is --

13 MR. UDDO: Is there a version of this that I don't
14 have?

15 MR. MOSES: Do you have the committee book with you?

16 MR. VALOIS: Yes, that's where I thought I got that
17 from. What page is it in that?

18 MR. MOSES: If you look at page 27 of the committee--
19 the top of page 27. What we're trying to do is ensure that a
20 peer review panel will be composed of a diversity of experience
21 in any given area of localized experience, of diversity of
22 knowledge, a diversity of experience background.

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1 Essentially, if you construct a panel -- and we've
2 seen this from basically the operations of the law school review
3 panels -- if you construct a panel where everyone has the same
4 background or the same experience or the same thoughts on how
5 you fund or who you should fund, you do not have a very good
6 peer review process.

7 As far as the law school panel is concerned on which
8 basis this was put in, I've always said if you don't have one or
9 two knock down drag out fights in the middle of the peer review
10 process, I haven't done a very good job in constructing a panel.

11 I don't want everyone to agree on everything because
12 that means you are not getting a diversity of information and
13 background that you need to get a consensus type of organization
14 for your final applicant.

15 That's what is meant there. It can be redrafted or
16 reworded or additions can be made to it if necessary.

17 MR. WOOTEN: Basile, I take that to mean -- all this
18 is subject to court review. That is one of the things about a
19 competitive process that everybody needs to keep in mind. If
20 you've laid out these procedures, then you're bound to live with
21 them.

22 They are going to have some kind of meaning. I think

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1 that this means you are not supposed to stack these things. You
2 don't stack them with all people out of the legal -- that are in
3 the legal services community.

4 You don't stack them all out of private law firms or
5 pre-paid legal fans. I think it's more -- I appreciate what
6 Charlie is saying, but you also want to give the appearance of
7 fairness.

8 When people are going to face a peer review panel,
9 they want to face one that doesn't line up either all for them--
10 - they may want them if it is all for them, but they are not
11 going to want to face one that is all against them.

12 I think that that is how that would be construed.
13 That is what it was meant to cover as far as I was concerned.

14 CHAIRMAN HALL: Rob, you are up. We're going to move
15 on. Is Mr. Powers or Mr. Newhart with us today? They want to
16 speak early. What time in the afternoon did you all --

17 A PARTICIPANT: Actually, Mr. Meeker has got the first
18 plan.

19 CHAIRMAN HALL: Okay, I just wanted you gentlemen to
20 know that I've got a message that you all have an early plane
21 and I intend to get you in. If we take you up after lunch, is
22 that going to ruin your plans? What time must you be out of

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1 here?

2 A PARTICIPANT: If we go in the right order, we will
3 be okay.

4 CHAIRMAN HALL: Let's go the right way.

5 MS. BENAVIDEZ: I have something. Jim mentioned
6 something about giving the appearance of firms. I don't think
7 we should give -- I think we should be there and not just give
8 an appearance.

9 MR. WOOTEN: I agree with that but I guess what I
10 meant by that was that people would be able to judge by the
11 backgrounds of the people that are on the peer review panel
12 whether or not they thought they would get fairness in a
13 process.

14 I didn't mean a cosmetic kind of fairness, but instead
15 real fairness on the basis of the backgrounds that people come
16 from when they sit on the panel. As I say, I think that if
17 people feel like -- this could happen.

18 Institutions are here for a long time. This
19 institution is going to be here well after any of the board is
20 either in contemplation or current. This can cut both ways.
21 There is no political magic here.

22 You want to be sure you put something in place that is

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1 fair to your perspective and fair to someone else's perspective
2 because that is what is going to be there in the future too. So
3 I agree; it has to be as fair as it can be constructed.

4 MS. BENAVIDEZ: Thank you.

5 CHAIRMAN HALL: I'd like to hear from Rob Elgin. He
6 has a review of some relevant studies that he's done. I
7 recognize him for that purpose.

8 PRESENTATION OF ROB ELGIN

9 MR. ELGIN: I'd like to go over a few studies that
10 were reviewed by the Division of Policy Development. We believe
11 that the public defender system is probably the most close to
12 analogous to a situation that we face.

13 We've looked at some papers that were written during
14 the 80s. Most of the papers that we've looked at or retained
15 that have been made available to us have been put together by
16 the Spangeberg Group.

17 I'll start with just a survey that the group did for
18 the Bureau of Justice statistics. The report was prepared in
19 1986 and it included a survey of 718 counties throughout 50
20 states to estimate state by state data on per case cost and the
21 type of criminal defense systems for indigents existing across
22 the states.

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1 The 1986 data that were collected were compared to
2 similar data that were collected in 1982 for the same counties.
3 This study was a very objective study, more or less a report of
4 what was out there in 1986 and how that compared to information
5 collected in 1982.

6 The study found, just in summary, that average case
7 cost for average indigent defense increased nationwide from 196
8 in 1982 to 223 per case in 1986. It found that more counties
9 used assigned counsel than any other system, but that assigned
10 counsel systems -- actually, it would be better if I
11 backtracked, pardon me, to define these systems before I go into
12 reporting the outcome of the study.

13 The study used three types of indigent defendant
14 systems. The type surveys were the assigned counsel program,
15 public defender program, contract attorney program.

16 The assigned counsel programs rely on a case by case
17 appointment of counsel from the local bar members. Public
18 defender programs are organized as state and local public
19 agencies or as private non-profit corporations that contract
20 with state or local governments to provide services.

21 Contract attorney programs, the funding source
22 contracts with indigent dual attorneys, law firms and/or local

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1 bar associations to provide services to indigents.

2 Now I'll go back to the findings. Across the states,
3 a mix of program usage shifted during the period covered by the
4 survey, the '82 to '86 period. While the assigned counsel
5 programs remained the most widely used systems, their usage
6 dropped from 60 percent accounting survey to 52 percent.

7 Public defender programs, as defined above, grew from
8 34 to 37 percent of counties surveyed. The contract systems,
9 the ones that I think are most closely analogous to what we are
10 contemplating here, grew by nearly 66 percent from their
11 absolute low of 7 percent to 11 percent of counties surveyed.

12 The Bureau of Justice data were broken down by region,
13 state and county to show the changes in service types for the
14 period surveyed. In the northeast, contract services grew from
15 2.8 to 3.7 percent of counties surveyed.

16 The midwest had the largest rate of growth. The level
17 coverage nearly doubled from 4.8 to 8.5 percent; in the south
18 coverage group from 4.8 to 6.8 percent, still low relative to
19 the other systems.

20 The west also experienced the high rate of growth on
21 an increase from 18.9 percent to 32.6 percent across the
22 counties surveyed in the west. Case cost as reported by the

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1 Bureau of Justice statistics varied according to program type
2 and related budget processes.

3 Some programs faced an annual appropriation workout
4 and a legislative budgetary process similar to that we faced.
5 We got a given pool of funds that had to be distributed among
6 the programs.

7 Other programs obtain their budgets through
8 negotiations between funding sources and providers, the latter
9 affected by case types and workload criteria status through such
10 negotiations.

11 Assigned counsel programs normally have rates set for
12 various types of services provided such as in court or out of
13 court representation. Some jurisdictions set maximum rates that
14 can only be exceeded upon a grant of a waiver for extraordinary
15 circumstances where no maximums are established, a local trial
16 judge normally considers the reasonableness of fees requested.

17 The contract programs also rely on a variety of
18 payment schemes, the most common being the establishment of a
19 fee schedule to set rates for each type of case. That is
20 something that we might consider for the various types of cases
21 that our grantees provide.

22 For example, a jurisdiction may contract with a

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1 service provider to handle a given volume of cases for a set fee
2 per case, something that we've done in PLF projects. Another
3 jurisdiction may establish a retainer agreement with the
4 provider; however, this can pose problems.

5 This form was successfully challenged in Arizona, a
6 violation in the criminal defense area, a violation in the fifth
7 and sixth amendments of the Constitution. The system fell for
8 the following grounds, at least in the state of Arizona.

9 One, it did not take into account the attorney time
10 expected in representation of attorney's share of defendants.
11 The system did not provide for support costs. The system did
12 not take into account relative competence levels of potential
13 providers.

14 The system did not distinguish relative complexity
15 among case types, all of which we think we are addressing in our
16 review of competition to our legal services at our level. Cost
17 per case in '86 varied from \$63 in Arkansas to \$540 in New
18 Jersey in the public defender system.

19 Other sources of information on public defender
20 programs indicate the large variation could be due to the
21 variance in procedures that are required across the states. The
22 nationwide average cost per case is \$223, as I stated earlier,

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1 in '86, 14 percent higher than 1982, again probably as a result
2 of procedural changes.

3 The assigned counsel jurisdictions were found to have
4 the lowest cost per case. That's a report of the Bureau of
5 Justice statistics. Other reports which I will just summarize
6 found that the contract systems -- one report from the Blue
7 Ribbon Panel established by the San Diego County Bar
8 supervisors.

9 Competitive process placed more emphasis on low cost
10 than on quality. So there again we have that potential problem;
11 is there enough weight given to quality. We found that the
12 screening process in that particular competitive program was
13 defective because it was subjective and done by persons who have
14 neither the time nor the resources to conduct a thorough
15 investigation.

16 It found that with low bid contracts it could present
17 a conflict between attorney's economic self-interest and
18 confident representation. We found that the contract system was
19 unstable, although three year contracts currently in use provide
20 greater stability than the annual contracts previously used.

21 It also found that for San Diego, the current system
22 provided inadequate training and supervision. Next I have the

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1 NLADA's position with respect to competitive bidding. This was
2 published in NLADA briefcase in 1982.

3 Its findings are very similar to those that I've
4 mentioned before so I won't repeat those. It did have a
5 recommendation, however, that if competition were to be used for
6 services to the provision of grants for services to the
7 indigent, that the bidding should ensure that quality is
8 considered as well as cost. Again quality creeps in as an
9 important factor.

10 I won't continue on with a summary of each report
11 because each one has the same set of conclusions. That is that
12 the assigned counsel programs remain the most frequently used
13 across states. Contracting for public defender service is on
14 the rise generally.

15 The contract systems require careful construction in
16 order to meet due process, efficiency and effectiveness in
17 criteria. Contract systems, as most are currently used, are
18 inherently unstable because of the duration which the grants are
19 given.

20 So those are the problems that one could predict with
21 such a system if we do not address them before such a system is
22 put into place.

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1 CHAIRMAN HALL: You used these reports ---

2 MR. ELGIN: We used the findings and recommendations
3 in these reports in developing the system.

4 CHAIRMAN HALL: Where in the regulations did you make
5 provision that takes care of the quality problem, the low cost?

6 MR. ELGIN: We hope that is taken care of. I think
7 it's the 1633.5. I know we need to flesh that out. That whole
8 1633 provision would have to address your concerns with regard
9 to quality.

10 In a solicitation we would require extensive reports
11 by potential providers on their abilities to provide the
12 services contemplated.

13 CHAIRMAN HALL: That's not in the proposed regulation;
14 is it?

15 MR. ELGIN: Our authority to do that is. Granted,
16 it's not spelled out in detail. We expect to flesh that out in
17 the regulation.

18 MR. MOSES: One thing I might add, if you look at the
19 review criteria and it's related to something I said earlier--
20 if you look at those criteria, there are six general, very
21 general criteria that have been set out.

22 Of the six criteria, only one of the criteria goes to

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1 cost. The other criteria go to issues related to service
2 dimensions, issues related to quality, issues related to
3 organization and ability to manage the project.

4 I think that our feeling was that that was a major
5 distinction between what we have been proposing and what a lot
6 of the current contracting systems in the public defender area
7 are doing.

8 MR. WOOTEN: Let me address that. 1633.55,
9 organizational capabilities, demonstrated as well as
10 sufficiently and successfully support the project. What that is
11 in actuality is a resume review.

12 Who are the people that are coming in and saying that
13 are going to be part of your project if you are awarded the
14 grant? Do they have the expertise to do what you are saying you
15 are setting out to do?

16 Do they have the background? Is your organization set
17 up in a way that is going to have quality safeguards supervision
18 by people who had enough stature and experience to supervise.

19 CHAIRMAN HALL: You feel the defender programs are
20 looking for a warm body more than anything else. Underneath the
21 proposed regulations, you are looking for the quality person and
22 not the one who would do it for the cheapest?

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1 MR. WOOTEN: Absolutely. I don't think that in this
2 kind of program the idea that this is a way to do -- to get the
3 cheapest -- if that's the right word -- representation for the
4 poor is what this is about.

5 I wanted to add something but Professor Uddo was
6 absent from the room. We talked to an outfit that was in the
7 prepaid legal services business and they gave us an unsolicited
8 proposal which we didn't have any money to fund.

9 In that proposal on how they viewed -- both of the
10 people who were at the head of this had extensive experience in
11 the legal services area. I think maybe both of them had been
12 executive directors and now they are in the for profit side.

13 Both of them said that they wouldn't go in, first of
14 all, without the cooperation of the bar association and in the
15 current world with the cooperation of the legal services program
16 that was there and two, without a plan for enlisting lots of pro
17 bono help.

18 So I think you could make a caricature -- it would be
19 easy to make a caricature of what would come out of this process
20 if you didn't think that the people who were in the peer review
21 process were trying to maximize the resources available to the
22 poor and the quality of those resources.

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1 If you come in on a mindset that what this is all
2 about is Jiffy Lubes, then conceivably somebody could grind the
3 Jiffy Lubes out of this process. I just don't think that is how
4 the process would work.

5 I don't think in -- I don't know that there's a
6 federal grant program that uses competitive bidding which most
7 do, where what you're ending up with is just low cost bidders to
8 provide what amount to even services.

9 CHAIRMAN HALL: Are there any other questions?

10 (No response)

11 CHAIRMAN HALL: Gentlemen, which one of you all are
12 going to do the summary for responses to newsletters and
13 mailings?

14 SUMMARY OF RESPONSES FOR NEWSLETTERS AND MAILINGS

15 BY CHARLES MOSES

16 MR. MOSES: Yes, I will. Of course, competition is
17 only as good as the number of people who are willing to possibly
18 compete. At this point, everything that the corporation has
19 done has been extremely tentative so that very few people really
20 know exactly, if anybody.

21 We don't even know exactly what we're going to do, but
22 what we have done is try to find out at least the number of

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1 people who are interested in finding out more information as a
2 very rough indicator as to whether or not there is an interest
3 among potential offerors for coming in and making bids.

4 At this point, as of Friday afternoon -- I obviously
5 don't know what has come in this morning -- we've had over 370
6 requests for information relating to how the corporation would
7 like to compete.

8 It's interesting that over 60 percent of those
9 requests have come from prepaid organizations, either
10 organizations that were currently with unions, organizations
11 that were providing full ranges of services through prepaid
12 plans to all of their members.

13 The requests have come from a total of 46 states and
14 the District of Columbia. So it's at this point with extremely
15 tentative information coming out from the corporation. There
16 appears to be a substantial amount of interest in the
17 possibility.

18 I think that's very important as we examine the
19 concept of competitive bidding to bear in mind because that has
20 to do with the number of offerors that actually might be
21 interested in bidding.

22 Unless you have any other questions on that, I just

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1 wanted to make sure the committee was aware of that.

2 CHAIRMAN HALL: Do you all have any questions?

3 (No response)

4 CHAIRMAN HALL: Thank you, Charlie. Someone is going
5 to do a summary of the written comments and apparently there are
6 some responses to them. Tim, is that going to be you?

7 MR. SHEA: Yes.

8 COMMENTS SUMMARIZATION BY TIMOTHY SHEA

9 MR. SHEA: I will summarize the comments and I will
10 leave these able subject matter experts to respond to them as
11 they see fit.

12 As of Friday, there were 22 comments that were
13 received by the corporation. Those come principally from LSC
14 program providers, although there were a certain number from bar
15 associations, some from private practitioners as well.

16 The New York State Bar Association submitted one as
17 well as the New England Bar Foundation. So there were bar
18 organizations that submitted comments too. Overwhelmingly, the
19 comments expressed some measure, I think, of dissatisfaction
20 with the proposal.

21 I'd like to try -- for purposes of this discussion, I
22 will try to summarize what I think the tenor of the comments

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1 were generally and then perhaps go over in some detail some of
2 the very thoughtful ones.

3 There was one submitted by Alan Houseman and Linda
4 Perle in particular as well as the Legal Services of Southern
5 Piedmont which bears some attention. Very briefly, though,
6 fundamentally I think you can group the comments into two broad
7 categories.

8 One expresses reservations about competition and
9 principle. Other comments express reservations about the ANPRM,
10 the specific terms of the proposal that we have on the table.
11 As you are well aware, a number of the commentators question the
12 authority of the corporation to begin with and that's really not
13 an issue at least for the present that we need to deal with.

14 A number of commentators suggested that competition
15 would threaten the stability of the existing system. Those
16 comments urged that the reservoir of expertise and experience
17 that now resides with LSC programs would be wasted by a
18 competition that shifted service to other presumably less
19 experienced providers.

20 I'm dealing first and foremost with the objections and
21 principal to competition. Secondly, there was some suggestion
22 as well that competition would result -- provision of legal

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1 services that focuses on simplistic and routine problems rather
2 than more service oriented legal problems with the thought that
3 it may be either statistics or client served that would become
4 the main object of evaluating programs.

5 Third, there was considerable comment that pro bono
6 efforts of programs would be undermined or maybe even more
7 generically that the goodwill that local programs that worked
8 hard to engender would be diminished if a contract should be
9 reassigned to other providers.

10 Again the suggestions urged that the working with the
11 bar and working with other private funders develop relationships
12 that if they were to be severed would, in net terms, diminish
13 the resources available for provisional legal services.

14 Finally, there was a certain expression, a certain
15 undercurrent, I guess, of the motives of the board in taking on
16 this issue and suggesting really that there was outright
17 hostility.

18 I think it's an unfortunate suggestion but this
19 proposal grew out of a certain measure of hostility against
20 their existing providers.

21 Let me pass on then to what I think the more specific
22 objections or objections to the rule as drafted. First, it was

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1 urged by a number of commentors that too much discretion is
2 lodged in the present.

3 There has already been a certain amount of discussion
4 about that, both in terms the development of the assessment of
5 the submissions as well as in the evaluation of the final
6 determination.

7 Similarly, there were reservations expressed about the
8 guidance given to peer reviewers. Fundamentally, that is routed
9 in the assertion that the peer reviewers are not given
10 sufficient guidance as to how to evaluate specific proposals.

11 That, to some extent, your questions have highlighted
12 as well. Considerable reservations were expressed about the
13 prospected service areas and within service areas various kinds
14 of specialties will be -- that is service legal specialties will
15 be recognized.

16 Part of those have to do with expectations; that is,
17 how will the bidders know how to formulate their submissions,
18 number one. Number two, what will the competition be on? Will
19 they be competing for the service in a service area? Will they
20 be competing for more than one level, service in a service area
21 or within a service area maybe for certain kinds of cases.

22 Finally, as for the -- there were a number of

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1 reservations expressed on how quality of representation was to
2 be measured under this scheme. The proposal as currently
3 constituted didn't give sufficient attention to quality issues.

4 Surely, in that vain, the matter of experience -- the
5 comments dealt almost uniformly with the matter of experience.
6 It didn't seem to have been accorded the weight they would like
7 to see in the system.

8 Having said that, it may be useful to -- if I may
9 direct your attention to comments -- I think surely the most
10 detailed comment was submitted by the Center for Law and Social
11 Policy, that is Alan Houseman and Linda Perle on behalf of PAG
12 and NLADA.

13 That appears at page 24 of the comment package that
14 you have. Just to summarize, there was -- I know Linda Perle is
15 here and she can speak, I am sure, better than I about the high
16 points of her submission.

17 She notes that the proposal which urges the proposal
18 that would diminish local control likewise addresses -- on page
19 26 -- the matter, in her view, the insufficient experience of
20 the bidders.

21 Finally, she notes on page 27 that there are a number
22 of potential questions on legality and how the current system--

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1 how a competitive system would be integrated to the current
2 system.

3 There certainly are some legal issues as well as
4 practical issues as to how to make both the structural matters
5 and some compliance issues with respect to that. Those are not
6 wholly addressed in this submission and I think a number of them
7 need further attention and this committee has already
8 highlighted that in many respects.

9 Her section by section analysis is very instructive
10 though. Briefly, there is some note -- attention given to the
11 three year funding cycle as well as the equalization. She
12 expresses reservations with respect to both, particularly
13 equalization.

14 On page 28, she devotes some attention to the matter
15 of multiple awards within a service area. I think that is a
16 matter which deserves some attention. The circumstances under
17 which -- how bidders will know whether a service area may be
18 subdivided either geographically or functionally deserves some
19 attention.

20 So if there is an opportunity to bid either for the
21 whole area or for parts of the area or for subject matter
22 expertise in the area, we don't want -- the corporation really

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1 doesn't want to leave that to the guesswork or speculation by
2 the submitters.

3 You want to make sure that potential bidders are aware
4 of what the parameters are of what they are bidding on. In the
5 selection criteria, she urges that selection criteria are not
6 sufficiently specific; that there are a number of critical
7 selection criteria that are left out, overhead experience,
8 demonstrated capacity to leverage other resources.

9 Some of those matters have already been addressed.
10 Fundamentally, she urges a greater specificity should be given
11 to any evaluation of -- greater direction, I guess, should be
12 given to those who evaluate specific proposals.

13 Moving on, again she urges that the peer review
14 process should be given more specificity. More direction to the
15 peer reviewers should be given. She urges that the scope and
16 tenor of the negotiation should be made more clear. That's
17 something that a board member has already raised.

18 The negotiation shouldn't substantially offer what the
19 bidders have bid on, otherwise we'll have, in effect, a whole
20 new proposal at that time. I think that's all in terms of my
21 general review that I want to highlight.

22 I would add one other comment. Those submitted by Ken

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1 Schorr which is page 60 of your comments is - I am really
2 picking out representative comments. It summarizes, I think in
3 a very complete way, the sense of the commentators.

4 It's short of enough that I don't think it needs any
5 further explanation. I think, frankly, that's all I have.

6 CHAIRMAN HALL: Thank you, Tim. Are there any
7 questions?

8 (No response)

9 CHAIRMAN HALL: Maureen, what is the plan; to break
10 for lunch at 12:00?

11 MS. BOZELL: Whenever you would like.

12 CHAIRMAN HALL: I don't want to -- we're going to go
13 into public testimony next, I believe. I didn't want to put Mr.
14 Powers and Mr. Newhart's presentation up if we could -- I don't
15 know how long they think they will be.

16 MS. BOZELL: I believe Mr. Meeker has to leave at
17 2:00.

18 CHAIRMAN HALL: I would like to go ahead unless there
19 is somebody here who just has to go eat. Why don't you come
20 forward, sir. Is Mr. Cox here? Why don't you come forward and
21 sit because I have you down as a panel on this thing. I think
22 we're going to have a response. Go ahead and start anytime.

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1 PRESENTATION OF PROFESSOR JAMES MEEKER

2 PROFESSOR MEEKER: I'm not quite sure of the procedure
3 of this. I guess I should identify myself first. My name is
4 Jim Meeker. I'm a professor at the University of California,
5 Irvine. I teach in the criminology law and society section of
6 the program, social ecology.

7 I have a law degree and PhD in sociology. I've
8 written a number of academic articles concerning the issue of
9 measuring legal need and various effects in terms of access to
10 justice.

11 What I am concerned with here today and what I want to
12 address is this issue of whether or not there is any current
13 scientific data available that suggests that competitive bidding
14 produces competition that decreases costs and increases quality
15 in terms of delivery systems in the civil area.

16 Now I've reviewed a lot of studies in this area and
17 I'm also in the process of conducting the evaluation of the
18 Orange County study which is the sister study, I guess, to the
19 San Antonio project, both of which were suggested by the
20 delivery system study that was done earlier and published in the
21 earlier 80s.

22 Both of those projects, along with the private law

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1 firm project were concerned with addressing the issue that as of
2 the early 80s, there were no studies that systematically,
3 experimentally tried to test the different delivery models in
4 terms of quality and cost.

5 CHAIRMAN HALL: Professor, could I stop you and ask a
6 question and get a response from Mr. Powers and Mr. Newhart too?

7 PROFESSOR MEEKER: Sure.

8 CHAIRMAN HALL: Maureen tells me that Mr. Powers and
9 Mr. Newhart are going to have a presentation on a report that
10 you are going to refer to in your report. Their presentation
11 should go first which would better clarify what you have to say
12 now. Do you know what they have?

13 A PARTICIPANT: I would like to speak as a member of
14 the ABA Committee on the Delivery of Legal Services which
15 produced a report on the San Antonio project. I don't know to
16 what extent Mr. Meeker is going to talk about that, but I assume
17 Professor Cox has some words to say.

18 It is relevant for the ABA's position regarding that
19 report to be reported at the same time as whatever Professor Cox
20 may have to say.

21 CHAIRMAN HALL: Okay, we can have him return with you
22 if that's not a problem.

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1 A PARTICIPANT: That's fine. I don't have a plane ✓
2 until 5:00.

3 A PARTICIPANT: My report is basic independent law as
4 I am here to address the defenders. So mine will not be tied to
5 theirs.

6 CHAIRMAN HALL: There's no one here of the opinion
7 that whether you all go first or last has any matter then or
8 clarification. I'm sorry to interrupt you, Professor.

9 PROFESSOR MEEKER: Basically, what I'm concerned about
10 is primarily discussing the San Antonio study and the Orange
11 County study in terms of what kind of valid observations can be
12 made with the results of these studies.

13 What I'm particularly concerned with is the
14 limitations of the results as far as not supporting or
15 substantiating major changes in policy that are being considered
16 here.

17 Primarily what I want to do is talk about some general
18 issues in terms of weaknesses in the study designs, most study
19 designs since they were essentially carried out in a very
20 similar fashion and where illustrative presents some of the
21 preliminary findings of the Orange County study.

22 Unfortunately, a paper I prepared and just discussed

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1 at the Law of Society meetings which it was my understanding the
2 Legal Aid Society of Orange County was going to send to you all
3 for public comment, evidently didn't make it in time. I didn't
4 see it in this yellow sheet. So I'll leave a copy with you.

5 MS. BOZELL: We're having a great deal of difficulty
6 hearing you.

7 PROFESSOR MEEKER: The major problem I have with the
8 studies, both studies is in terms of their external validity.
9 That's basically how generalizable are these results, what kind
10 of policy conclusions can be made from them.

11 First of all, both studies only dealt with family law
12 issues. As you are all aware, I am sure, at least according to
13 the LSC fact book, that family law, for at least the most recent
14 years, has only constituted at best 30 percent of the regular
15 caseloads of staff models.

16 If you go back further and you look at some of the
17 earlier work done in the mid-70s, it's pretty consistent what
18 they found back then, about 30 percent of the cases. So this
19 represents a very narrow issue.

20 In fact, a lot of the justification for dealing with
21 family law issues in both of these studies was the fact that
22 family law, unlike other areas of law that a lot of the staff

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1 models deal with, family law is the one area which you are most
2 likely to find a competitive private bar market that can offer
3 comparable services and at least produce competitive models.

4 So this is a very special type of case. Indeed, the
5 proposed regulations here deal with all services not just family
6 law issues. There is no evidence at all that any of these
7 findings would hold for other areas of law such as
8 landlord/tenant or government benefits or entitlement programs.

9 Indeed, I think it would be very hazardous to
10 speculate that the relationships found in these studies would
11 hold forth. There is a lot of intuitive on the surface
12 reasonings about the types of markets that are involved in those
13 kinds of cases in terms of the private bar.

14 We suggest indeed the competition would not be there.
15 It's a different kind of specialty. Suppose the family law is a
16 specialty that reaches both people there in the lower income
17 sections of society as well as the upper income.

18 The other problem has to do with the models that were
19 involved. On the contract and staff models in particular, both
20 of them dealt with very few attorneys. In Orange County there
21 was one attorney that was a project manager that was involved
22 throughout the study.

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1 She, at different points in time, had an additional
2 system, another staff attorney. There were two of them. At no
3 point were there more than two attorneys involved. In the
4 contract models, each of the different types of laws that were
5 handled, both in the San Antonio and the Orange County study,
6 was represented by a single contract attorney.

7 As far as any differences in terms of quality, time or
8 cost between the contract models and the staff models in both of
9 these studies, we don't know if it's due to models. We don't
10 know if it's due to the particular attorneys involved.

11 We don't know how representative these attorneys are.
12 That's a very confounding problem in terms of analyzing these
13 experimental designs. The voucher attorneys, on the other hand,
14 did represent a larger group of attorneys.

15 To the extent that they did, that's less of a problem.
16 There's another element in terms of the attorneys and the models
17 in that in a true experimental design, one normally randomizes
18 the subjects that are being studied.

19 In both of these cases, there is really two different
20 types of subjects being studied. One are the clients and their
21 problems which, in both studies by design, are supposed to be
22 randomly assigned between projects or between models.

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1 Also what is under scrutiny here is the issue of
2 quality and cost. That focuses on the attorneys. In neither
3 one of the studies were the attorneys randomly assigned to the
4 models.

5 In fact, if you think about it in terms of reality,
6 that would be hard to do, to assign attorneys to staff model,
7 private model or voucher model. To the extent that there is
8 self-selection going on, that there are reasons why an attorney
9 decides to become a staff attorney or a voucher attorney or a
10 contract attorney, we don't know what kind of self-selection
11 biases that has on the results and whether or not the
12 differences are due to either the attorneys involved or again to
13 the models being studied.

14 There is no way to disentangle those effects. There
15 are other problems in terms of the client demographics in Orange
16 County and Bayhar County, Texas. Orange County is very unique
17 in California.

18 We have a very large Asian population from Vietnam.
19 We also have a very large hispanic community as well as an
20 illegal alien community. To the extent that it is an atypical
21 county drawing results on those clients to other areas of the
22 country, becomes somewhat problematic.

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1 We don't know how their particular, in this case,
2 family law issues and how they deal with attorneys differs from
3 other, say, ethnic mixes throughout the country. In fact, I've
4 done some earlier work with a colleague of mine, Professor
5 Dombrink, that shows at least a willingness to use attorneys to
6 solve problems as very profoundly influenced by cultural biases.

7 In particular in Orange County, we found that some
8 hispanic groups and Asian groups are a lot less willing to use
9 and resort to attorneys for solving their problems than other
10 ethnic groups.

11 This is a problem with generalized ability that has to
12 be taken into account. To the extent that Bayhar County also
13 has a large hispanic community, it is somewhat suspect whether
14 or not the results they found there for their clients would be
15 valid in, say, a state like Vermont or New Hampshire which has a
16 far lower hispanic community.

17 MR. UDDO: Excuse me. How does that affect the
18 outcome of the study?

19 PROFESSOR MEEKER: Well, it could affect the outcome
20 in terms of what I mentioned earlier, cultural biases and their
21 willingness to go to an attorney, to use these services or to
22 rely on an attorney to handle these kinds of disputes.

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1 Now this becomes, I would think, more problematic in
2 different areas other than family law because at least when one
3 is seeking a formal termination/dissolution of a marriage, by
4 law you have to go to legal systems for it. That's what San
5 Antonio dealt with.

6 However, Orange County dealt with custody issues.
7 There is both formal and informal ways of dealing with custody
8 issues and dispute management. To the extent that different
9 cultural groups are going to rely disproportionately on
10 attorneys and attorney services, that could influence in terms
11 of your caseload, in terms of your quality and your satisfaction
12 with the output.

13 MR. UDDO: It doesn't affect those cases that were
14 actually handled with respect to whether or not they were well
15 handled and the cost involved in handling those cases; right?

16 PROFESSOR MEEKER: It depends on what you mean by well
17 handled. Quality is a very illusive concept. I think San
18 Antonio made a good faith effort in terms of --

19 MR. UDDO: Let's assume that we have a definition of
20 well handled. The cultural part doesn't affect that; does it?

21 PROFESSOR MEEKER: Sure. If you have well handled--
22 if you are going to take into account the client's responses to

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1 that whether or not they are satisfied, it could have profound
2 influences on it.

3 Now if you are going to define quality irrespective of
4 client input, that may have less of an impact.

5 MR. UDDO: Do these studies ignore client
6 satisfaction?

7 PROFESSOR MEEKER: Both studies, by design, had a
8 survey that they were going to administer to the clients to
9 determine their satisfaction. Both studies found that the
10 surveys were very difficult to administer and the response rate
11 was very low. I think in San Antonio the response rate was 15
12 percent.

13 PROFESSOR COX: Something like that.

14 PROFESSOR MEEKER: It was something -- 15 percent in
15 Orange County. Since we were asked to come and evaluate the project
16 after it was completed, we tried to contact all the clients by
17 telephone. We were able to contact less than 10 percent.

18 So, although by design they intended to have quality
19 component of client satisfaction in there, neither one has any
20 valid data relating to that. We don't know. In fact, that is
21 something that needs to be studied.

22 I was somewhat disturbed on the discussion earlier,

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1 quality here seemed to be all determined in terms of legal
2 criteria which -- don't get me wrong. I think that's important,
3 but I think there is another significant component here in terms
4 of whether or not these individuals view however these models
5 are giving them access to justice whether or not they are
6 satisfied with it, happy with it or they think there is good
7 quality. I think that's an important component.

8 MR. VALOIS: Wait a minute now. I heard what you
9 said, but I'm not sure I quite understand it. If our staff
10 attorneys deliver the proper results from a quality standpoint
11 for a client, are you telling me that if you are of one cultural
12 background that they may be happy with that and precisely the
13 same results delivered to a person of a different cultural
14 background they are not happy with it? That's important to us.

15 PROFESSOR MEEKER: What I'm saying is that it may
16 influence. For instance, I think part of the element of quality
17 of legal services, that attorneys take the time to explain to
18 the client what is going on, what their options are, what
19 available alternatives they may have.

20 To the extent that the attorney has difficulty
21 communicating to the client these things or does not or takes--
22 assumes the client understands when they don't, I think that

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1 reflects quality.

2 It depends also on the legal issues involved. When
3 you are dealing with custody issues and you are working out a
4 negotiated agreement in terms of who is going to have custody or
5 how long and what periods of time, that kind of negotiation
6 involves a lot of communication with the client.

7 That type of communication, how well that
8 communication is carried out, I think, is an essential element
9 of quality.

10 CHAIRMAN HALL: Professor, if they have a legal
11 problem and you solve it for them and you do it on a quality
12 basis, you do a good job and use good judgment -- this probably
13 speaks more to my practice than anything else.

14 A lot of my divorce clients, due to the nature of the
15 suit, are not happy unless they get everything. That's human
16 nature and probably would be true with me as well.

17 Still, a lot of them have hopefully gotten a good job
18 done for them. It seems to me that satisfying a client, making
19 them like what you want, when I do that it is more for the
20 repeat type of business thing.

21 In the legal services arena, if you've done a good job
22 for that client and protected their legal rights to the best of

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1 your ability, it seems like their satisfaction, although
2 important, is certainly secondary to the type of quality job you
3 did for them.

4 PROFESSOR MEEKER: I'm not looking at quality only in
5 terms of client satisfaction. That is one element. There are
6 problems in the area of domestic dispute.

7 MR. VALOIS: But you are telling us this study is
8 defective because certain people were happy and certain people
9 were not happy with the result based -- regardless of what the
10 result was.

11 PROFESSOR MEEKER: Not in terms of happiness and not
12 in terms of defective. I'm saying the studies are incomplete.
13 Part of the quality issue on this - and I think you'd agree with
14 me -- the attorney's jobs in this situation is to fully
15 communicate to the client their options.

16 Yet we don't have any data here of how well the
17 attorney communicated with the client, whether or not they gave
18 them copies of their work products and the different negotiated
19 agreement, say, in a custody issue.

20 We don't know how well this client attorney
21 communication was taking place. That client information is part
22 of the satisfaction or part of the quality element as well as

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1 satisfaction with how well this was taken as well as
2 satisfaction of outcome.

3 These are all different client input elements that
4 need to be considered. Satisfaction of outcome is only one
5 element. You also have to have some sort of information in
6 terms of the client/attorney interaction and how satisfactory
7 that interaction was and how complete the exchange of
8 information was.

9 CHAIRMAN HALL: If you find out it's not satisfactory,
10 then what?

11 PROFESSOR MEEKER: If you find out it's not
12 satisfactory as it relates to the model type?

13 CHAIRMAN HALL: Suppose the client didn't like the
14 attorney and wasn't satisfied with the way he represented the
15 facts and set forth the options, but the pre-certified law
16 specialists or at least that reviewed the one in San Antonio
17 find that all the appropriate orders are entered and deadlines
18 are met and the division of property was one that was more than
19 fair to the client that is represented by the model attorney?

20 PROFESSOR MEEKER: Wait a minute. I mean, more than
21 fair in a distribution of property is going to be a judgmental
22 issue. You have to be careful on that. I'm not talking about

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1 an individual client.

2 Let's say that according to the peer review, and I
3 think there's problems with the way that peer review is
4 implemented. I will be willing to talk about that.

5 Notwithstanding that issue, let's say the peer review
6 says that this particular model is giving quality service, but
7 it also turns out that a systematic survey of all the clients
8 involve show that overall that the clients in one particular
9 model are less satisfied and report less incidents in terms of
10 client/attorney communication for one model versus another, then
11 I would say that we have to seriously look at is there something
12 inherent in that model design that for some reason those
13 attorneys are not fulfilling their obligations to the client at
14 least from the client's perspective.

15 Is there a problem with communication? Is there
16 something systematic about that? Yes, I think that is something
17 you would have to be worried about in terms of quality on if
18 they are systematic differences, not an individual client
19 because there is always going to be individuals who are unhappy
20 with whatever representation they get.

21 What I'm talking about are systematic significant
22 differences. We don't know.

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1 CHAIRMAN HALL: You're never going to know that.

2 MR. VALOIS: You're going to the right client
3 expectation level also; aren't you?

4 PROFESSOR MEEKER: That's true.

5 MR. VALOIS: Can you break that down into cultural
6 groups?

7 PROFESSOR MEEKER: I'd think you'd want a control for
8 cultural groups; that's correct.

9 MR. VALOIS: Then if you find that clients of cultural
10 group A have a higher expectation than clients cultural group B,
11 what is the legal service staff attorney supposed to do?

12 PROFESSOR MEEKER: Well, then they would want to take
13 down that into account and evaluate that the overall quality
14 based on the client information. If one particular group has
15 unreasonable expectation compared to another, then you would
16 want to discount their ways.

17 Now if these clients are randomly assigned to cross
18 groups, then there is no risk that any particular model is going
19 to get more of one particular type of client than another. This
20 will equalize the self-cross groups. It shouldn't influence the
21 results.

22 MR. UDDO: Did the study have a mechanism for clients

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1 to complain?

2 PROFESSOR COX: In San Antonio, they did.

3 PROFESSOR MEEKER: In Orange County, they could
4 complain to the project manager if it were a voucher attorney
5 and they could get it shifted in terms of the voucher attorney.
6 There were no formal mechanisms to collect data on complaints,
7 not in Orange County.

8 MR. UDDO: How about in San Antonio?

9 PROFESSOR COX: San Antonio used the program grievance
10 procedure.

11 MR. UDDO: The clients were aware of the grievance
12 procedure?

13 PROFESSOR COX: Yes.

14 MR. UDDO: So presumably if there was widespread
15 dissatisfaction, it would be a certain incidence of complaints
16 filed by clients?

17 PROFESSOR MEEKER: As far I've seen in that study,
18 both your versions and the ABAs, I didn't see any data reported
19 on that.

20 PROFESSOR COX: There were no grievances filed that I
21 know of.

22 MR. UDDO: Who designed each study?

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1 PROFESSOR COX: The San Antonio study, I designed.

2 MR. UDDO: Who approved it?

3 PROFESSOR COX: The ABA and the LSC by funding it.

4 MR. UDDO: They were submitted -- your proposed study
5 was submitted to both the ABA and the LSC before you were
6 funded?

7 PROFESSOR COX: That's correct.

8 MR. UDDO: So it was reviewed by the ABA and the
9 corporation?

10 PROFESSOR COX: That's correct.

11 MR. UDDO: How about the Orange County study?

12 PROFESSOR MEEKER: The Orange County study was
13 implemented by LSC. There wasn't anybody in charge of
14 scientifically monitoring what was going on at the time. From
15 my understanding with interviewing both LSC individuals and
16 Orange County individuals that the idea was to pattern after San
17 Antonio.

18 PROFESSOR COX: If I could interject here, that's
19 correct. The intention was to pattern it after the San Antonio
20 study, but I do not believe that was accomplished and thus I do
21 not particularly care for it, to put it mildly, the discussion
22 of both studies in the same breath.

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1 PROFESSOR MEEKER: As far as external and internal
2 validity goes, the differences on how the designs were carried
3 out, as far as I'm concerned, are minimal differences. Both
4 designs, San Antonio as well as Orange County -- and we can just
5 look at the San Antonio if you would like have --

6 MR. UDDO: Let me just tell you what my concern is,
7 Professor Meaker. In my four years on the board, one of the
8 things that I've consistently said is we shouldn't do anything
9 until we've studied it, done our homework and given ample
10 consideration to the kinds of things that you try to determine
11 before you make a major decision for the corporation and thereby
12 the grantee.

13 This study carries a great deal of weight in my mind.

14 PROFESSOR MEEKER: Which one?

15 MR. UDDO: The San Antonio study. The San Antonio
16 study was not controlled by LSC. The San Antonio study had
17 large involvement from the ABA.

18 I'm just hard pressed to say that a study that was
19 apparently fairly carefully designed had the approval of the
20 corporation and the ABA as a legitimate study, that we should
21 now pick it apart and say it's not a good study. We'll never get
22 a good study.

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1 We'll never get a study that we can make a decision on
2 if everyone that comes to us just gets picked apart. Is there a
3 study that is going to satisfy everybody and that is not going
4 to be subject to being picked apart?

5 I can understand Orange County if there is suspicion
6 of something that was done purely by the corporation may be
7 suspect, that is fine. I don't see the San Antonio study in
8 that light.

9 I have problems with taking the San Antonio study and
10 try to pick it apart at this point when it went through, I
11 thought, a very legitimate process and should have had a great
12 deal of credibility. I'm a little surprised that it doesn't.

13 PROFESSOR MEEKER: Part of the problem here -- just
14 because the ABA approves a study, it doesn't mean it's
15 legitimate.

16 MR. UDDO: No, but I'll tell you what; it carries a
17 lot of weight in my mind that the ABA thought this study was
18 valid and the proposed method was valid and they were involved
19 in it the whole way along. I've worked with the ABA and feel
20 like the ABA would not let anything through that was shoddy,
21 frankly.

22 PROFESSOR MEEKER: Let's look at the issues of the

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1 types of cases addressed. In San Antonio, they looked at
2 contested divorces without custody. when they approached Orange
3 County and asked them to do the same kinds of cases, Orange
4 County, at that time, used a clinic model to handle these kinds
5 of cases, supervised by one attorney using a lot of paralegals
6 and a lot of self-help in education material for the clients.

7 They weren't willing to study that for Orange County
8 because that was obviously more cost efficient in terms of the
9 preliminary data that they gave LSC than any model which was
10 primarily based on an attorney/client relationship, a specific
11 attorney handling most of the case.

12 So consequently, they asked Orange County to look at
13 child custody issues which according to at least attorneys I've
14 talked to -- and in Orange County the child custody issue is a
15 far more problematic issue in terms of family law cases than
16 simple divorces which makes San Antonio very atypical from my
17 discussion with other directors around the country that they
18 don't usually follow a full staff model handling these kinds of
19 cases.

20 To draw cost comparisons on an atypical program on
21 that basis, has very limited external validity. I'm not saying
22 the specific findings in San Antonio are wrong or incorrect.

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1 What I'm saying is it's gotten very limited generalized ability
2 in terms of the program picked to study, in terms of the design
3 implementation and in terms of the type of legal issues that
4 they involve.

5 Now there are also some problems with how certain
6 things were implemented. Your right; you'll never get a perfect
7 study. The important thing for policy implications, the
8 important think for making policy changes is that you recognize
9 the limitation of the study, that there are no perfect studies
10 and you don't exaggerate the validity of the data upon which you
11 are drawing your inferences from. That's what I'm concerned
12 with.

13 MR. UDDO: I don't have any problem with that, but I
14 get the sense there's an attack on the study itself. I find
15 that a little bit --

16 PROFESSOR MEEKER: No, there's no attack on the study.
17 There's an attack on limiting the generalized ability to study.

18 MR. UDDO: Most of what you've been saying this
19 morning really seems to relate to the validity of the study
20 itself. What I'm hearing is that you're finding flaws in the
21 study itself.

22 If what you're telling us is that its utility is only

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1 to determine the cost effectiveness of uncontested divorces
2 without child custody disputes, well then that's fine. I can
3 understand that you would want to say -- and I think there's
4 probably some legitimacy to the position that you can't
5 extrapolate too far from exactly what it was they were studying.

6 I'm getting the impression that the whole study is
7 under attack and that's what I find a little bit difficult to
8 buy because I thought this was a study that was being carried
9 out quite responsibly under the auspices of the ABA and have
10 become surprised over the furor over the validity of the study.

11 PROFESSOR MEEKER: When I go back through and read
12 through it, what disturbs me is how some of these things were
13 carried out. Although I think in designing it sounded good, the
14 actual implementation for generalized ability purposes are very
15 suspect.

16 For instance, if you want to look at the voucher model
17 versus the contract model here, the idea in theory -- there are
18 two different economic theories that judge a voucher model
19 versus an economic one or versus a contract one.

20 The contract one, competition among attorneys
21 competitively bidding is supposed to drive down the cost and
22 increase the quality. In a voucher, the idea is that you give

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1 the client the voucher to go out and shop around and the client
2 shopping will drive down the cost and increase the quality by
3 patronizing those individuals who give the lower cost/higher
4 quality services.

5 In fact, that wasn't done in San Antonio or in Orange
6 County. Neither one of those were a voucher model. They were
7 really adjudicare models. There wasn't any shopping around.
8 When they surveyed the attorneys that were going to participate
9 in the voucher panel in both of those studies, the surveys of
10 the attorneys, when they gave their projected hourly rates, in
11 both of those studies those rates were considered too high for
12 what they would be paid for.

13 So consequently, what was done was they paid the
14 voucher attorneys on a percentage basis of what the contract
15 bids were. That, in essence, confounds the two models. You
16 can't draw cost comparison between the voucher model and
17 contract because the voucher fees were based on the contract
18 bids.

19 They were based in Orange County at 130 percent of the
20 contract bids. In San Antonio it was a sliding scale from 20 up
21 to 30 percent, depending upon the case type. That kind of--
22 that is a fundamental design problem.

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1 I don't know if who approved to that. I don't know if
2 the ABA caught it or not, but that makes valid cost comparisons
3 between those two models problematic.

4 MR. UDDO: Why don't we get Professor Cox's response
5 to that?

6 PROFESSOR COX: Well, I have a number of responses.
7 One is --

8 MR. UDDO: How about to just that point?

9 PROFESSOR COX: We're getting lost in the forest here
10 and we're examining all the individual trees. That's my first
11 comment.

12 My second comment is that I recommended to the ABA
13 delivery committee that the voucher component of the study have
14 build in an incentive for consumers to shop. As a result of
15 hearings like this, the delivery committee held with all kinds
16 of grantee input, the delivery committee told me no way, that's
17 not going to sail.

18 So my backup position was that then the only
19 legitimate alternative is to have what he's calling a judicare
20 model with a fixed fee as opposed to an hourly rate basis on
21 which the attorneys were reimbursed.

22 My third comment, if you got the gist of my second

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1 comment, is I recommended what "should have been done," but it
2 wasn't accepted.

3 MR. UDDO: That was not something that slipped
4 through, that the ABA missed. It was actually discussed and the
5 determination was made that it was not going to be done that
6 way.

7 PROFESSOR COX: That's correct, absolutely. My third
8 comment is that the results of the San Antonio project, whether
9 you talk about cost efficiency, quality effectiveness or case
10 management, are enlightening not in the differences revealed
11 between the two private attorney model studies but in the
12 difference between the staff model and the two private attorney
13 models.

14 So Professor Meeker's, Jim's comments with respect to
15 the differences between the two private attorney models, in my
16 judgment, misses the major lesson and the major thrust of the
17 findings of the study.

18 PROFESSOR MEEKER: I'd like to respond to that. One
19 thing is that I was somewhat disturbed about how cost was
20 calculated in that study. I wrote the ABA on that issue. For
21 instance, the staff model has -- there are two sets of data on
22 that -- I'm sure you have seen it -- one the hourly rate and one

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1 the adjusted overhead rate.

2 There were no costs for administration of the two
3 private attorney models included in those figures. In fact,
4 we've tried to do that and investigate those issues; what were
5 the administrative costs of the private models in Orange County.
6 We've discovered some disturbing things.

7 MR. UDDO: Can I just ask you who is we?

8 PROFESSOR MEEKER: Myself and Professor Dombrink who
9 is my co-author on the evaluation of the Orange County Study.

10 MR. UDDO: Who is sponsoring that evaluation?

11 PROFESSOR MEEKER: We were given last year a \$5,000
12 grant by the Legal Aid Society of Orange County to evaluate the
13 project because they were concerned that they had carried out
14 this experimentation with no ongoing supervision by LSC and were
15 afraid that no evaluation or comprehensive evaluation would be
16 done by the study.

17 MR. UDDO: You are still in the process of carrying
18 that out; I mean, still from that grant that you are doing now
19 or have you just picked this up as something that you personally
20 interested in or is it an ongoing thing?

21 PROFESSOR MEEKER: We're finishing up the report.
22 Within about two weeks after I get back, we should have the

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1 final report on that.

2 MR. UDDO: Okay. I'm sorry; go ahead.

3 PROFESSOR MEEKER: The administrative cost, I think,
4 is an important element especially since you all have raised
5 that issue here earlier in terms of how much is this going to
6 cost to administer it by LSC.

7 When we went out in the field and interviewed all four
8 contract attorneys involved in the project -- in essence, almost
9 all the cases were handled by three. The fourth attorney only
10 had one case.

11 They were all very disturbed with the level of
12 communication and the difficulty of communicating with LSC. In
13 fact, one of the contract attorneys ended up suing LSC for
14 breach of contract.

15 Now we tried to figure in in terms of cost figures
16 what that would do to the contract model. That is very
17 difficult to do. LSC was unable to give us the information in
18 terms of how much it cost them to either handle that suit or
19 administer the contracts for the contract attorneys since they
20 dealt directly with LSC.

21 CHAIRMAN HALL: Why did he sue?

22 PROFESSOR MEEKER: Why did he sue? He wasn't given

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1 the required number of cases on the contract.

2 CHAIRMAN HALL: Why not?

3 PROFESSOR MEEKER: Why not? There weren't enough
4 cases.

5 CHAIRMAN HALL: So that type of contingency could be
6 made in the contract that you'd make with that attorney under a
7 competition system?

8 PROFESSOR MEEKER: There were also issues of delay.

9 CHAIRMAN HALL: I mean, it sounds like your
10 implication was -- your first statement was that LSC didn't
11 respond and the next thing you had a guy suing Legal Services
12 Corporation. I was afraid there was something in the system
13 here, the folks or the staff, here that caused the suit to come
14 on.

15 PROFESSOR MEEKER: There were two issues on that. He
16 didn't get enough cases and his contract was delayed in terms of
17 implementation of final signing. He was given the understanding
18 in the original negotiation agreement that it would start in
19 December. In fact, he didn't get any cases until June when the
20 final contract was signed.

21 He had to carry overhead costs of extra personnel and
22 a larger office for those six months which was also part of the

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1 basis for his suit. So it was an issue of contract null in
2 performance in terms of when it was supposed to start and in
3 terms of the actual number of clients he got.

4 CHAIRMAN HALL: It wasn't a bad faith type of breach?

5 PROFESSOR MEEKER: No, there's no allegations of bad
6 faith, but there were allegations of, by all the contract
7 attorneys, what were difficulties in terms of dealing with LSC
8 at that distance.

9 MR. UDDO: We get sued by grantees and employees of
10 grantees too, so that's sort of a wash it seems. We're involved
11 in litigation all the time.

12 PROFESSOR MEEKER: That is part of the administrative
13 costs. In fact, you'd have to have --

14 MR. UDDO: We didn't figure it in on the staff
15 attorney model side either; that the potential for litigation or
16 the possibility for litigation or the track record that there is
17 litigation didn't get figured in, as I understand it, not in the
18 San Antonio model. There was nothing figured in to up the staff
19 model cost because we have the history of lawsuits.

20 PROFESSOR MEEKER: These are not projected costs.
21 We're using actual costs.

22 MR. UDDO: I understand what you're saying, but I'm

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1 saying if I were to look at that criticism, I'd say over the
2 long haul that is going to up the staff attorney model overhead
3 costs too because we get sued by grantees and employees of
4 grantees.

5 All I'm saying is that I understand what you're
6 saying. In this particular case, it did not accurately reflect
7 the contract overhead cost because it was in fact a lawsuit
8 there and it was not one from that staff model.

9 For me to attach any great significance to that would
10 be difficult because I know over the long haul, there is going
11 to be a fair number of lawsuits from staff model programs too
12 and it's going to all balance out over the long haul.

13 I understand what you're saying. Aside from the
14 lawsuit, what other costs would you --

15 PROFESSOR MEEKER: There'd be the administrative costs
16 and communication costs. LSC did not keep track of those so we
17 could not include those in the study. There was some discussion
18 that it didn't cost anymore to administer the contract study
19 than the voucher study.

20 The voucher study was administrated locally. It took
21 on the average of about an hour extra time to administer that.
22 I found that a little difficult to believe that it's easier--

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1 the same costs for local monitoring as opposed to 3,000 miles.
2 They are exactly the same.

3 We calculate figures that way. I am suspicious of
4 those figures.

5 MR. UDDO: That voucher and contract, what about
6 Professor Cox's comment that -- don't compare the two private
7 attorney model programs so much as the two private attorney
8 model programs to the staff.

9 You've already told us you don't think all the
10 overhead costs got figure in where they did in the staff model.

11 PROFESSOR MEEKER: That's true.

12 MR. UDDO: That communication and administrative costs
13 you said were between the two private attorney models.

14 PROFESSOR MEEKER: Only between the contracts.

15 MR. UDDO: In other words, one they kept him on and
16 one they didn't?

17 PROFESSOR MEEKER: The local program kept track of
18 it's administrative costs for the voucher. We can include that
19 in there. LSC did not keep its administrative costs for the
20 contract. We can't included that in there and we don't have the
21 suit information.

22 I think that's important. I disagree with Professor

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1 Cox in terms of comparing this staff versus the two private
2 models. From what I understand the proposed rule regulations is
3 that there is an assumption here that competitive bidding is
4 going to drive down the costs and increase the quality.

5 In these models, there was only one model that was
6 competitive bid. It was contract. There was no competitive bid
7 for the voucher. That was based on the contract fees which the
8 voucher attorneys did not competitively bid on.

9 In fact, when we interviewed the contract or voucher
10 attorneys involved in Orange County, almost all of them
11 volunteered the information that they projected there or they
12 saw their involvement in this study as essentially pro bono.

13 They knew they were being paid below market rates and
14 that the only reason why they engaged in this was because it was
15 sponsored by the Legal Aid Society of Orange County. They
16 viewed it as pro bono work with Orange County.

17 All of them had a high commitment to pro bono work but
18 that leads to the issue of how much does paying attorneys at a
19 submarket rate -- is that going to cut into pro bono market. We
20 don't know.

21 I think that's a very important issue to study.
22 Neither one of these studies addressed it and neither one were

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1 designed to address it. Yet, that can have profound influences
2 in terms of your markets out there to handle these kinds of
3 cases.

4 If they view this as pro bono, is that going to cut
5 into the other pro bono and other services out there that are
6 now being partially funded. I think that's an important issue
7 that neither study can adequately address but it's been raised.

8 I think there's some problems in terms of quality as
9 measured by both studies. I think San Antonio is to be
10 commended in terms of its innovative effort to try to rely on
11 peer review.

12 I think when you rely on a scale that has not been
13 validated, when you have items in these scales, some of which
14 are rated 30 and some of which are rated only a 1 and there's no
15 justification for why that's the case, where you have
16 individuals who are creating this scale with no background in
17 terms of creating scaling techniques, when you do not have any
18 input in terms of individuals who have experience in terms of
19 large scale delivery services to the poor which probably are
20 going to be different than individual services to the affluent
21 in terms of family law, I think that kind of issue creates a
22 suspect scale.

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1 I think what has to be done in the future is a better
2 attempt to come up with a more valid scale or at least a scale
3 that addresses these issues in terms of how you are going to
4 weigh items and what justification you use for these waitings.

5 I think that influenced the final result. In terms of
6 Orange County, there were no peer reviews because we came in
7 after the fact. You could look at other indices of quality in
8 terms of how many attorney hours were put into the case or in
9 Orange County how far the case developed.

10 They had a fractionalization scale in which they paid
11 attorneys by how far the case developed, whether or not it was
12 just consultation, whether or not they went up to an order to
13 show cause, whether or not there was a hearing and various
14 stages in between.

15 It was felt it was unreasonable to pay attorneys
16 solely on the basis of hourly rates because there would be an
17 inability to control how many hours attorneys were putting into
18 the project.

19 Well, if you look at Orange County, there are some
20 severe problems in terms of how far the cases were developed in
21 terms of the different models. We find that the contract models
22 in terms of fractionalization case development carried the cases

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1 not nearly as far and significantly less far than either the
2 voucher or the staff models.

3 It's not exactly clear why. Of course, when you
4 translate this into cost, because they didn't develop the cases
5 as far, of course, it looks like each case cost less because
6 they didn't carry it as far through the system as the other two
7 models.

8 It seems to me that is a serious problem with paying
9 people according to -- solely on the basis of the
10 fractionalization level because most of our discussions with the
11 attorneys out there when they put in their competitive bid
12 estimates all had the explicit assumption that there would be
13 some relationship between how far it takes to develop a case and
14 how many hours you put into it.

15 It takes more hours, attorney hours to prepare a case
16 to trial as opposed to the first order to show cause here.
17 That's the reason why they were willing to accept the different
18 levels of pay.

19 When we do an analysis in terms of whether or not
20 there is a linear relationship between the number of hours an
21 attorney worked on a case and how far the case developed, we
22 find severe differences with the different models.

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1 Indeed for the voucher model and for the staff models,
2 the further the case developed the more hours they put into it.
3 That was not the case for contract attorneys. The relationship
4 between fractionalization and hours was practically zero in
5 terms of linear relationship.

6 In fact, they put in fewer hours per average on the
7 cases in the other two models. Does this relate to quality? I
8 don't know, but it's something I would be suspicious of if you
9 have a particular model for delivery services that develops
10 cases less further, that put in fewer hours.

11 To purely look at the differences in cost without
12 factoring that in would be misleading. As far as I know, San
13 Antonio didn't do a detailed analysis between the number of
14 hours put into a case and how far it was developed in the
15 system.

16 Part of that may not apply as much to them because
17 they were only looking at final judicial dissolutions of a
18 divorce. A divorce ends in that. When you are dealing in
19 custody cases, not all custody cases end at trial level.

20 Most of them, at least in Orange County, ended in
21 order to show cause level where the negotiated agreement was
22 approved by the court.

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1 MR. UDDO: Sometimes they never end.

2 PROFESSOR MEEKER: Sometimes they never end.
3 Sometimes you can end a case without going to court or without
4 getting an order to show cause order. So therefore, at least in
5 those kinds of cases, you would be severely remiss if you only
6 looked at final judicial determination because a lot of these
7 cases don't require that.

8 MR. UDDO: Maybe the problem here is that I'm
9 misunderstanding the significance of the Cox study. Maybe I
10 should ask Professor Cox; you don't claim that your study is
11 itself support for the conclusion that the kind of competitive
12 bidding system that was talked about this morning is preferable
13 to the current system; do you?

14 PROFESSOR COX: No, in fact, when you get to me I will
15 have some remarks along those lines as to the relationship
16 between the San Antonio study and any study at all and the
17 current proposed regulation and what I believe are some
18 necessary revisions in the proposed regulation to accomplish an
19 objective that I'll set out.

20 MR. UDDO: I guess that means you don't want to answer
21 my question.

22 PROFESSOR COX: No. I said that no, I don't claim

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1 that the San Antonio study and its results are or should be the
2 basis on which you would be justifying the current proposed
3 regulations.

4 MR. UDDO: I took your study to conclude that there
5 are certain cases, certain types of cases that can be done more
6 cost effectively through something other than a staff model.
7 That was the sum total of what I concluded from your study.

8 I don't extrapolate from that that it works for all
9 cases. I personally don't extrapolate from that that means that
10 the staff attorney model should be supplanted with something
11 else.

12 In some cases, particularly the ones you studied, can
13 be more cost effectively handled through certain private models
14 rather than staff models. I didn't read it to go much farther
15 than that.

16 PROFESSOR COX: I would. That's also the difference
17 between the ABA and me now.

18 MR. UDDO: Well, the earlier characterization that you
19 made that there is some insight into seeing that -- get away
20 from comparing the two private attorney models and look at the
21 private attorney models and the staff attorney model in this
22 study and you see there is something there worth thinking about,

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1 looking at and talking about.

2 I don't have any problem with that. I get the
3 impression that Professor Meeker thinks that that's your study
4 and maybe the Orange County study is being used as a
5 justification for the regulation that was discussed this
6 morning.

7 I don't certainly don't take them to support this
8 regulation or a complete revamping of the delivery system.
9 That's my personal opinion. Maybe other people on the committee
10 feel that those studies do that; I don't.

11 PROFESSOR MEEKER: I would go on a bit further in
12 terms of the San Antonio study when you concluded that some
13 cases may be more effectively dealt with by the private model, I
14 would qualify that by saying the particular type of cases that
15 looks like it may be more effectively done by private models,
16 the type of staff handling those cases was very atypical in
17 Bayhar County.

18 I would suggest that if you're going to study that,
19 then you should study staff models like Orange County that uses
20 a clinic approach which is a lot cheaper than the staff approach
21 used by Bayhar County.

22 If you were going to validly draw the conclusions that

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1 staff versus private, then you should look at the various ways
2 the staff models have approached this. Bayhar is very atypical
3 on that.

4 MR. UDDO: Is it atypical?

5 PROFESSOR COX: I can't answer that because I don't
6 know what or how Legal Service programs around the country
7 handle the kinds of cases that were handled under the San
8 Antonio study.

9 I can tell you that I do not believe that the way in
10 which the San Antonio program handles them is, in my judgment,
11 the most efficient and quality effective way. I believe the San
12 Antonio study results show that.

13 MR. UDDO: Why was that county selected?

14 PROFESSOR COX: When the study was in the design
15 phase, we approached three programs recommended to us initially
16 by a committee member, delivery committee member, who was also
17 an employee of the Legal Services Corporation.

18 Of those three programs -- if you want me to identify
19 them I will; I'm not being abstruse here -- the community legal
20 services in Phoenix, the Denver program and the San Antonio
21 program.

22 The San Antonio program was the only one willing to

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1 cooperate with a comparatively designed study. The other two
2 refused to be a part of the study, largely on the basis, I
3 believe, of what they feared would be the ultimate use of the
4 results.

5 MR. UDDO: That causes problems? It causes problems
6 when you say we should study X, Y and Z. I hear that we can't
7 get cooperation to study X, Y and Z. Some of the problems with
8 the San Antonio studies may have been created by a lack of
9 cooperation.

10 At least there are two instances there, the first one
11 dealing with your criticism about the voucher system.
12 Apparently, that was debated, discussed and the decision was
13 made that they didn't want to do it that way and now on the
14 program that was selected, it seems like, at least ultimately by
15 default, out of the three that were recommended.

16 That's a problem. I want a study. I want to see and
17 I want to know -- I want to act on facts. We've got to use what
18 we're able to gather if we don't have cooperation.

19 MR. WOOTEN: It seems to me the puzzle that is really
20 kind of hard to get our hands around is how do you evaluate how
21 a program -- whether or not they have met their objectives.
22 What we tried to do in here is allow programs, whoever is going

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1 to apply, to say these are our objectives.

2 This is what we want to do in our service area and
3 then also to describe to us how they intend to evaluate whether
4 or not they have met their objectives. A lot of these kinds of
5 issues are running around and around that basic problem.

6 How do you decide whether or not you've gotten quality
7 service. Do you do it based just on lowest cost or are there
8 other things about how far you go through the system. All these
9 kinds of issues need to be dealt with. I think they need to be
10 dealt with in a process.

11 I think the process is designed to deal with them in
12 other than a monolithic way. I don't think there is one way. I
13 think that one of the things that the programs ought to be open
14 to is to use timekeeping and measure the timekeeping against the
15 product.

16 You've got something that's an identifiable product.
17 How long did each program take to come to that? Those are the
18 kinds of things that the process ought to force out of people
19 who are applying so that you can't --

20 If it's going to be very hard to debate at the
21 national level, although it's important to you, I think it's
22 very hard to come to a final conclusion without hearing what the

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1 programs are willing to do to give the kind of data that will
2 allow you to evaluate them.

3 All these issues will multiply upon themselves. If the
4 objective is to say that evaluation is hard, yes, evaluation is
5 hard. Is it impossible? I don't think so. I think the
6 programs would help with that as the application and screening
7 process went forward.

8 MR. UDDO: Let me saying one thing about what Jim
9 said. ONE of the problems I have with the proposed regulation
10 is that objectives thing. I don't understand how the bidder can
11 state the objectives and what do you do about priority stuff?

12 Is the tail going to wag the dog and the priorities
13 going to be set by what the bidders decide what they would like
14 to do rather than what needs to be done? Somebody has to
15 establish priorities and what sort of objectives they are
16 bidding on.

17 We can't just let a bunch of bidders say this is what
18 we want to do and maybe ignore 75 percent of what the needs are
19 on that delivery. I don't see anything in here that says where
20 you are going to set priorities to figure out what needs to be
21 done for the poor who need legal services in that delivery area.

22 MR. WOOTEN: A really good application would have a

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1 needs assessment as part of it. We've got from our data right
2 now a fairly accurate -- although it's getting better--
3 breakdown of what the various needs are in every service area
4 right now.

5 We would expect that the peer reviewers would have
6 that as they match what the experience was in a given service
7 area against the application. A really good application would
8 have some sort of an objective needs assessments, either the
9 experience of a program that is already operating in that area
10 or some kind of client survey.

11 MR. UDDO: But it's not required right now; is it?

12 MR. VALOIS: We are talking about designing a proposal
13 that people bid on. We're not going to let -- let's say, we'd
14 like some folks to bid on --

15 MR. UDDO: That's what it says right now.

16 MR. VALOIS: That's not the way it's going to end up.
17 We're not going to have a program which just says anybody who
18 wants to do any kind of legal services in North Carolina, submit
19 a bid and tell us what you want to do.

20 I mean, hopefully we're going to tell them what the
21 needs for the bid are and what services they are.

22 MR. WOOTEN: Mr. Valois, the tension there is between

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1 national and local control.

2 MR. VALOIS: I understand that.

3 MR. WOOTEN: This whole priority setting. One of the
4 things that the bidding process could demonstrate is what that
5 program thinks of -- these are the things we want to concentrate
6 on.

7 These are the needs we see. This is how we want to go
8 about it. This is how we are going to evaluate whether or not
9 we've met those needs.

10 MR. VALOIS: What Professor Uddo is asking about is
11 suppose we only get bidders who want to do landlord/tenant law.
12 What do we do with the rest? We have to guess that there are
13 some other needs out there. We can assume that, I think.

14 MR. WOOTEN: Why would we assume that all we would get
15 were landlord and tenant? We've got a program that at a minimum
16 is doing sort of what they consider the full range right now.
17 Won't they be bidding to do the full range?

18 MR. VALOIS: I think so.

19 MR. WOOTEN: I guess what I'm saying is I don't think
20 the likelihood is that in any given area we are just going to
21 have the Jiffy Lubes who do tire pressure and that you're not
22 going to have -- I don't see that as a realistic problem. I do

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1 see and I think it's important that when somebody applies, what
2 they see is the need.

3 It's part of what the peer reviewers will evaluate as
4 their sensitivity as to what is going on in their local
5 jurisdiction and what evidence they have, they can show on an
6 application for what the need is.

7 That's why it -- I know everybody wants to make this--
8 - and I wasn't here for all the comments, but everybody wants to
9 make this as specific as possible, but you run the risk of
10 making it as specific as possible is sort of what happened when
11 the EPA came out with the idea of catalytic converters.

12 It turned out that catalytic concerters were one of
13 the worst things we could have done to do away with air
14 pollution. Europeans without those started funneling the things
15 back through the system.

16 I'm just saying that sometimes having a wider net and
17 seeing what you get in the way of sophisticated proposals, you
18 might get a heck of a lot better proposals. I thought that
19 Linda Perle's comment on part of what should be in there showing
20 the leverage of the resources is just one of those kinds of
21 things that you'll illicit.

22 I think it ought to be left in here. That's one of

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1 the kinds of things you will illicit to the extent you give the
2 people a chance to show what their sophistication is about the
3 problem.

4 PROFESSOR MEEKER: I had a response to you on the
5 issue of cooperation and yes, we need more studies. I don't
6 know what the level of cooperation is out there. I do know that
7 Orange County came along and agreed to participate in this
8 study.

9 Who know? Perhaps there are others out there who are
10 willing to participate also if they know there is going to be a
11 fair and effective evaluation done afterwards. We also have a
12 number of bits of information I think that can relate to this.

13 For instance, the experience we found with the
14 contract attorneys and their problems in negotiation with LSC
15 and their problems with continued communication with LSC is not
16 an isolated incident.

17 If you read to the comments here, there is a letter
18 from Jacksonville. They were also involved with an LSC funded
19 private law firm demonstration project. They essentially also
20 comment on the difficulty and the problematic nature of running
21 their contract model through LSC.

22 You have a proposal here where you are not going to be

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1 just dealing with a few contract proposals through LSC, but they
2 are going to be dealing with multiple contracts, cross different
3 issue, cross different providers within the same area and lots
4 of different areas.

5 If there is some indication that suggests there may be
6 problems in doing this, it seems to me that suggestion should be
7 further studied. It should be actively pursued by LSC in terms
8 of being able to demonstrate that they can handle these kinds of
9 negotiations.

10 I think these studies can demonstrate or at least gain
11 insight to a lot of potential problems that might arise. I
12 think while you can throw up your hands and say nobody is going
13 to cooperate and give us any studies or information on this
14 business, that you have to worry about then proceeding on making
15 major policy changes in this vacuum of knowledge.

16 I think you do have to actively proceed to gain that
17 information first notwithstanding difficulties of cooperation.

18 MR. UDDO: I agree.

19 CHAIRMAN HALL: Gentlemen, if Mr. Meeker's going to
20 have an opportunity to respond to what Mr. Cox says, we might
21 want to hear what Professor Cox says unless you all have any
22 more questions. How long do you think you presentation is?

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1 PROFESSOR COX: Five minutes, ten minutes at most.

2 CHAIRMAN HALL: Okay, let's hear it. I think most of
3 the questions may have already been asked.

4 PRESENTATION OF PROFESSOR STEVEN COX

5 PROFESSOR COX: All right. In my presentation I want
6 to as best as I can be both brief and present a big picture, an
7 overall picture. I want to start with -- also I am here to
8 answer any questions that you want to ask me.

9 In my presentation, my five or ten minute
10 presentation, I am not going to really address the San Antonio
11 study. I am going to address my view of the proposed regulation
12 that is being discussed here.

13 I want to start with an objection that I think
14 virtually everybody, if not everybody, can accept. The
15 objective is to serve as many poor people in as quality
16 effective a manner as possible with whatever dollars are
17 available. Does everybody understand the objective?

18 I don't think there is a great deal of debate, if any
19 at all, about that. Where the debate comes down to is how best
20 to achieve that objective. I want to start there with how not
21 to achieve it, how not to achieve it.

22 It is by creating monopoly markets in which poor

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1 people have no choice but a single available provider of
2 service. How not to achieve the objective: by creating
3 monopoly markets in which poor people have but one single
4 provider from which to choose.

5 The current funding allocation system, especially in
6 light of the refunding rights available under it, in my
7 judgment, creates exactly those kinds of markets. When I say
8 markets here, by the way, each area and each service within an
9 area, in essence, is a legal service market.

10 In my judgment, the current funding allocation system
11 creates monopoly markets with a single seller being a staff
12 program. Now what Professor Meeker has claimed here is that
13 existing scientific evidence is not sufficient to justify major
14 policy changes.

15 In my judgment, that claim is irrelevant to the
16 question at hand. It is irrelevant because without any studies
17 at all, without any studies at all, we know that the current
18 funding system and the objective that I started out with are
19 inconsistent.

20 So one of them has got to be changed if you are going
21 to even have consistency between your overall objective and the
22 means used to achieve that objective. I am going to assume here

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1 because I claimed that I though the least debate was on the
2 objective, that then I think that the funding system is what
3 ought to be changed.

4 How to achieve the objective, not how not to but how
5 to, by creating as much competition between two or more service
6 providers as possible, by creating as much competition between
7 two or more services providers as possible.

8 The current proposed regulation, in my judgment, will
9 not create such competition. Therefore, it will not, as it
10 currently stands, achieve the objective that I started out with.
11 Why?

12 It provides for competition between alternative
13 service providers and possible service providers at one point in
14 time only, namely at the time of the bill. It does not provide
15 for the existence of two or more service providers nor,
16 according to my reading of the proposed regulation, does it
17 provide for performance evaluation following the funding award.

18 In my judgement, that performance evaluation is
19 absolutely necessary to make optimal funding choices in the
20 future. In brief -- and I'm going to perhaps coin a couple new
21 phrases here -- I'm going to distinguish between one time
22 bidding competition versus what I call dynamic or omnipresent

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1 competition, the kind of competition that we refer to when we
2 talk about private marketplaces, legal services markets for the
3 non-poor, where at any time, any moment in time, a consumer and
4 all consumers have multiple service providers from which to
5 choose and that there is some competition between them.

6 My last point is that I believe three additions need
7 to be made to the proposed regulation in order to accomplish the
8 desired dynamic competition which I believe is necessary to
9 achieve the objective I set up.

10 The first addition is for performance evaluation
11 provisions. I simply think that you have got to have in that
12 proposed regulations some provisions for performance evaluation.

13 Second, initially I think you need to provide for two
14 or more service providers. In other words, on the first go
15 round in competition, you need to fund two or more service
16 providers.

17 MR. UDDO: I assume you mean providing the whole
18 spectrum of services.

19 PROFESSOR COX: That's right, exactly. Subsequently,
20 you can let consumer choices in performance evaluations
21 influence the number of providers. I'll come back to that in a
22 second.

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1 Let me get all three out; performance evaluation
2 provisions, provisions for two or more providers initially, and
3 then on subsequent rounds, you can let the performance
4 evaluations and consumer choices determine the number of
5 providers.

6 Third and finally, greater detail on the permissible
7 and impermissible uses of funds awarded. This gets down to, if
8 you will, the mechanics of what you allow and what you don't
9 allow a grantee to do once he or she receives the award.

10 Let me just give you a couple of examples. Will you
11 allow -- and this is the real nitty gritty -- will you allow the
12 grantees to keep the profits at the end of the year or must they
13 be returned?

14 If they must be returned, you can assure you are not
15 going to get any back and all kinds of consequences. What
16 salaries will be permitted and so on and so forth. So there are
17 three additions to the proposed regulations: provisions for
18 performance evaluation, provisions for number of providers and
19 detail on uses of funds once awarded.

20 I think, in summary, you can see as a result of the
21 remarks I just made that I do answer your question awhile back,
22 Professor Uddo. That is, I would not use the San Antonio study

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1 as my foundation on which I would build a new funding allocation
2 system.

3 What I would use the San Antonio study and its results
4 to show is the tremendous need for revision. As I tried to
5 indicate, you wouldn't need that study or any study to show that
6 the current system needs revision.

7 All you need is pure and simple logic of the
8 inconsistency between the objective of serving as many poor
9 people on this high quality manner as possible and what you've
10 currently got. Thanks.

11 CHAIRMAN HALL: Any questions?

12 MR. UDDO: I'd like to hear Professor Meeker's
13 response.

14 PROFESSOR MEEKER: I have a couple of responses to
15 that. First of all, it's not clear that if LSC is picking a
16 couple of providers that clients really have a choice. If you
17 follow your theory correctly, then every client should have a
18 choice on legal services.

19 I'm not so sure that market really works in reality.
20 If you have a lot of money, it may work in terms of choice, but
21 I think the average person out there in terms of being able to
22 choose amongst a wide multiplicity of deliverers varies by

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1 location and is also highly influenced by their funds.

2 Part of the problem in picking in this area is that it
3 presumes that a consumer has knowledge of quality and presumes
4 that they have knowledge in terms of cost. While you can go to
5 an attorney and find out how much he's going to charge, it's
6 very difficult for any particular individual to determine what
7 that quality is beforehand.

8 Some of this stuff takes a long period of time dealing
9 with attorneys over times. It's not exactly clear that most
10 consumers of legal services have that kind of reputation in
11 terms of use of service to really judge quality.

12 It's a real problematic area. Notwithstanding that,
13 if LSC is picking the two, then that still reduces the client's
14 choice on that. There are a lot of goods that are delivered to
15 consumers in this country and to tax payers that are not
16 necessarily based on choice.

17 Everyone doesn't have a choice on their police
18 department. Everyone doesn't have a choice necessarily in terms
19 of their fire department or in some other areas where you have
20 monopolistic services but you have control over those
21 monopolistic services.

22 It's not always clear just because you provide

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1 multiple providers that it is going to cure the ills of the
2 marketplace. We've had mixed results in terms of reduced
3 quality or in terms of whether or not we have changes in quality
4 in terms -- and also changes in cost, say, if we look at the
5 phone system.

6 When they went to multiple provider on that I think
7 the analysis is still out on that of whether or not people have
8 actually higher quality, cheaper phone service as a result of
9 the multiplicity of markets out there.

10 I think you have to be careful about experimenting on
11 that. I think legal markets should be analyzed separately on
12 that. I agree in terms of issue of quality and performance
13 evaluation. I think that is necessary.

14 If the evaluation done in San Antonio is indicative of
15 the level of quality being delivered by that staff model,
16 perhaps something should be done to look at that staff model.
17 Perhaps we should look at the entire monitoring system as it now
18 exists and whether or not it can adequately detect policy and
19 performance.

20 I think things should be done in that area, but I
21 don't think it is necessarily related to the proposed regulation
22 change right now.

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1 MR. VALOIS: I guess, Professor, I understand your
2 theory. I really do understand your theory. I don't see how it
3 works in this situation. I understand the notion about where is
4 only one provider in a marketplace, he has a monopolistic power
5 to set the price and all the rest of it.

6 I really don't see how that applies here under these
7 circumstances. I mean, you're talking about having legal
8 service provider A versus legal service provider B. I don't see
9 how it is that they compete in terms of price or the amount of
10 service they are going to provide. Can you elaborate on that a
11 little bit?

12 PROFESSOR COX: Yes, you are right. I am talking
13 about economic theory. It wasn't three months into the
14 conducting of the San Antonio study that I saw that theory come
15 alive and stare me right in the fact.

16 What first brought it to my attention was the director
17 of the San Antonio study. In one conversation, Brendan said to
18 me, You know, Steve, I wish you would quit using this word
19 competition.

20 It really just destroys the moral around here.
21 Everybody around here knows, and this is in the program, that
22 we're going to be compared to these other two providers. I wish

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1 you'd quit talking about this as a competition or as a race.

2 I was sort of taken back because I thought what is so
3 bad about that. What happens in a competitive environment? What
4 happens in a race, if you will? Everybody is trying to do their
5 best.

6 What is it that we're after here? We're after
7 responsive providers to -- what? -- consumers. What's our goal?
8 Our goal here is to use scarce dollars to the welfare of the
9 poor, to the best advantage of the poor.

10 You're right. We've got to pay service providers.
11 What we want to do is we want to reward those who are most
12 responsive to their needs. What creates that responsiveness?
13 It's an environment of competition.

14 The competition finally is stimulated by knowing that
15 there are others against which your performance is being
16 evaluated and compared.

17 MR. VALOIS: Again, the difficulty I'm having with
18 comparing your system to a pre-market system; if I have a check
19 for \$22,000 and I want to buy a car, I can take it down to the
20 Ford dealer or I can take it down to the General Motors dealer
21 and I get to make the choice on who I think gives me the best
22 product for my check for \$22,000 or however much it costs.

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1 PROFESSOR COX: I noticed you chose a large amount of
2 money and I think you're right.

3 MR. VALOIS: A person with, for instance, a
4 landlord/tenant problem does not have in his hand, unless you're
5 proposing to couple your suggestion for the voucher scheme, a
6 negotiable instrument with which he can go to provider A and say
7 what can you do for me and then go to provider B and say what
8 can you do for me and then choose, which is really what
9 competition is about, who he is going to employ with his
10 voucher.

11 So that's why I'm having difficulty seeing how your
12 economic theory which I understand completely works in these
13 circumstances.

14 PROFESSOR COX: Because I think you're only difficulty
15 can be captured by the following reaction. Ultimately,
16 competition among sellers in a market is stimulated and depends
17 upon consumer behavior.

18 If all consumers go to one provider and keep going
19 back to that provider time in and time out, there is not going
20 to be any competition among the sellers; right. There can be in
21 some interim phase, if you will, competition among sellers, a
22 feeling of competition.

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1 That, in essence, was what I saw being created by the
2 San Antonio study. It wasn't even a matter in the study that
3 the voucher attorneys, the contract attorneys or the staff
4 attorneys knew that consumers were going to come in, their case
5 was going to be accepted and that they then were going to be
6 given a choice of which model they wanted to be assigned to.

7 That wasn't the scheme. We randomly assigned them.
8 Nevertheless, because each attorney knew that ultimately a
9 report would be written, a report in which the three would be
10 compared as to quality, case management and cost, they felt that
11 competition.

12 MR. VALOIS: We followed your advice and we put up an
13 invitation for bid and we have selected two providers in Detroit
14 to provide legal services. Thus, according to your theory, we
15 set them up into competition. What is it they are competing
16 about? That's what I'm missing.

17 PROFESSOR COX: You've forgotten a critical
18 ingredient. You've all of what you've just said you've done but
19 you also, as a part of it, have specified in advance a
20 performance evaluation.

21 In other words, every case is going to be reviewed by
22 a peer review panel. We're going to be asking you to submit

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1 evidence as to time spent on each case and so on and so forth.
2 That information will not only be gathered but it will be
3 analyzed and the results will be used in the subsequent round of
4 competition.

5 MR. VALOIS: I understand that. The result of which
6 is perhaps that two providers are in existence in Detroit for a
7 three year term, after which and during which we measure their
8 effectiveness, their results on its satisfaction and all the
9 rest of it.

10 Rather than, as some may be concerned, we have created
11 not one monopoly but we have divided a pie between two
12 monopolists. At the end of the three years, we now say provider
13 A, you have clearly outperformed B.

14 Nonetheless, we are going to open this up for bid
15 again and perhaps C will appear on the scene. Is that the way
16 it works?

17 PROFESSOR COX: You'd open it up for bid again and as
18 part of the reviewing or part of the evaluation now of the bids,
19 you would have actual performance evaluations on the two earlier
20 providers, the two that won before assuming they are in the
21 second round.

22 You would always have the opportunity for new bidders.

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1 It's called potential competition as well as actual competition.
2 Both are very important to maintaining what I call dynamic
3 competition over time.

4 MR. VALOIS: It sounds to me like you do the same
5 thing but doing away with the presumption of refunding and
6 monitoring care.

7 PROFESSOR COX: Well, would you like me to comment on
8 what you just said or should I --

9 MR. VALOIS: Sure.

10 MR. UDDO: I think Bob is absolutely right. Without
11 the price competition, you are not really getting competition
12 until after the fact in the performance evaluation. I don't
13 know if the existence of the other providers add that much any
14 more than doing away with the presumption of refunding and
15 saying, Look, you're not to presume to be refunded.

16 You've got to pass the performance evaluation. It
17 seems to me it introduces the same kinds of dynamic tensions.

18 PROFESSOR COX: If you said well, I hear you,
19 Professor Cox, but what you've just said to us is really just
20 not politically feasible, what's your backup position?

21 It's almost like I went to the ABA and they said this
22 is how a voucher system ought to be designed and they told me

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1 where to stick it. Then I gave them a backup position. My
2 backup position would be just exactly what you announced.

3 That is a revision of monitoring with new case
4 reporting system and external peer review whereby the grantee
5 knew that X, Y and Z data were going to be gathered on a very
6 systematic basis and that the data were not only going to be
7 gathered but were going to be analyzed and the results were
8 going to be used in any consideration of refunding.

9 CHAIRMAN HALL: You could just raise the point value
10 of past performance when you reconsidered. If a competitor or
11 whatever they are called had gotten the money and the award new
12 that and that was worth 50 points, perhaps that would be their
13 potential competition.

14 PROFESSOR COX: Let me hasten to add here, because I
15 know that monitoring for you and performance evaluation may well
16 be one in the same. In the abstract they are one in the same
17 for me.

18 Because you have used -- and when I say you I mean the
19 Legal Services Corporation -- has used a system called
20 monitoring. I don't believe for one single second that that
21 system has even come close to what I call performance
22 evaluation. As a result of that, I separate the two terms.

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1 MR. UDDO: I understand what you're saying.

2 MR. MOSES: I'd like to make a comment on that. I
3 think a lot of this economic theory sounds fine in the abstract,
4 but I agree with your observations earlier. A lot of this has a
5 lot of difficulty in terms of implementation.

6 A lot of this assumes that a legal service is what is
7 commonly called a fungible item. It's a known quality and
8 delivery. It's a widget, if you will. That may be true for
9 divorces, especially without custody, but there are a lot of
10 areas in which legal services are not widgets.

11 I would be very worried that one would institute a
12 major policy change without any understanding about how they go
13 about approaching qualities on these issues, how they would
14 compare differences in terms of, say, services style or services
15 tactics in terms of handling certain problems.

16 For instance, in Orange County, we have a real severe
17 problem with low income housing. There is different ways of
18 handling these issues. Whether or not handling it on a pure
19 tenant/landlord case by case issue or as opposed to putting some
20 of these cases together in one action against a particular
21 fending landlord or alternative approaches to these things, I
22 think you'd have to be very careful in setting up a way of doing

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1 this.

2 There's no clear evidence out there that this kind of
3 competition will necessarily produce that kind of quality. I
4 think it's important that you do monitor in a more broad context
5 where you look in the quality.

6 I don't think that's been done, but I think these kind
7 of issues should be addressed first before you modify
8 extensively the delivery system because you don't know how these
9 things are going to operate and there's no plans to implement
10 this kind of quality review.

11 There's a real problem when you start turning these
12 things over every three years. It takes awhile for people to
13 find out where the legal aid delivery system is available and
14 who to go to.

15 If for three years you go to one particular address
16 and three years later it's somewhere later and then some of
17 these issues you used to get full services from one particular
18 location and now two years later you only get partial services
19 there and you have to go somewhere else, that creates a lot of
20 problems in terms of the client community in terms of knowing
21 what access is available and where to go.

22 One of the things we found out in Orange County when

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1 we did a needs assessment was 20 years after the war on poverty
2 we still had something like 38 percent of the people out there
3 not knowing that legal services were available to the poor.

4 There is no addressing of this. I think if you
5 fractionalize your services by dividing them up against
6 different providers, and these providers are changing all the
7 time, you are going to compound that problem. That issue needs
8 to be addressed.

9 MR. UDDO: What would you think about doing away with
10 the presumption of refunding and a more sophisticated
11 performance evaluation?

12 MR. MOSES: I'd have to see what that sophisticated
13 performance evaluation was.

14 MR. UDDO: Let's say I was going to let you design it.

15 MR. MOSES: I wouldn't want you to change regulations
16 on the basis of my design because there would be a lot of people
17 out there disagree.

18 MR. UDDO: What I'm trying to say is one that would be
19 a real attempt to meet the criticisms that you've had of a
20 performance evaluation or peer review as good as you think we
21 could design it.

22 MR. MOSES: Is it in some sense how monitoring works

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1 now; that if you don't pass monitoring --

2 MR. UDDO: I tend to agree with Dr. Cox. I don't
3 think monitoring has been as much performance evaluation
4 oriented as it might be.

5 MR. MOSES: I'd agree with that.

6 MR. UDDO: I think a lot of the intangibles -- we
7 haven't really attempted to gauge some of the intangibles and
8 some of the performance of fine satisfaction. Again, some of it
9 is because we've had a resistance on trying to gather certain
10 information.

11 It may be the wisdom of the Congress is going to
12 prevail here, and nothing like this is going to happen until
13 there's a different board and sort of different dynamic between
14 the board and the field.

15 So I'm asking the question hypothetically and assume
16 it's going to be a different day and a different board. Do you
17 think that that would supply the kind of emphasis on the
18 performance and the kind of dynamic that Professor Cox is
19 talking about without all of the excess baggage of trying to
20 come up with a whole new system of competition?

21 MR. MOSES: I think it's important that yes, people
22 should realize that funding is contingent upon quality. I think

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1 a lot of that evidence can be gleaned from the experience in the
2 defender area which Mr. Newhart can speak to more information on
3 that.

4 They found some real severe problems in terms of
5 quality in delivery when it's clearly based on the lowest
6 dollar. I think any allocations of fund should have a quality
7 component in it.

8 MR. VALOIS: Professor Cox made three points or wanted
9 us to remember three points. One is the performance evaluation.
10 I take it again you are talking about the consumer of these
11 services being the one who evaluates as well as --

12 PROFESSOR COX: I have no objection to a consumer
13 satisfaction component, but certainly that would only be a
14 component of the performance evaluation and not, really, even
15 the major component in my judgment.

16 MR. UDDO: That is the peer review?

17 PROFESSOR COX: In my judgment, the single most
18 important component of performance evaluation must be external
19 peer review. You understand what I mean by external peer
20 review, somebody other than the grantees themselves.

21 MS. SWAFFORD: Let me ask a question.

22 MR. VALOIS: The third point was greater detail of

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1 permissible and impermissible use of funds. What are you
2 talking about there? Give me a specific example.

3 PROFESSOR COX: Are you going to award a lump sum
4 dollar amount. Are you going to pay them only for the services
5 rendered? If it's a lump sum dollar amount, at the end of the
6 accounting year are you going to allow them to keep any
7 accounting profits? Are you not going to allow --

8 MR. VALOIS: You are not advocating one or the other?

9 PROFESSOR COX: There are all kinds of questions that
10 need to be addressed.

11 MR. VALOIS: There could be base number and then a per
12 case and then balance them out at the end of the year. Salaries
13 was another specific you mentioned, profits kept at the end of
14 the year.

15 PROFESSOR COX: There are hundreds of questions under
16 that general category, use of funds.

17 MR. VALOIS: Are you asking whether in their request
18 for bid we are going to ask -- we are going to set salaries?

19 PROFESSOR COX: No. I am saying that in my judgment
20 the current regulation that I read does not give any such detail
21 and yet at the very least such detail needs to be considered and
22 either put in some kind of manual if not in the regulation

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1 itself.

2 MR. VALOIS: Why would we care -- why would LSC care
3 when it's asking for a bid what the provider pays to its
4 lawyers?

5 PROFESSOR COX: Forget the salary. Go to whether they
6 can keep the profits or not. What is the foundation of the cost
7 efficiency incentive in a competitive market? It's called the
8 profit reward.

9 Why does a seller of anything want to offer it at the
10 last possible cost? Because by doing so he will make more
11 profits.

12 MR. VALOIS: I understand that, but if we start
13 controlling salaries, we're not really talking about competition
14 anymore.

15 PROFESSOR COX: No, that's right.

16 MR. VALOIS: We're giving them all of the lines and
17 their accounting scheme and then we're dictating a result.

18 PROFESSOR COX: If you ask me -- I just brought it up
19 as a generic topic. If you ask me how to do it right off the
20 top of my head, I would tend to favor the lump sum grants with
21 the grantees keeping any profits earned at the end of the year.

22 CHAIRMAN HALL: Claude Swafford did join us during the

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1 presentation. She has a question.

2 MS. SWAFFORD: If this has been address, somebody,
3 bring me up to date on it. I've never been able to understand
4 why there is such a wide variation why some programs get
5 slightly over \$8.00 and some programs get nearly \$15.00 per
6 person.

7 Is that going to be equalized or addressed? Coming
8 from Tennessee, we'll have a program that varies just
9 tremendously just within that state. Is that going to be
10 addressed in terms of how much is spent?

11 I know in cities maybe there is some reason for
12 getting more per person, but in Tennessee that's not the case.
13 The rural areas in some cases will get more than the
14 metropolitan areas.

15 CHAIRMAN HALL: Claude, they haven't addressed that.

16 MS. SWAFFORD: It may be of significance here but it
17 does seem to me to be something that needs to be addressed.

18 MR. UDDO: I think it was addressed earlier. It's in
19 the regulations. There's a statement in the regulations on
20 equalization after the 1990 census.

21 MS. SWAFFORD: There's going to be an effort to
22 equalize the disparity there.

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1 MR. UDDO: That's in the language of the regulation.

2 CHAIRMAN HALL: We do need to break for lunch. Is
3 there anything else?

4 MR. ^{WOOTEN}WOOTEN: I just want to make a quick observation
5 and throw this out. There are a lot of lawyers involved in all
6 of this. Nobody has been talking about the criteria for an
7 anti-trust evaluation here.

8 I think that what's going on here is kind of a brown
9 shoe market analysis. The question is, is there sufficient
10 justification for this to be monopoly in any given relevant
11 market.

12 I think, oligopoly here -- and I think this is what
13 Professor Cox is really alluding to -- has led us to the point
14 where if there are two competitors in any given relevant market
15 -- I mean, there is competition and all the benefits from it,
16 maybe not in this case price competition but to sort of talk in
17 kind of a fuzzy headed way about there is justification for
18 competition here as opposed to analyzing an anti-trust division
19 would at the Justice Department, I don't think they would say
20 there is justification for their being one monopoly provider in
21 any given service area based on what is usually used as a
22 justification.

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1 I don't want to throw that out. I don't know whether
2 we ought to pursue that.

3 MR. VALOIS: There are lots of monopolies in this
4 world and I guess the issue is whether or not this should
5 continue to be one.

6 MR. ^{WOOTEN}WOOTEN: Exactly.

7 MR. VALOIS: There's only one water company on my
8 street, only one telephone company, one cable vision company,
9 one electric company and one guy in the street paving business.

10 MR. ^{WOOTEN}WOOTEN: The question is, are there distinctions
11 between those what we usually call natural monopolies that are
12 declining cost industries and a service provider that may not
13 have any of those same kind of characteristics.

14 Nobody is talking in terms of those kinds of
15 distinctions that lawyers usually make the money about. They
16 are talking, I think, much more vaguely about how this is a
17 unique service.

18 Maybe it is, but I think that the uniqueness isn't
19 being demonstrated very rigorously.

20 PROFESSOR MEEKER: One point on that, too, there's no
21 demonstration that in fact competition would reduce costs or
22 increase quality either. That's theoretical presumption that we

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1 have these kinds of markets.

2 My point is, I think some study ought to be done on
3 this to make sure it works one way or another before you decide
4 to jump.

5 CHAIRMAN HALL: Thank you, Jim. Thank you, gentlemen.

6 PROFESSOR COX: Are we through or do you want me to
7 return?

8 CHAIRMAN HALL: Yes, you wanted to return on another
9 panel as I understood it. Let's break for lunch.

10 (A luncheon recess was taken)

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AFTERNOON SESSION

1
2 CHAIRMAN HALL: We are ready to get started again. Is
3 Professor Cox in the room? We are going to hear from Lonnie
4 Powers, I believe, and then Professor Cox has another report or
5 response.

PRESENTATION OF LONNIE POWERS

6
7 MR. POWERS: Thank you very much, Mr. Hall. I
8 appreciate the chance to address the committee. I am Lonnie
9 Powers. I am here today in my capacity as a member of the
10 American Bar Association, special committee on the delivery of
11 legal services.

12 It was that committee which was charged with the
13 responsibility of conducting the San Antonio study on behalf of
14 the ABA. I bring to my service on the committee and to speaking
15 with you all today 19 years of legal practice including private
16 practice, working for the state attorney general in my native
17 state of Arkansas and for the last 10 years being associated in
18 one way or the other with the delivery of legal services to poor
19 people.

20 Ten years ago this summer I helped to begin a mixed
21 delivery system in Arkansas a ^{judicare} and a staff attorney model
22 which represented clients in the entire southern third of the

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1 state.

2 I speak of that experience to give some context to
3 what I'm going to say about what I think we learned in San
4 Antonio and also a couple of other points which were made this
5 morning.

6 I think the point of the San Antonio study and the
7 discussion here today is a grappling with the issue of how to
8 best stimulate innovation and progress in the delivery of legal
9 services in order to provide the best service to low income
10 people that we can.

11 I am reminded somewhat by some of the discussion of a
12 couple of churches up in the hills of Arkansas. There was one
13 on either side of the road and they had a basic theological
14 difference.

15 So one Sunday morning the people on the left side of
16 the road got together and put up a sign that said "There ain't
17 no hell." The folks in the church on the other side said we
18 can't let them get away with that. So they went and built a
19 sign that said "The hell there ain't."

20 I'm hoping that the discussion today can move us past
21 this sort of theological distinction and into the more practical
22 matter of how do we deliver legal services to poor people.

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1 A few points about the San Antonio study, I thought
2 the conversation before lunch was quite helpful. I won't try to
3 reiterate that. I do want to make it clear that the American
4 Bar Association is proud of the work that went on in San
5 Antonio. We certainly do not question the validity of the
6 study.

7 It is clear, however, as the conversation made evident
8 before lunch that the study has limited utilities. We say that.
9 Professor Cox has certainly never, as far I know, said anything
10 different.

11 We studied one city for a limited period of time with
12 a very small number of cases that were involved. It's obvious
13 from that that one should not generalize too far. Because of
14 that, the findings that came from this study are necessarily
15 limited.

16 We found that there's evidence concerning the
17 performance of all three models which is troubling in some ways
18 and seems to confirm the utility of peer review under certain
19 circumstances.

20 We found that the voucher system, or as it actually
21 was adjudicare system in this instance, seemed to have limited
22 utility and the ability to deliver services. However, we were

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1 troubled by the fact that one-third of the clients who were
2 assigned to that model didn't show up.

3 One can interpret that fact in different ways but that
4 is a fact that is of concern if we are trying to deliver
5 services to poor people. The quality review panel had some
6 trouble in findings regarding the quality of the work, but the
7 whole process of quality review needs some further study for
8 reasons that were pointed out including trying to determine if
9 these were the appropriate criteria.

10 Using external peer review certainly seemed to have
11 some utility. The issue of cost has been discussed at some
12 length. We point out in the study that there were some
13 difficulties in analyzing the cost. Certainly, Professor Cox
14 has always recognized that and did again today.

15 There was one other -- and there was some debate about
16 that before lunch. There is one other thing that wasn't pointed
17 out clearly before lunch and that is that in addition to the
18 three kinds of cases which were studied, that is assigned to
19 contract voucher and staff attorney cases, there was another
20 kind of case.

21 That was the case in which child custody issue arose.
22 Under the design of the study, all of those cases were handled

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1 by the staff program. The contract lawyers and the voucher
2 lawyers were aware of that when they agreed to participate and
3 when they set their rates.

4 We're not sure to what extent that had an effect on
5 what they bid. There is some suspicion but certainly no real
6 evidence that we found in the study that the fact that those
7 cases went back to the staff program imposed a greater case load
8 on the staff attorneys who were also handling the study type
9 cases and may have had an impact on their performance.

10 That is an issue that would need to be looked at if we
11 were going to study this some more. The final conclusion as we
12 say in the study, is that there are things here which need to be
13 looked at which are interesting, which were -- we think the
14 study was worthwhile.

15 We, as others have said, feel that there is nothing on
16 which we can base a policy recommendation to make a change,
17 particularly a significant change in the way legal services are
18 delivered to poor people based on this study.

19 If you will indulge me for a couple more minutes,
20 there are three points that I wanted to comment on outside the
21 scope of the study. One of them is the affect on pro bono of
22 competition.

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1 We don't know what that would be because we haven't
2 had competition, but we do know from the last eight years of the
3 private attorney involvement regulation that the existence of a
4 core staff for a pro bono program to do the client interviewing,
5 to do client community education, to work with the private
6 lawyers that are delivering the pro bono work is absolutely
7 critical.

8 The American Bar Association is determined that time
9 and time again as the experience in local areas all over the
10 country to the extent that having price competition for the
11 delivery of legal services would interfere with that because
12 that might be viewed as an expense that could be avoided if you
13 were only going to deliver services in routine cases, you are
14 going to cut the guts out of pro bono programs and you are going
15 to make them very difficult if not impossible to continue.

16 The point about partnership between the private bar
17 and legal services has been made before but it's absolutely
18 critical. If you keep changing providers very often you are
19 going to undercut that.

20 The other thing that is going to undercut the
21 partnership is if you do away with local legal services programs
22 whose boards are dominated by local attorneys appointed by local

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1 bar associations, you are going to lose a lot of the connection
2 that has been absolutely critical I think to forging this
3 partnership.

4 Another point regarding external funding -- today I am
5 the executive director of the Massachusetts Legal Assistance
6 Corporation which is a much smaller state level analogue to this
7 organization.

8 I occupy a position which in some ways is similar to
9 that of Mr. Wear's. We are restricted by statute to funding
10 non-profit corporations. We provide as much money to legal
11 services programs in Massachusetts as does the Legal Services
12 Corporation.

13 If the Legal Services Corporation contracts with a
14 private attorney or an organization which is not a non-profit
15 corporation in Massachusetts, we will be unable as we are now to
16 add funding to the income of that organization so that we can
17 maximize the amount of services that are delivered to the poor.

18 I think that that partnership is also working in this
19 very strong -- and it would be a shame if we lost that. The
20 other thing is that I do not know of foundations or the United
21 Way or my organization that is going to make a grant in
22 anticipation of someone being awarded a contract from the Legal

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1 Services Corporation.

2 It's going to be very difficult if not impossible I
3 think to give evidence of other funding during a competitive
4 grant process. The last point I would make is one that has been
5 made several times about bulkanization of services.

6 I came to Chicago last night, from an American Bar
7 Association conference on access to justice for low income and
8 moderate income people in this country. There were lots of
9 issues about which there was disagreement and several issues
10 about which there was agreement.

11 The central point of agreement which came up from the
12 beginning was that people in this society, whether they are just
13 over the poverty level or below it -- in fact, those just over
14 the poverty level are probably in worse shape in this dimension
15 than others -- need a way to get access to lawyers.

16 They need a way to find out basic legal information
17 and to get steered to a lawyer when they need one, at least to
18 find out where they are. To the extent that legal services
19 programs exist one to a service area, we do have much more of a
20 chance to a central point of access to the justice system than
21 we will have if we have multiple service providers.

22 I think that's a point which should be kept in mind as

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1 the corporation thinks about competition because there will be a
2 definite impact, I believe, on the ability of clients to get
3 access to the services that they're provided if we have more
4 than one service provider in an area.

5 That's probably a little more time than I had planned
6 to take. I appreciate your indulgence and I'll be glad to
7 answer any questions that I might be able to. Thank you.

8 CHAIRMAN HALL: Maybe we should hear from Professor
9 Cox.

10 MR. UDDO: If I could just ask one question it might
11 give Professor Cox something to talk about. What's the ABA's
12 position with respect to Professor Cox's study and where it goes
13 from here?

14 Is it over and done with and the position is that it's
15 a limited utility or is it the beginning of further
16 investigations into a mixed delivery system?

17 MR. POWERS: I'm going to give you a lawyer answer to
18 that question. The first part is that the study is over. We
19 have issued the final report on the study. We say in the report
20 that there are areas there which are right for investigation.
21 We urge that further investigation be done.

22 On the other hand, there are no plans afoot at this

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1 point certainly through the delivery of Legal Services Committee
2 to undertake other studies. There is discussion of that within
3 the ABA and I think we may see some things arising as much out
4 of the San Antonio study as the conference on access to justice
5 which will touch on some of these issues.

6 Over the course of the next year or so, I think the
7 ABA will do things which will be useful in fleshing out some of
8 the issues that are pointed out in San Antonio. There are none
9 insofar as I know plans afoot to replicate this study.

10 MR. UDDO: Okay.

11 CHAIRMAN HALL: I do have a question for you, Mr.
12 Powers. Your points on the pro bono decline, the private
13 funding grants and whether or not they will want to make their
14 funds available to someone that they are not sure of is going to
15 be awarded to the program, are those based on any studies in
16 particular? I take it they are not based on the San Antonio
17 study.

18 MR. POWERS: NO, they are not based on San Antonio.
19 They are based on my -- they are my personal position. I'm
20 certainly not speaking for the ABA on that, but they are based
21 on ten years of experience of working in legal services
22 programs, working as a consultant to the American Bar

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1 Association in the past and to the Legal Services Corporation in
2 evaluating private bar involvement programs throughout the
3 country and on the last six years of making grants to and
4 evaluating legal services programs in the state of
5 Massachusetts.

6 CHAIRMAN HALL: I'm not challenging you. I appreciate
7 your opinion. Professor Cox, did you have a response to that
8 question.

9 PROFESSOR COX: No, not necessarily to that question.

10 PRESENTATION OF PROFESSOR STEVEN COX

11 PROFESSOR COX: I assume that you are aware that what
12 I wrote up in a report is not what the ABA published as their
13 final report. When the ABA decided to not publish what I had
14 written, I asked for a disclaimer and from one perspective got
15 it and from another didn't.

16 What I got was a forward which simply acknowledges
17 what I wrote, what they are calling a preliminary report, they
18 the ABA, and what they released was a final report differ. I
19 wrote a paper comparing my interpretations of the results and
20 the policy conclusions I drew from those results with the
21 interpretations presented in the ABA's final report and the
22 policy conclusions the ABA draws and presented that paper at the

1 Law and Society Association meetings yesterday in Madison,
2 Wisconsin.

3 I had given a copy of that paper to Charlie Moses and
4 I understand that that along with the paper that Professor
5 Meeker delivered at the same meetings will be made part of this
6 record.

7 Thus, I am a bit -- I mentioned that because I am a
8 bit hesitant in elaborating on that. The paper, in essence,
9 says what I have to say in terms of the difference between my
10 interpretations and those presented in the ABA.

11 MR. VALOIS: Can I ask what the differences are? I
12 haven't read either of those reports.

13 PROFESSOR COX: Yes. The major difference regards the
14 policy conclusions drawn. The ABA -- let me identify the common
15 ground and then the difference. The ABA report calls for
16 additional study. Certainly, I have no disagreement with that
17 and in fact every bit of agreement of additional study.

18 I believe it is needed and desirable. The ABA goes on
19 to say that that is it. As far as they are concerned, the only
20 policy conclusion from the study is that further study should be
21 done and that no other policy changes are called for as a result
22 or as a consequence as a result of that study.

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1 It is that with which I disagree. I believe that the
2 San Antonio study results show that the current system in which
3 legal services are delivered is flawed and point us in the
4 proper direction of revising that system. I elaborated on that
5 this morning.

6 MR. VALOIS: Let me ask Mr. Powers has the ABA done
7 any additional studies that led it to disassociate itself from
8 that conclusion or has it done any additional studies at all on
9 that particular point?

10 MR. POWERS: We have not done any additional studies.
11 The reason that the delivery committee undertook to revise the
12 draft report -- and it was the committees responsibility and the
13 ABA's responsibility to issue the final report -- was that we
14 felt the evidence that was generated from the San Antonio study
15 because it was a limited period of time in one city dealing with
16 a staff program which is unusual if not unique in terms of the
17 percentage of family law cases that it handles, that one could
18 not, with any degree of certainty, get to the universal
19 conclusions which we felt Professor Cox was suggesting that we
20 get to and which I think he has quite clearly articulated here
21 today.

22 So it is not the facts on which we differ. The facts

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1 that Professor Cox reported are in the final report. The tables
2 that he generated are in the final report. The question really
3 is the extent to which one can make universal conclusions based
4 on one study and one city. That's the only point on which we
5 really fundamentally disagree.

6 PROFESSOR COX: There is one more and I just selected
7 that one being that the voucher model was not workable; that the
8 client simply did not accept that means of delivery of legal
9 services.

10 The other is that the model was highly workable and
11 that what really we were observing was that consumers, because
12 of the additional cost of coming to get the voucher and then
13 going out to select the attorney, were being motivated to
14 consider carefully whether they wanted to pursue their case.

15 Those two alternatives and, if you will, those sort of
16 two extreme possible interpretations were in my preliminary
17 report. In the ABA report, the one possibility, namely that the
18 system is very workable and provides a real mechanism for
19 efficiency, did not find its way into the released ABA report.

20 MR. VALOIS: It could be. It could be other
21 explanations as well. You could have some for reason A and some
22 for reason B.

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1 PROFESSOR COX: That's correct. I just simply
2 selected two alternatives. I'm just giving this as one example
3 of differences between my version of the report and the ABA
4 release.

5 MR. VALOIS: There is a criticism about somebody not
6 following up and asking the people who did not show, as you put
7 it, or not return. Did anybody go back and ask them why they
8 didn't come back?

9 PROFESSOR COX: No, for two reasons. One is that was
10 unanticipated and thus was not part of the research design.
11 Second, we know from the attempt to interview clients once the
12 case is over the difficulty of contacting them, that would be
13 very difficult, highly recommended.

14 If I were doing the study again, I would build that
15 into the research design. If a client did not show up to pick
16 up their voucher or did not select an attorney, I would build
17 into the research design an attempt to contact them and find out
18 why.

19 MR. VALOIS: How many individuals are we talking
20 about?

21 PROFESSOR COX: Let's see, there were roughly 900
22 cases, 300 of which were assigned to the voucher model. I don't

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1 have the figures in front of me so I'm being really rough here;
2 let's say 300 assigned to the voucher model of which one-third
3 did not show up to pick up their vouchers or 100.

4 MR. VALOIS: A hundred.

5 PROFESSOR COX: I'm really choosing extremely rough
6 figures because I don't have them before me.

7 MR. POWERS: That's substantially correct.

8 MR. VALOIS: They could move to another part of the
9 country.

10 MR. UDDO: Lonnie, why would the committee chose to
11 include one hypothesis but not the other in the final report?

12 MR. POWERS: In the final report, what we -- if I may
13 paraphrase and I could find it and read it -- what we tried to
14 do was to be more specific about some of the things which
15 clients could have -- which could have motivated clients not to
16 go forward; difficulties of access to lawyers, unfamiliarity
17 with attorneys, the fact the lawyer was on the other side of
18 town, the fact that they had no real basis for choosing one
19 lawyer over another because they didn't know enough about
20 quality differences and they had no economic incentive to choose
21 one lawyer over another.

22 We said there might be other reasons. We thought that

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1 that sort of specificity of concreteness, if you will, which I
2 think could give rise certainly to the interpretation that
3 Professor Cox suggests which really is not so much an objective
4 interpretation as the suggestion that using access to attorneys
5 is a reasonable rationing mechanism over client demand.

6 That is a policy decision and a political decision, if
7 you will. It certainly was in the power of Congress to make that
8 sort of decision. It may very well be within the power of this
9 board to make this sort of decision.

10 We felt that that was not the sort of speculation
11 which was appropriate in the report when we could, by recording
12 more concrete instances which might have given rise to the fall
13 off, allow people reading the report to draw their own policy
14 conclusions about the effect of those facts.

15 MR. UDDO: I understood Professor Cox to say that you
16 retained his hypothesis that it was evident that the voucher
17 system didn't work and excluded the hypothesis that it could be
18 evidence that it worked well. Did I understand you correctly?

19 MR. POWERS: That's correct.

20 MR. UDDO: I guess that's my question. I can see
21 leaving them both out as hypothesis or speculation, whichever,
22 but to retain one and to exclude the other and to retain the one

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1 that says the system doesn't work, it does sort of cast some
2 doubt on the motivation behind picking and choosing that way.

3 MR. POWERS: Well, we felt that what we did was give
4 evidence or give some concrete examples which really gave a
5 balanced way of looking at both sides of that. We had no
6 intention and I don't think we did -- skewed the argument one
7 way or another by presenting insofar as we could what seemed to
8 us to be concrete explanations for the behavior and then people
9 can draw their own conclusions about the impact of that behavior
10 on the delivery systems.

11 MR. UDDO: Was it the committee's intent all along to
12 write the final report or did that just really surface after
13 there was some disagreement over what the conclusions, the
14 policy conclusions should be?

15 MR. POWERS: It was the committee's understanding all
16 along that it was their responsibility -- that they were
17 responsible for the contents of the final report. I think that
18 the decision that we should revise the draft that had been
19 submitted to us was one that was arrived at late. We did not go
20 into it with that intention.

21 I think that what we did as we laid out in the forward
22 was an attempt to remove places where we thought Professor Cox

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1 had pushed the data further than it could go and engaged in
2 speculation and with all due respect to you, Steve, to make it
3 somewhat more readable.

4 Those were our motivations and I trust that we
5 achieved them.

6 MR. UDDO: I am just dismayed over this whole thing
7 because I thought that this study would be one that there would
8 be some real unanimity on and one that everyone could say that
9 because it was a joint effort between the corporation and the
10 ABA that we had come up with something that we wouldn't have
11 such disagreement over.

12 The corporation, prior to our being here, was saddled
13 with some studies that continually referred to support of one
14 position or another that were told are conclusive and definitive
15 studies.

16 In some cases, they may be, the NORK study and several
17 others that consequently surfaced. I guess I'm dismayed that
18 this study seems now to have been infected with this
19 disagreement.

20 MR. POWERS: Well, I think that the apparent
21 disagreement may be much greater than the actual disagreement.
22 There is -- I don't personally have and I don't think the

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1 committee has any disagreement whatsoever with the facts as
2 reported in this study and in earlier drafts that Steve
3 submitted regarding the number of clients that were served, the
4 number that were assigned to different mechanisms or systems, if
5 you will, the length of time between the date the case opened
6 and the date it is reported closed.

7 As we both said, there is some problem with the cost
8 analysis, but that's a problem as much of design and the quality
9 of the information we had as anything else. There's no
10 disagreement about that sort of thing.

11 The place where you get into disagreements, what do
12 those facts mean in terms of our designing the best system to
13 deliver the highest quality legal services to clients. I'm not
14 -- coming from a state who has a governor who believes that any
15 problem is subject to rational analysis, I've been convinced
16 that Governor Dukakis is wrong about that.

17 There's a whole lot of issues in this world and in
18 this country which we have to make our best judgment on given
19 the goals that we're trying to reach. Certainly the board
20 members and the staff of the corporation struggle with that
21 every day.

22 I think what we did in partnership in San Antonio was

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1 to produce some facts on which people can make judgments. What
2 the committee tried to do -- and I think did a very good job of
3 -- was to restrict ourselves to reporting those facts and not
4 making the sort of policy judgments that it's your
5 responsibility to make.

6 Other people are going to agree or disagree with you
7 and suggest other ways. I don't think we can do a study that
8 answers those policy questions.

9 MR. UDDO: Your final report includes Professor Cox's
10 preliminary study and then your revision or do you just get the
11 revision of the final report?

12 MR. POWERS: The final report is the edited and
13 revised version. It's the official version, if you will, of the
14 study. Professor Cox, as you said, has produced a paper which
15 reiterates some of the points he would liked to have seen made
16 in the final report.

17 He certainly discussed some today. The report that we
18 have submitted to the corporation and published is a unitary
19 document. It does not have his draft in it.

20 MR. UDDO: The forward does indicate though that there
21 was a preliminary draft which -- I haven't seen the final
22 report. I don't know why I haven't but I haven't seen it.

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1 MR. POWERS: I don't know either. We submitted copies
2 to the corporation some time ago, at least six weeks ago.

3 MR. SHEA: Roughly.

4 MR. VALOIS: Do we have a copy of the preliminary
5 draft or whatever it is that you submitted to the ABA? Do we
6 have copies?

7 A PARTICIPANT: I haven't sent you one.

8 MR. VALOIS: Mr. Powers says we can read both reports
9 and draw our own conclusions.

10 MR. UDDO: Well, I'm more concerned about the
11 credibility of the study. I mean, we can always draw our own
12 conclusions. We don't have any problem doing that. I'm just
13 concerned that this thing now seems to have been infected with a
14 problem that is going to make it subject to criticisms and
15 debate.

16 I would have preferred that if you all disagreed on
17 the policy conclusions to be drawn, that you just eliminate the
18 policy conclusions to be drawn and published the study as
19 submitted and get away from this appearance stuff.

20 There was a political dispute as to whether or not he
21 wanted to take the chance at letting his policy conclusions get
22 out as the committee's conclusions and instead change them. It

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1 just seems to me that the thing would have been better -- we
2 would have all been better served if you just took the policy
3 conclusions off and given us the study and said there are
4 differences of opinion as to what the policy conclusions are.
5 You all take the facts and do what you want with them.

6 Now I think we've got something that is already
7 politicized and that's unfortunate.

8 MR. POWERS: It is unfortunate. We certainly
9 considered doing that but Professor Cox, as you have seen today,
10 is quite an advocate. We felt that his policy conclusions and
11 speculations were included throughout the body of the report and
12 required some revision which we've done.

13 I know that the corporation has copies of the earlier
14 version. I know there's at least been some attempt to compare
15 them which I'm sure Mr. Shea could furnish to you at the
16 appropriate time.

17 MR. UDDO: Let me ask you another question. I really
18 don't know the answer to this. Why hired Professor Cox?

19 MR. POWERS: Professor Cox was the third party in an
20 agreement in which the Legal Services Corporation and the
21 American Bar Association were the other parties.

22 MR. UDDO: Somebody must have recommended him. Where

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1 did he come from?

2 MR. POWERS: He came from Arizona. I wasn't around.

3 PROFESSOR COX: I was hired by the American Bar
4 Association, the Special Committee on the Delivery of Legal
5 Services.

6 MR. UDDO: Are we a party to that, your hiring
7 agreements?

8 PROFESSOR COX: You agreed to accept me as the project
9 director.

10 MR. UDDO: Did we agree to pay you too?

11 PROFESSOR COX: No.

12 MR. UDDO: The ABA paid for it; right?

13 PROFESSOR COX: That's correct.

14 MR. VALOIS: With our money or theirs?

15 PROFESSOR COX: Theirs. That's the ironic situation
16 here, at least as far as I'm concerned. As I state in my paper,
17 the paper that I delivered at the Law Society meeting, the
18 purpose, at least the purpose that I was always told, for having
19 the ABA fund all research costs including my expenses and
20 salary, was so that an "outside uninterested party" was funding
21 the research portion and thereby guaranteeing the research
22 objectivity and integrity of the study.

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1 In my judgment, events certainly since January of
2 1988, and I actually believe prior to that but I detailed the
3 events since January of 1988 in my paper, I believe those events
4 show that the role of the ABA changed from that of guarantor to
5 something else. What I state in the paper is protector of the
6 status quo.

7 CHAIRMAN HALL: Professor, what were you hired to do?
8 Fact find or make conclusions or what was your understanding?

9 PROFESSOR COX: My understanding was that I originally
10 was hired to design the project. Then I was hired to conduct
11 it. At the time that I was hired to conduct the study, that I
12 was hired to not only conduct the study, collect the data, but
13 analyze it and write the report.

14 In fact, at various times, I indicated that my
15 contract did not guarantee me the right of authorship of the
16 report or even use of the data for professional papers. Every
17 time I raised that issue, I was always sort of brushed aside
18 with well, clearly, you will always have that right.

19 I wish now, of course, that I had insisted upon it in
20 writing.

21 MR. POWERS: My recollection of at least some of those
22 conversations is somewhat different. I would prefer not to get

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1 into characterization. I recall the issue of your use of the
2 data in professional publications having come up.

3 It is clear, I think, from the contracts and certainly
4 from the practice of the American Bar Association that when we
5 undertake a study, the committee or the association as a whole,
6 if it is that important, is responsible for the final product.

7 We assumed that responsibility in a way that we felt
8 was appropriate. I don't believe that there is anything in the
9 policies of the American Bar Association or in the approaches
10 that the members of the committee took to this study which can
11 be used to substantiate an argument that we are trying to
12 protect either the staff attorney system or the operations of
13 the particular program under study here.

14 There are clearly some issues which one would want to
15 investigate further regarding the way in which cases are handled
16 by all parties that were studied by this agreement. We don't
17 try to conceal that.

18 What we do try to avoid is the use of this limited
19 study for purposes for which it was needed, designed nor is
20 appropriate. That's what we tried to do. That's what I think
21 we did.

22 I commend the study to the corporation and to anyone

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1 else who wants to read it to draw the policy conclusions which
2 you feel are justified from that. I hope that we have provided
3 some basis for you to do it.

4 We believe that further analysis and further
5 investigation may give a more complete foundation on which to
6 make a policy conclusion. This one doesn't give you a long way
7 that we can go for all the reasons that have been discussed for
8 probably more time than any of us have here today.

9 MR. UDDO: Actually, I find this discussion
10 fascinating.

11 MR. POWERS: It may be fascinating but I'm not sure
12 how far it pushes the debate about delivery systems.

13 MR. UDDO: Well, I think it's helpful. I think it's
14 useful. To be honest, it wouldn't bother me if the ABA did
15 candidly say they prefer the staff attorney model and that's why
16 they were hesitant about the policy conclusions of the study,
17 because their experiences are that they think it's better.

18 Therefore, they've got disagreement with Professor
19 Cox's conclusions. Cooking the numbers isn't necessary. I
20 think you can say this is how we --

21 MR. POWERS: We didn't cook the numbers. I think we
22 all need to be real clear that at least since 1980 when the

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1 American Bar Association passed the Honolulu resolution
2 regrading committing LSC funds to involve private attorneys in
3 the delivery of legal services through the passage of first the
4 10 percent and now the 12 1/2 percent private attorney
5 involvement, regulation through the commitment of the American
6 Bar Association and substantial money every year to the private
7 bar involvement project to promote both pro bono and compensated
8 delivery systems, that ABA has not taken a position that the
9 staff attorney model is gospel.

10 What we've taken a position on is that we've got to
11 deliver the best services we can to clients. If that means
12 using contract attorneys in Nashville, Tennessee or ajudicare
13 attorneys in Arkansas or staff attorneys in Boston, that's what
14 we ought to do.

15 That's the position of the ABA and that's why I have
16 to reiterate that we are not preaching the staff attorney
17 gospel; we are preaching the best delivery system there is to
18 clients. I think that's what you all are doing too.

19 We may disagree somewhat about how we get there, but
20 that's why we did this study and that's why we will continue to
21 work on these issues with you.

22 CHAIRMAN HALL: Thank you, Mr. Powers.

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1 MR. POWERS: Thank you very much.

2 CHAIRMAN HALL: Thank you, Mr. Cox. Mr. Newhart, I
3 believe.

4 PRESENTATION OF JIM NEWHART

5 MR. NEWHART: I'll try to keep this brief. As a
6 public defender, I always feel like I'm intruding into these
7 discussions on the civil side, but what got me involved in this
8 some time ago was sitting on the Standing Committee for Legal
9 Aid and these comments we made about experiences on the civil
10 side.

11 I would say well, geez, on the defender side we had
12 that experience 15 years ago. Then I would talk and all of a
13 sudden I had responsibility for writing some report comparing
14 the two. That's the old adage, I suppose, just because you
15 opened your mouth.

16 In any event, I sit on the Standing Committee for
17 Legal Aid. As I always remind them, I'm the id of that
18 committee, the only indigent defense attorney on the committee.
19 I also in that capacity, because I'm the only indigent defense
20 attorney, share a project called the Bar Information Program
21 which employees Bob Spangeberg as his chief consultant.

22 The purpose of that committee is to supply technical

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1 assistance to state and local bar associations, to state and
2 local governments, to the judiciary to help them resolve crises
3 that exist in their indigent defense delivery system.

4 There is no currently any federal money available that
5 used to be available in the 70s to assist these jurisdictions in
6 dealing and coping with the massive onslaught of criminal cases
7 and how to process them.

8 I'm also in my job capacity, the chief public defender
9 in the appellate defender office for the state of Michigan. I
10 should briefly state that in that capacity, we've had
11 legislation passed supporting us.

12 It mandates that -- and I wrote it -- a mixed system
13 where I take a certain percentage of the cases. It says the
14 private bar shall take no less than 25 percent of the cases. In
15 fact, they take almost 66 percent of the cases.

16 We were on a support center to support the private bar
17 and we've had a lot of experience and a lot of time invested in
18 the partnership between us and the private bar. I should also
19 say that as that legislation went through, our Supreme Court
20 mandated that no contract defender programs will ever supply
21 services to that court again.

22 They are barred in Michigan at the appellate level.

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1 There is legislation pending to bar them at the private level.
2 That's what I'm going to address myself to. The experiences
3 that we've had on the national level writing standards in this
4 area -- we even use the word competitive bidding as you will
5 see.

6 I've got a copy of those here that have gone through
7 the American Bar Association some time ago. You've heard
8 reference to them before. It's not accident. So I want to
9 briefly describe what similar -- and I recognize there's a lot
10 that is not so similar to the problems that you're now facing.

11 The similar parts are self-evident. We've got the
12 same delivery mechanisms that you might have when you've got to
13 provide a mandated service. We have a staff model. We have
14 assigned counsel, voucher if you will.

15 We have control of assigned counsel plans and open
16 assigned counsel plans. We've got contract programs. The
17 contract program just briefly can be provided in a lot of
18 different ways.

19 We've tried to define it, but we've come down to one
20 definition for it. For example, legal aid and defender
21 associations, which go back to 1910 in this country, are not-
22 for-profit corporations.

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1 Like in New York, like in Grand Rapids, Michigan and
2 Detroit, Michigan, they contract with the local funding
3 authority to provide the services, all, some or some discreet
4 part of the services.

5 They are a contract program in one sense of the term.
6 They contract into different theories. Some contract for some
7 certain cases. Some contract for certain areas of cases limit
8 to the number of cases.

9 Some contract for one year, two year, three year
10 periods but it's a -- they are a contract program with staff
11 lawyers sometimes amounting to 1,000 lawyers.

12 The other type of contract program is where you have
13 private attorneys who take, again under some terms, a set number
14 of cases or no set number of cases, an infinite number of cases.
15 They can also practice privately on the side.

16 I think that's what you're talking about primarily,
17 which is -- the LSC traditional delivery models are not-for-
18 profits for the most part. You're really concerned with when
19 you inject that private practice component in it.

20 So I'll address myself to that aspect of contract
21 experience on our side. There are, as I alluded to -- as I went
22 through on the defender side, this is a recent phenomenon, the

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1 contract program. It's driven by one reality. This is something
2 that's a little different but in some ways similar.

3 There were no contract programs to speak of that
4 anybody really until the 70s. At that point, the eruption both
5 in case load for defenders began to occur and in terms of the
6 advent of the contract defender.

7 The phenomenon, almost uniquely part of that, was the
8 public defenders arose and the contract defenders arose
9 primarily driven by cost; that is to detain costs. The local
10 funding authorities, particularly counties which have the
11 primary delivery responsibility in this country, couldn't
12 control their budgets.

13 In other words, they'd budget \$100,000 for an indigent
14 defense and they'd find that at the end of the year they'd spent
15 \$200,000. The courts are writing these blank checks for
16 lawyers.

17 So they wanted to get a line item in their budget that
18 was stable. The easiest way to do it was to create a defender
19 office and say you do all the cases. The other way was to get a
20 contractor and say you do all the cases.

21 They were both striving for -- one of the main
22 instincts was control over the number of cases they would

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1 handle. In a sense, it became low bid except they had no
2 control over the contractors.

3 There were no standards for the contract letting.
4 There were no follow ups. Obviously, they are private bar. The
5 contract was let and then the next year they came back and they
6 had to do it again because that's the cycle of most county level
7 contracts.

8 What they found was over time as this phenomenon kept
9 going, that the contracts were used principally in rural
10 counties, rarely used in large delivery markets. Where they had
11 the experience with large delivery markets -- and if you look at
12 the data that I assume you will see in the case log -- it
13 primarily comes out of where contracts were used extensively as
14 we're talking about, not Maricopa County in Arizona, like
15 Phoenix but in smaller counties in Arizona, but in California.

16 They were used extensively. They have been used
17 extensively in Washington. They have been used extensively in
18 Michigan and they've been used extensively in Arizona. Not
19 unpredictably, that's where most of the case laws come from
20 contracts.

21 Well, the rush to stabilize budgets occurred in these
22 smaller to medium counties. The other phenomenon that occurred

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1 was they stopped using them roughly about 1984, 1985. They sort
2 of maxed out.

3 All the growth in contracts since then has been for
4 conflicts. I'll give you an example. We are now seeing the
5 addition of the second and third public defender office. In Los
6 Angeles, they have one public defender. For the conflicts
7 alone, they have a second public defender. Now they are talking
8 about a third public defender.

9 They are doing this in many of the major cities.
10 Those tend to be contracts with a variety of deliverers to take
11 the overflow from the conflicts which are about ten percent of
12 the cases.

13 It's no longer that stand alone contract where it's
14 the only delivery model in the area. That's been the largest
15 growth recently. In the large cities that had contracts like
16 San Diego, like Seattle King County, the contracts essentially
17 have exploded and been disappeared.

18 The problems with them, the corruption in them, the
19 furor that has come down around the contracts -- maybe it's
20 because of the sheer size but most predictably it's because the
21 case loads have exploded and the contracts can't absorb it and
22 they can't be administered.

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1 It's all they can do to process the contracts coming
2 through because you've got the constitutional mandate. These
3 cases must be done. They must be met. What happens is, when
4 the contracts maxed out, they had to go over to the private bar.

5 The side counsel is so expensive, it's driving the
6 costs up. Day in and day out the defender office has been the
7 cheapest delivery model, the most stable and the one most
8 favored by the courts because they don't have this turnover for
9 these lawyers that have to be in court.

10 So the experience with contracts and large delivery
11 models, markets have been very bad; I mean, disastrous to say
12 the least. They have been front page stories in places like San
13 Diego and Seattle King County.

14 The ABA then -- we've experienced these problems with
15 -- remember, we have no legal services corporation so it's an
16 atomized market from state county down. Part of the problem was
17 getting information out to well meaning county officials whose
18 main goal, of course, is to get the lowest cost for the dollar
19 that they can.

20 They were ill-equipped to let a contract in this area.
21 So frequently it was the courts getting involved and the courts
22 felt an inherent conflict, getting deeply involved in this

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1 letting of the contract.

2 They were the only ones in a position other than the
3 bar to have knowledge about who can provide meaningful service
4 in their courts, who can give feedback later. So what we began
5 to do on the defender side in the National Legal Aid Defenders
6 Association was try to first come up with a policy that the low
7 bid contract itself, if that was a sole guy, was wrong for all
8 the existing -- the ABA policy and I've got a copy of that with
9 the documentation.

10 That policy was taken to the ABA and it was adopted by
11 the ABA House of Delegates. For four years NLADA had worked on
12 with a variety of people at the county level, county officials
13 with contract defenders that existed around the country both the
14 full-time, big ones, and with the part-time attorneys where they
15 could practice privately, developing standards for what a
16 contract ought to look like.

17 That took four years. It followed -- was adopted by
18 the American Bar Association in 1984. Basically, it's
19 guidelines to help both the people bidding and the county
20 letting it out.

21 What you ought to be looking for in letting a
22 contract? These were modeled primarily on standards that came

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1 out of counties in California developed by County Board of
2 Commissioners for a principled way to go about letting out the
3 request for bids and for what the contract must include.

4 State v. Smith indeed the Arizona case referred to
5 earlier, adopted almost verbatim those standards by the National
6 Legal Aid Defenders Association which later became the ABA ones.

7 I should point out that almost everybody has bought
8 into those standards but they are not used. Everybody agrees
9 they should be used, but Bob Spangeberg has found as he has gone
10 out and about looking at the contracts, that very few people are
11 following them.

12 Indeed, low bid is still the primary because the
13 consumer is not the client. I mean, you have two consumers
14 here. You've got the client who consumes the ultimate services
15 and you've got the attorneys who are also a consumer.

16 You've got to be concerned about the entire process of
17 their participation. What we're finding is a couple of things.
18 In Michigan, in Trevor City, the attorneys went out and rigged
19 the bidding.

20 They clued it. They all said they were going to bid
21 for the contract, but they all said they wouldn't go below a
22 certain amount. It's natural because the bids were being driven

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1 down. It came out and became a big front page story.

2 The other thing they found, the profit motive is an
3 incentive. I don't mean in a sense that you are going to get
4 the least amount of services in a particular case for the dollar
5 which has been documented, but what they found was, when you
6 have the private practice in there -- and this is one of their
7 California cases -- the contractors were resolving all their
8 cases in two hours in the morning on the public side.

9 Let me do their civil side. They have separate doors
10 for their public clients. They have separate waiting rooms
11 which were much like bus stations. Then they have their nice
12 offices on the other side.

13 I mean, they treated them as second class cases. They
14 never visited their clients. They never filed motion practice.
15 They resolved the cases in the least amount of time as possible.
16 What you found was not only were the individual clients getting
17 less work done, but you found that the private work was
18 expanding rapidly.

19 That led to another phenomenon that became the
20 hallmark of contracts. Most people who bid on the contracts did
21 it for several reasons; excess capacity is one way and that's
22 traditionally a new lawyer.

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1 As soon as they got sufficient private practice built
2 up, they pulled out whatever other service they were providing.
3 So you constantly had a turnover which put turmoil on the
4 courts. You don't have any stability, any learned expertise,
5 showed no one source to go to for the courts.

6 As a practical matter, the threat was we'll take your
7 contract. By the end of a year or two year contract, most of
8 the private providers said so what. That's no threat, not like
9 it is to a program that you might get defunded.

10 Their point was they were going to bail out of the
11 contract anyhow. In many years, they bailed out early. They
12 would just end the contract. Ethical problems, yes.
13 Enforcement realities, very little.

14 So again these experiences were becoming more and more
15 commonplace and more and more known. I remember the discomfort
16 was not just to the clients in this in terms of quality service,
17 the providers themselves, the funders.

18 The county was finding they were spending an enormous
19 amount of time in administration just in letting the contracts.
20 They were under a lot of controversy about what criteria they
21 were using because they didn't have the learned expertise.

22 They were somewhat, in fact, honestly confused as to

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1 why all this pressure was on them about quality. They were
2 looking for low bids. They would say to me, aren't all lawyers
3 on the oath, the same oath. You don't have specialization
4 requirements at the bar; do you? Therefore, our lawyers can do
5 all cases; can't they?

6 Until you as the bar are willing to supervise and
7 enforce the standards against these lawyers, what's wrong with
8 us taking the lowest bid? These are ethical requirements that
9 they should meet.

10 On appeal, what we found was, because I am an
11 appellant defender, that when we did our analysis of who were
12 running, in effect it was citizens of counsel against most on
13 appeal. Inadvertently, it was the attorneys that came out of
14 the contractors for issues such as a person was in jail on bond.

15 I mean, you couldn't get him to make bond. The
16 lawyers said my contract doesn't include doing bond reduction
17 motions. Therefore, he said if you want me to do one, you've
18 got to pay me to do it.

19 I remember this in an assigned case. The little guy
20 said I have no money. He says well, someone in your family
21 must. He said yes, my aunt does and she has a car. He said
22 well, tell her to sell the car and I'll get the \$500.00 on the

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1 bond motion.

2 In some respects, sadly but lucky for us, he took a
3 certified check from her for \$500.00 to do the bond motion. That
4 incentive, that pressure to limit the terms of the contract and
5 then to go to the person and say if you want that special
6 service, that extra service, to get additional money was not
7 uncommon whatsoever.

8 Documenting it was very difficult. Being told about
9 it by clients was not uncommon at all. The contracts were let
10 for so little money that there was this tremendous pressure,
11 understandable pressure on the lawyers to keep them simple.

12 That gets to another problem, the complex case.

13 MR. UDDO: Jim, could I stop you for a second? A few
14 minutes ago you said there were several reasons why people would
15 take contract cases. The first thing you said was excess
16 capacity. I got the impression there were other things you were
17 going to say. Did you have some others?

18 MR. NEWHART: Yes, there are. There is -- in some
19 areas it's specialty such as death penalties where they might
20 get involved on a regular basis and accepting death penalty
21 appointments.

22 That's so unique and so specialized and so out of the

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1 mainstream that that's not a normal type of situation. The
2 other is where in the local legal culture, it's expected that
3 everybody will do their duty in a small town, either taking a
4 contract or it's a traditional way of getting in to that local
5 legal culture. He'll accept the contract.

6 It's the same with the old way assigned counsels used
7 to be once a contract has become scrutinized. The most common
8 one universally has been even among people who have left my
9 office and gone into small towns and accepted the contracts--
10 universally has been got no other business.

11 It's the way to pay the rent for the first fill-in-
12 the-blank amount until they get established. almost universally
13 that's the main reason they are taken.

14 MR. UDDO: Any evidence that people would enter into
15 contracts as a feeder source for civil business?

16 MR. NEWHART: In the criminal area, I can't say that
17 I've seen that at all.

18 MR. UDDO: You know what I mean, a personal injury
19 case that you hope to get because somebody in the family --

20 MR. NEWHART: There's ethical restrictions if you take
21 an assigned case for thinking -- subsequent business that arises
22 because of that assigned case. It's not a tort coming out of

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1 someone related in experience.

2 It doesn't grow out of the case, but it has proved
3 discomfoting for lawyers to take those kinds of cases. I don't
4 know that there is any evidence at all that that in fact has
5 happened because you are dealing with the poverty community for
6 the most part.

7 MR. UDDO: I know, but it seems to me that --

8 MR. NEWHART: I've not seen that at all.

9 MR. UDDO: I was just thinking that maybe the
10 expectation would be that some family member would have a
11 worker's comp claim or a tort action that would get referred to
12 the contract lawyer just because it was a lawyer that they had
13 contact with.

14 MR. NEWHART: There is, to my knowledge, not even
15 anecdotally do I know of an incident of that. I have a lot of
16 attorneys from my office who have done the contracts for as
17 little as six months. They never did it for that reason.

18 There's the other reason, too, that some do it
19 initially instead of they have the lingering -- they like doing
20 criminal work. It's about the only way you can do it for some
21 jurisdictions is if the contract is there, you'll take it for
22 some portion of the cases.

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1 The blush goes off the rose very quickly because it's
2 rarely proved cost beneficial. You rarely have for a long
3 period where contractors stay in the business. It's just -- the
4 very nature of it is such that when you look at --

5 In Michigan, the average overhead is now \$45.00 an
6 hour alone. You are not going to stay doing this for very long
7 and stay in business unless you have no other business, unless
8 you are filling excess capacity.

9 The costs are very high for private practice in
10 Michigan. I'm sure it's true across the state from what we've
11 done in the Spangeberg group and looking at it. In Michigan,
12 it's just overwhelmingly cheaper to run a public defender.

13 I should point out that because the image of the
14 public defender is such in the local legal culture, many
15 communities don't want it. So in Michigan, as we are designing
16 our states delivery system, state funding will occur.

17 We're leaving an immense amount of discretion at the
18 local level, not because there's not a conviction among most
19 observers that the cheapest and most stable from standpoint of
20 delivery is the defender office.

21 In the local legal culture, it may not be acceptable.
22 It just isn't something they want. So they are going to have a

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1 choice between some forms of assigned counsel and some forms, I
2 assume it will have to be of, in the more rural areas, some kind
3 of subcontract from the staff program to provide for
4 arraignments at 2:00 in the morning.

5 Somebody is going to have to take responsibility for
6 that kind of stuff. So you have got to look at what the local
7 people will accept. That's a critical part of our state
8 legislation.

9 As I indicated, the concept of the contract, there
10 were three players who found them dissatisfying; the commission
11 because of the time they were spending in managing the
12 contracts, the court because they were getting less experienced
13 people almost institutionally required to come into the court,
14 and then the rising costs.

15 All the other experience we found as the contracts
16 turned over and as the firms came in immediately following and
17 wanted to raise the costs. Jim Meeker, in talking to him about
18 the contractors in Orange County, indicated that several of them
19 -- I think there was only one for each delivery model of case,
20 so that's almost all of them indicated that they took them as an
21 experiment.

22 They wanted to see how it worked and wanted to learn.

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1 They fully expected when they did the second time around that
2 the price would go up. That proved to be true on the defender's
3 side, just the cost of living increases alone plus that
4 escalator called private practice.

5 You don't get tax free practices. You're paying taxes
6 all the way down the road. So the experience has always been
7 that the cost had gone up some places. We documented a 26
8 percent rise in the contracts in one year as they turned over.

9 Let me make sure I've covered all the examples here.
10 The other phenomenon that is going on that we found is the
11 conflict issue. Now I'm not sure how this will play out in the
12 civil case, but I'll make reference to it because it's been a
13 major issue on the defender side in the contract area.

14 Most of the contracts have sort of a difficulty when
15 it comes to getting into a case and there's a conflict. The
16 original contracts said if there's a contract, the contractor
17 had to hire the next attorney out of their own budget. What you
18 found was no conflicts because of that.

19 The next round of contracts said that no, the
20 conflicts will be handled by the public entity. What you found
21 was an overabundance of conflicts. They would take out a
22 screening fee on the case.

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1 So what you found was unless you had closed
2 supervision by someone watching that phenomenon, that mechanism
3 of conflict -- in fact, we've done evaluations and criticized
4 public defender office who had been using the rubric of conflict
5 as a way of limiting the overcrowded case loads.

6 I mean, we took no issue that their case loads were
7 too large, but when we did our evaluations, we found the only
8 way out in the local legal culture was to say you had a
9 conflict.

10 So we found some offices having these huge number of
11 conflicts. It was a way of reducing their case load. So that
12 was a problem we ran into. I'm sure in some way if the economic
13 factors are what they are and the case loads are what they are,
14 that could present a problem.

15 One final comment on this general background area that
16 I find interesting, if you look at the legal services community
17 where you've got an 800 percent demand over supply, you've got
18 more people who want lawyers than you'll ever supply.

19 You can supply 20 percent of their needs. I doubt
20 seriously what you find is just what Detroit learned when
21 selling Ford automobiles, why they couldn't make enough of
22 them.

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1 He could sell anything no matter how poorly made it
2 was because the demand was so high. My guess is if you have
3 competition, two competing models in a jurisdiction, everybody-
4 - you are going to go to one office and they are going to be
5 turned away because they just can't take anymore cases that day,
6 week, month, whatever.

7 You have limits. They will go to the other supplier
8 and they are going to take that service. There still won't be
9 enough capacity. So I'm not sure what you're going to learn by
10 the clients voting with their feet because there simply isn't an
11 excess supply of lawyers.

12 In other words, in the private sector when you've got
13 that kind of demand, the suppliers increase. I mean, they keep
14 increasing and increasing and increasing whereas McDonalds,
15 Burger King, et cetera will be to meet the demand.

16 I don't think we have ever met the demand in
17 hamburgers yet. I think that is the phenomenon you are going to
18 find. The same thing is true in the defender's side that
19 virtually anything you throw out there, the demand is so high
20 and the money is so limited, although you've go to come up with
21 it, you don't learn much from the fact that the clients have
22 accepted this service.

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1 Not all of them are going to get served in the first
2 place. They are just going to go to where they can get service
3 or they are not going to go at all. If the bounce effect starts
4 taking on, they just drop out.

5 One final thing from the defender experience that I
6 think is critical to understand is the ABA is on record as
7 supporting the mixed system of delivery, that is the massive
8 involvement of the private bar.

9 We're also on record -- and it's true of the standards
10 here and in other areas -- and we've done it for some time--
11 have developed over time involving outside specialists,
12 evaluation designs.

13 Our evaluations, if done completely, are more than
14 just a monitoring visit as it has come to be known here. It is
15 certainly more than an evaluation of quality of the two,
16 training delivery and the case load.

17 Part of that design makes you look more in depth.
18 That is, you talk to the bar. You talk to the major civic
19 groups. You talk to judges and then you verify, cross verify
20 information.

21 If the program tells you one thing, you go look at
22 court files to see if those numbers jive out and verify. You

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1 talk to everyone and paint a picture. I don't think anybody
2 suggests that it's scientific by any stretch of the imagination.

3 All you can do is do as much objective as you can and
4 then make sure you've cross checked as much as you can and you
5 don't rely on any one of those to get a full picture of how this
6 program is delivering services in that social legal culture.

7 So I strongly support and I think it's fair to say
8 that the ABA is on record supporting that you do a thorough
9 evaluation before you ever make judgments about the particular
10 delivery model.

11 The last point I want to make deals with what Lonnie
12 touched on but is a position we are responsible for commenting
13 on. We haven't had much time to sort of ingest and develop a
14 response that is in detail yet, but we fully intend to as this
15 progresses regardless of the form wherever it occurs.

16 We are particularly concerned too, outside of just the
17 regulations themselves and what might be said, on the impact in
18 the pro bono area. That is an area of great concern to us and
19 certain other entities from the ABA.

20 We are very concerned about the organized involvement
21 of the bar at the local level. I hope what I said, the
22 experience in Michigan, would also validate that. It's very

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1 important that you learn what the local culture will accept and
2 want and try to do what you can.

3 I mean, sometimes you can't please everyone. Their
4 role and their determination in the quality of services that are
5 being delivered in their community and how they are delivered in
6 their community, I think we've learned the hard way, is very
7 important.

8 As such, the ABA is very sensitive to that, wants to
9 ensure that whatever is developed for this area will have a
10 health involvement of the organized bar. That's the defender's
11 view on this so far.

12 There's more to come. I wanted to keep it short, but
13 I'm happy to answer any questions.

14 CHAIRMAN HALL: Thank you, Mr. Newhart. Any
15 questions?

16 MR. VALOIS: Just one. Did you make those contract
17 request for bids available to Mr. Wear?

18 MR. NEWHART: We have the standards here. We also
19 have the sites within these in the background papers in here to
20 the counties that have developed model standards, model
21 contracts.

22 MR. VALOIS: I would like to see copies of those.

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1 MR. NEWHART: I've got the copy here to give you.

2 CHAIRMAN HALL: Thank you, sir. Gary Johnson, I
3 believe, member of the Board of Directors of the Legal
4 Assistance Foundation of Chicago, is going to come forward.

5 PRESENTATION OF GARY JOHNSON

6 MR. JOHNSON: Welcome to the greater Chicago area and
7 I emphasize greater. I'm pleased for the opportunity to speak
8 to you. I'd like first to read a statement from our president
9 Douglas Fuson, who is unable to be here today, and then I'll add
10 a few remarks of my own.

11 Douglas Fuson is the president of the board of
12 directors of the Legal Assistance Foundation of Chicago. He
13 says: "Because of a prior out of town commitment, I am unable
14 to attend this afternoon's hearing. Accordingly, I have asked
15 to have this statement presented on my behalf and made a part of
16 the record. These comments are by no means exhaustive.

17 "I am a partner in the law firm of Sidley and Austin
18 and have served on the LAFC Board of Directors for nearly 10
19 years. I am currently the president of the board. During my
20 tenure, I have also served on several of the board committees
21 that oversee LAFC's operations.

22 I have had extensive contact with management personnel

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1 at LAFC, as well as contact with persons outside the agency who
2 have a strong interest in insuring that poor persons in Chicago
3 have full and effective access to the courts in civil matters.

4 "LAFC is an efficient and well-run program, and
5 provides first quality legal assistance to the poor in the city
6 of Chicago, as LSC's own monitors have confirmed. This, of
7 course, is the sole reason not only for LAFC's existence, but
8 for LSC's as well.

9 "We believe it would be a great disservice if under
10 the 'motherhood and apple pie' rhetoric of encouraging
11 'competition,' LSC were in fact to emasculate the effectiveness
12 of the program. Unfortunately, that is exactly what the
13 proposed regulation would inevitably accomplish.

14 "The provision of quality legal services to an array
15 of poor persons whose needs are as great and as varied as those
16 that exist in the city of Chicago is no easy task. LAFC,
17 through its six neighborhood and downtown offices, provides
18 civil legal advice and counsel to over thirty thousand poor
19 people a year.

20 "LAFC sets its priorities based upon the needs of its
21 client constituency. Its board, more than one-half of whose
22 members are appointed by the Chicago Bar Association, is

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1 responsive to those evolving needs, and has encouraged LAFC
2 management and personnel in the innovative and effective
3 representation which has gained such high praise for LAFC's work
4 from judges and lay persons alike.

5 "One of the most objectionable aspects of the proposed
6 regulation is that such local control of program priorities is
7 completely ignored. This has been a fundamental and valuable
8 element of the legal services program throughout its existence
9 and has served the interests of clients.

10 "A related and equally objectionable aspect of the
11 proposed regulation is that while paying lip service to such
12 notions as 'peer review,' the regulation would in fact place the
13 structure, priorities and operation of each local program within
14 the virtually unfettered discretion of the LSC president.

15 "The proposal not only would abolish local control of
16 service priorities but quite clearly would politicize the
17 operation of the entire program. This would most definitely be
18 a giant step in the wrong direction.

19 "Decisions as to the most appropriate and effective
20 means to represent clients must be left in the hands of the
21 lawyers who are entrusted with the ethical obligation of that
22 representation." I might add that it must be left in the hands

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1 of the board which sets general policy direction.

2 "Yet another fundamental problem with the proposed
3 regulation is its omission of any reference whatsoever to the
4 concept of quality representation or to performance standards,
5 let alone the rather basic idea that experience in the provision
6 of the types of services required by the poor should count, and
7 county heavily, in determining who is best suited to provide
8 these services.

9 "My final point, and for purposes of this message,
10 although much else could be said, is closely related. I am
11 deeply concerned that the sort of atomizing of legal services
12 apparently contemplated by the proposed regulation will have a
13 disastrous effect on the quality and effectiveness of
14 representation that the poor will receive.

15 "One of the greatest strengths of an organization like
16 Legal Assistance Foundation of Chicago is its expertise
17 developed over time, its ability to train new lawyers and staff
18 in efficient and effective delivery of legal services, and its
19 ability to retain talented and experienced attorneys who could
20 earn much larger salaries in private practice.

21 "Anything done by LSC which would take away from any
22 of these strengths would greatly harm the delivery of legal

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1 services to the poor in Chicago. Thank you for your
2 consideration."

3 That ends the statement I was asked to read by Doug
4 Fuson and I'd like to add a few points of my own, if I might.

5 CHAIRMAN HALL: Please do.

6 MR. JOHNSON: It seems to me that there are a number
7 of aspects of a legal services program that rely very greatly on
8 stability. One, of course, is recruiting. One of the biggest
9 problems we have as an agency, and I'm sure the other legal
10 services programs around the country as well have, is recruiting
11 talented personnel.

12 With the salary levels that we offer for our attorneys
13 compared to private practice or even many competing government
14 agencies, it takes an extraordinary level of commitment to
15 recruit someone to our program.

16 I'm happy to say we have found extraordinary people
17 with that extraordinary commitment. If we were to recruit
18 people on the basis that this proposed regulation were in
19 effect, I think there would be substantial doubts in the minds
20 of recruits about whether the agency that they were being
21 recruited for would be there in a period of three years or
22 shorter, whether the kinds of work that they were being

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1 recruited for would continue to be performed at that agency.

2 I think it would be a very, very serious impairment of
3 our ability to recruit talented personnel, something that is
4 already very difficult. A related area I think in which
5 stability and predictability, if you will, are every important
6 is in the area of fundraising.j

7 We've developed very strong relationships with the
8 large law firms in town. I'm a partner, by the way, in another
9 large law firm, Mayor, Brown and Plaft. Step by step they have
10 increased their giving to the Legal Assistance Foundation of
11 Chicago because they support our activities and value what we
12 do.

13 If our existence over time were open to question and
14 if our mission from year to year and the scope of our mission
15 were open to question, I think that the relationships that we've
16 worked so hard to develop over time would be seriously impaired.

17 Of course, what goes for the private law firms and
18 other donors who support our program goes, of course, for the
19 agencies which fund us in part through the generosity of their
20 grants.

21 Stability and predictability are very important. I
22 think that because of the peculiar nature of the marketplace

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1 that we're dealing with, legal services for the poor, the goal
2 of creating competition will take an extraordinary amount of
3 regulation and oversight in order for that goal to be
4 accomplished.

5 As I say, I think competition is an important goal in
6 most contexts. This marketplace is so unusual that I think that
7 there will be another layer of oversight bureaucracy, if you
8 will, created to allow some form of competition to take over.

9 The results will be that we will be laboring mightily
10 in producing a mouse, as the expression goes. It will detract
11 the attention of the corporation, I think, from where it belongs
12 which is putting money on the front lines where the efforts are
13 difficult and the challenges are many.

14 Most importantly, I think, taking away the decision
15 making priorities for what a community needs away from the local
16 community. Our board, as I said, is appointed in majority by
17 the Chicago Bar Association, the majority bar association.

18 Our relationships there are very important. As with
19 all relationships, they are fostered over time. I think that to
20 create the kind of instability and unpredictability that is
21 talked about here would undermine that very important
22 relationship.

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1 So I thank you for the opportunity to address these
2 important issues and would welcome your questions.

3 CHAIRMAN HALL: Thank you, Mr. Johnson. Does anyone
4 have any questions for Mr. Johnson?

5 (No response)

6 CHAIRMAN HALL: Thank you, Mr. Johnson. With your
7 permission, I think Linda Perle could go in the morning. I
8 appreciate that. The next one on my list, unless there is
9 someone that has to go, is Dwight Loines.

10 PRESENTATION OF DWIGHT LOINES

11 MR. LOINES: My comments are going to be brief. Of
12 course, we are quite concerned that you are proceeding at all
13 with 1633. We think that it was not within the contemplation of
14 congress when the appropriation bill for this year was adopted,
15 so we think you are proceeding without authority here.

16 Beyond that, to be honest, we are also quite concerned
17 that given the track record of at least the majority of this
18 board and the current administration, that it really strains
19 credibility for you to proceed with something that contemplates
20 such a fundamental change in the program.

21 I sat here for at least a good part of the day and I
22 was struck by some of the concerns by people on the board about

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1 objectivity and lack of bias, et cetera. I have to tell you,
2 after reading 1633, it's very difficult to walk away from it
3 without concluding that it was devised by people with a
4 particular bias against the current structure of the program.

5 There's no other explanation, it seems to me, for not
6 including references or at least weighing concerns about past
7 quality of legal services that have been rendered by current
8 programs.

9 There is particularly no other explanation for why the
10 -- there is no recognition for the years of experience and the
11 expertise that has developed on the part of staff people in
12 local programs. There is absolutely no reference to that in 1633
13 at all.

14 I can't help but conclude that the major concern of
15 the -- the major result that would come out of this regulation
16 is an overemphasis on sort of the bottom line. We believe very
17 strongly that chief justice in this situation would lead to
18 practically no justice.

19 We are particularly concerned about the removal of any
20 remnants frankly of local control that this regulation would
21 contemplate. We believe very strongly in that. Somebody, I
22 guess Valois, mentioned in passing in the hall that he didn't.

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1 quite understand where the union's interest was here.

2 We have a very strong concern about local control. We
3 feel -- as you know, we have collective bargaining agreements
4 with many local programs and we frankly feel that through those
5 agreements, the staff has achieved a greater impact in how local
6 programs run and operate.

7 We think that that has led to greater accountability,
8 greater responsiveness of the programs, both to its staff and to
9 the client community. So unless LSC is proposing to become a
10 joint employer with local programs, we would frankly suggest
11 that this is an area that you probably don't want to pursue too
12 vigorously.

13 As I believe I was about to say, the final decision
14 making in the hands of the president of the corporation, we find
15 particularly objectionable. This has nothing to do with the
16 fact that Terrance Wear is currently the president.

17 Our point is that no one person in Washington can
18 possibly have his or her hands on the posts of local communities
19 across the country to be able to make an intelligent decision in
20 this regard.

21 The reference to the peer process and peer review we
22 find a little interesting, but we notice that there's no

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1 requirement that reviewers have legal services background, that
2 they have experience in providing legal services to indigent
3 people.

4 We also note, of course, that their participation is
5 by recommendations only. The process also seems to suggest that
6 all decisions are going to be made in Washington. I can only
7 come to that conclusion given the fact that you contemplate
8 making reviews by mail in some cases, although you also provide
9 for some on-site review.

10 In closing, as I have suggested, we think that this
11 particular regulation would seriously undermine the existing
12 program, throw it into turmoil. It is something that frankly is
13 a bad idea whose time is not now. Thank you very much.

14 CHAIRMAN HALL: Thank you, sir. Are there any
15 questions?

16 (No response)

17 CHAIRMAN HALL: Thank you, sir.

18 MR. LOINES: Thank you.

19 CHAIRMAN HALL: I appreciate your brevity too because
20 it's getting late in the date. Jill Shinn, client board member
21 of northeastern Missouri legal services.

22 PRESENTATION OF JILL SHINN

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1 MS. SHINN: I have written comments for the committee.

2 CHAIRMAN HALL: Are they not in our book?

3 MS. SHINN: I would prefer that I present them before
4 they are distributed because I have some comments on what I have
5 observed today.

6 Is it not on the Supreme Court building in stone
7 "equal justice under the law"? It seems to me that the majority
8 of the committee really doesn't care about poor people's right
9 to civil rights at all.

10 I sat here this morning and I heard the gentlemen say,
11 "I think," "I don't think," "I hope," "It's not spelled out,"
12 "Very general," "Our feeling is." It seems to me that if you
13 couldn't come up with a better, more concise plan that you've
14 wasted an awful lot of time and an awful lot of money writing
15 this.

16 One of the main things you've done again is ignore
17 completely the rural areas. Do any of you know what a country
18 lawyer is? I don't think so but I'm going to tell you in a
19 minute.

20 First, I want to give you some background. My name is
21 Jill Shinn. I am an eligible client. I reside in Kahoka,
22 Missouri within the service area of the Legal Services of

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1 Northeast Missouri, Inc.

2 It was my honor to help create this organization in
3 1980 because I was unable to obtain the assistance of a local
4 attorney to help me in a consumer law problem. It was against a
5 local businessman and the General Electric Corporation.

6 In my effort to obtain assistance, I contacted several
7 members of the local bar, told a conflict of interest or
8 potential conflict of interest existed due to business,
9 professional, social relationships between the attorney and the
10 local businessman.

11 So I contacted my congressman who referred me to the
12 federal trade commission who then in turn referred me to my
13 local legal assistance agency. I found out that there was no
14 such thing in the fourteen counties of northeast Missouri.

15 This was in 1980. I talked to the members of our
16 community action agency and we submitted a grant application.
17 It was in late 1980 and we were funded. The staff was hired in
18 1981.

19 In July, just days before the statute limitations ran
20 out on my claim, an action was filed. After about six months,
21 the matter was settled to my complete satisfaction. I'm proud
22 to say that I've served as a member of the board of directors of

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1 the Legal Services of Northeast Missouri since 1980 and was
2 fortunate enough to become an elected president of the board; in
3 1986, the first client to be selected.

4 I served until just last month. My purpose this
5 afternoon is to tell you that your plan for competitive bidding
6 has once again ignored the realities of both poverty law
7 practice and the practice of law generally in the rural areas.

8 Northeast Missouri has suffered economically in the
9 last nine years because of general economic decline, drought,
10 low corn prices, low soybeans and pork prices. When we were
11 funded in 1980, we were funded based on a poverty population of
12 25,521 people.

13 Since then, we've watched you expand our client base
14 by raising the poverty levels annually with no commensurate
15 increase in funding. Legal Services of Northeast Missouri
16 initiated judicare prior, several months or maybe years prior,
17 to mandatory PBI only to find the base of private attorneys
18 participating, eroding due to our inability to pay a reasonable
19 rate of compensation.

20 Several of the rural members of the bar have given up
21 and moved to urban areas. This has created a strain on both our
22 judicare panel and the availability of attorneys willing to

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1 serve as members of the board.

2 However, Legal Services of Northeast Missouri has been
3 blessed by the combination of the dedicated local bar, hard
4 working staff that has endeavored to improve service, refine
5 management and jump every hurdle that is placed in our path by
6 the beltline bureaucrats running the corporation in Washington,
7 D.C.

8 Each year your requests and demands and ever expanding
9 regulatory requirements have interfered with our ability to
10 provide direct client services. In 1988, we began to tally just
11 exactly how many hours were spent on servicing our Legal
12 Services Corporation grant.

13 In 1988, over 142 hours were spent in LSC grant
14 writing and compliance. This represents over 2.2 percent of all
15 hours spent by service providers. Roughly translated, we spent
16 over \$5,000 in LSC grant writing and compliance which compares
17 with our total judicare budget of \$30,000 for 1989.

18 The point of this lesson is to again remind the
19 members of this committee and the board that every time you have
20 whim to change the system without adequate planning and due
21 consideration of the accumulated expertise in the field, you
22 cost real clients real services that are not otherwise

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1 available.

2 You were talking awhile ago about the setting of
3 priorities. You know, I really resent that priorities in this
4 proposal are going to be crammed down our throats by a bunch of
5 people that have fallen off the yellow brick road and went to
6 sleep in the poppies.

7 Legal Services of NORtheast Missouri has a priority
8 access -- has made it priority access to consultation for any
9 eligible client to an attorney. This priority is important to
10 us because this is the way law is practiced in rural Missouri
11 not only by our staff but every other professional who takes
12 pride in the term country lawyer.

13 However, in 1988, 394 applicants requested the filing
14 of dissolution of marriage. Only 23 percent of them were
15 granted their request. The remaining 77 percent were forced to
16 settle solely for compensation.

17 Similarly, 219 applicants sought representation in a
18 consumer case that only 25 percent were litigated by our staff,
19 our judicare component. The remainder had to be content with
20 advice.

21 One of the gentlemen back here said something about 80
22 percent being rejected. That is exactly the amount in our area

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1 that is also rejected because of insufficient funds to hire
2 enough attorneys to take care of the requests of eligible
3 people.

4 These problems can't be fixed by any competitive
5 bidding proposal. Missouri has just now abandoned competitive
6 bidding for the provision of public defender services as a
7 result of the low quality and diminished economy.

8 Long term economy can only be achieved by providing
9 the field sufficient resources to maintain an experienced staff
10 working hand in hand with the local bar to provide consistent
11 high quality representation of clients.

12 These problems cannot, on the other hand, be fixed by
13 asking our director to take time away from his case load to
14 review your C.S.R. data to explain in detail every single use of
15 the word term other or to tell you once again that we haven't
16 engaged in any lobbying.

17 He'll do it and he'll stay late into the night to make
18 sure he serves his clients, but every year we pray he will not
19 be lured away by a more lucrative practice or job security.
20 Each proposal that emanates from the corporation appears so
21 poorly considered that we are sure the author must have dictated
22 it on his way to the 2:00 p.m. golf tournament.

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1 There is no evidence that any attempt is made to meet
2 client needs or to comply with the intent of Congress. In the
3 rural area, anybody is welcome in the office of the country
4 lawyer.

5 Norman Rockwell's endeavor is more than a caricature.
6 It's a gospel of truth. Country lawyers really would like to
7 help every person with every problem. They are generalists
8 practicing every type of law.

9 More and more the lawyer has to refer the low income
10 person to the local legal aid office because he doesn't have the
11 expertise to handle the complex food stamp dispute or because he
12 has an actual or potential conflict with the local businessman
13 and consumer abuses.

14 As a matter of course, all small town attorneys are
15 retained at some time by the bank, insurance company, retain
16 businesses or schools for the specific purpose of creating
17 actual or potential conflicts of interest so as to preclude
18 representation of clients.

19 The competitive bidding proposal has as its core--
20 and the corporation has already begun the utilization of private
21 law firms to submit grant proposals for the provision of legal
22 services.

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1 Had such a system been in place in 1981, I would have
2 had no more success in attaining redress for my complaint than I
3 did by visiting every single member of the private bar in my
4 community.

5 Please stop and reflect on the harm this proposal
6 represents for clients. Finally, I cannot leave without
7 emphasizing the importance to the rural programs of the National
8 Support Centers and Clearinghouse.

9 Urban programs have the resources to create specialty
10 units and maintain large libraries. Furthermore, urban legal
11 assistance lawyers have access to law school library, resources
12 unavailable to rural lawyers.

13 On the other hand, country lawyers are generalists and
14 like their private counterparts, they frequently endeavor to
15 call on experts to assist with complicated or obscure legal
16 problems.

17 Low income clients in rural Missouri have a right to
18 the same kind of access to specialized expertise as their urban
19 counterparts. These services are frequently utilized by our
20 judicare panel and our pro bono volunteers and would be an
21 important part of any conceivable service delivery system.

22 Recently, the corporation, as a condition of our

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1 partial 1989 grant, mandated the collection of written records
2 in contact with these centers. The early returns are in. The
3 written records reveal that past estimates of backup center use
4 was underestimated by at least half.

5 It's no secret the corporation seeks to close these
6 centers. One must be in awe at the inept way they have gone
7 about proving their point. Ineptness is the point of this
8 presentation.

9 Since 1982, the corporation has failed to understand
10 that field attorneys represent real people and real pain with
11 real problems. History will not record the 1980s as an area of
12 any logical dispute between the legal services community and the
13 ruling government.

14 It will record years of wasted effort, inept
15 management and the lack of leadership by the corporation
16 contrasted by hard working people in the field, staff private
17 bar and board members alike who have made personal sacrifice and
18 could at the end of the decade hold their heads high with pride
19 and say they were involved in the preservation of legal services
20 to the poor.

21 Please go back to the drawing board and rethink
22 competitive bidding. Before you do it, make some effort to work

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1 with the field with the common goal of sustained quality of
2 legal assistance and fiscal responsibility.

3 Get rid of the witch hunters in both the corporation
4 and the field and endeavor to show the American people and the
5 world that justice remains a right and not a privilege under
6 law.

7 CHAIRMAN HALL: Thank you, Ms. Shinn. I want it noted
8 on the record that Lorain Miller has joined us. I don't think I
9 mentioned Paul who has been here all day.

10 MR. EAGLIN: That's right.

11 CHAIRMAN HALL: Any questions for Ms. Shinn?

12 (No response)

13 CHAIRMAN HALL: Mary Drolett is with the Berrien
14 County Legal Services?

15 MS. DROLETT: That's correct.

16 PRESENTATION OF MARY DROLETT

17 MS. DROLETT: I am appearing here today on behalf of
18 the Legal Services Association of Michigan which is an
19 organization comprised of 12 of the 14 LSC grantees in the state
20 of Michigan.

21 Having listened to all the comments, I think a lot of
22 what I have to say might be repetitive. So I will be very

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1 brief.

2 CHAIRMAN HALL: Thank you.

3 MS. DROLETT: First of all, I would note for the
4 record, however, that we were all somewhat incredulous that this
5 meeting was going forward at this time in light of the clear
6 language of the appropriations bill as well as the action of
7 Congress last week; that this is not a matter to be considered
8 by this board but rather it's work for a subsequent board.

9 MR. VALOIS: Congress hasn't completed its action on
10 that last week. I've heard it so many times today. It may be
11 clear to everybody but it's not all that clear to me.

12 MS. DROLETT: Thank you for that clarification.

13 MR. WEAR: Mr. Chairman, may I add something to that?
14 Mr. Chairman, the Appropriations Act of 1979 does not preclude
15 the corporation from examining the issue of competition.

16 What that act says is that the corporation must
17 implement a system for competitive award of grants and contracts
18 that take affect after the end of this fiscal year and after a
19 new board of directors is nominated and confirmed.

20 It says the corporation has to do that. It doesn't
21 preclude the corporation from doing it. During the course of
22 the authorization or rather appropriation hearing for the Senate

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1 Appropriations Subcommittee, Senator Rudman agreed with me that
2 that indeed was the state of the law. That is where we find
3 ourselves here today.

4 MR. VALOIS: Thank you, Mr. President. I realize that
5 there are those who will interpret things in a manner which
6 pleases them and they are certainly free to do that. I don't
7 take issue at the privilege of doing that.

8 Because we haven't previously clarified that point, it
9 doesn't mean we agree with it or I agree with it.

10 CHAIRMAN HALL: Ms. Drolett.

11 MS. DROLETT: Having said that and received that
12 clarification, I'm appearing because the concern of our legal
13 services grantees in Michigan is not necessarily that there is a
14 problem with competitive bidding for grants.

15 Quite honestly, if done fairly and comparing apples to
16 oranges, I don't think that there are any of us who are
17 threatened by the concept of competitive bidding. We're proud
18 of the programs that we run in the state of Michigan and the way
19 that services are provided to the poor people in our state.

20 However, the game plan for competition should require
21 competition on an equivalent basis. The plan published by the
22 corporation does not assure that apples will be compared to

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1 apples. I think that under those circumstances, the concerns
2 for our program are legitimized.

3 First, the plan as published clearly ignores themes of
4 community involvement and local control which have historically
5 been a strength of the legal services program. In recent years,
6 this philosophy has been strongly emphasized in the monitoring
7 efforts of the corporation.

8 When current LSC grantees have been monitored, great
9 importance has been placed on issues of compliance with
10 regulations on board composition, priorities in the allocation
11 of resources and private attorney involvement.

12 Yet the plan published by the corporation contains no
13 indication that applicants for LSC funds under that plan will be
14 required to have any of those things in place. There is no
15 indication in the plan published that there will be a governing
16 board which is appointed by the local bar association or that
17 there will be any client members appointed by viable
18 organizations representing the poor.

19 Second, there is no indication that there will be any
20 priority setting requirement in the application process.
21 Currently, as you all well know, current grantees are required
22 to provide a regular assessment of the legal needs of the

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1 community and the resources available in the community to meet
2 those needs.

3 This is an important part of our responsiveness to our
4 client communities. Another important part is that we are all
5 required to submit a plan to involve the private bar in the
6 delivery of services.

7 As mentioned before, there is no such requirement here
8 and the joint and cooperative efforts of the bar associations
9 and programs seem to be something that will go by the wayside or
10 be lost through the competitive bidding process.

11 In addition, there is no indication that the
12 corporation will continue to commit 12.5 percent of funds which
13 they have done through local programs to efforts to involve the
14 private bar and the delivery of services.

15 Clearly, these are things that the corporation is
16 committed to as to current grantees in order to guarantee local
17 control and community involvement. Any applicant for services
18 should be required to comply with those requirements.

19 Second, from our experiences with other funding
20 sources the plan has published, it seems to abandon some real
21 basic principals of grant making. For instance, while the state
22 in purpose is to ensure economic and effective delivery of legal

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1 services, the plan seems to contemplate fragmentation of
2 services rather than the consolidation of services or economies
3 of scale.

4 Most of our Michigan programs receive funding from
5 other public and private sources. In making grants, those
6 agencies are looking for a way to maximize the effectiveness of
7 their grant dollars by coordinating with and linking with
8 existing service delivery systems.

9 I think Title III, Older Americans Funds, have been
10 used for an example before. Small amount of monies which could
11 not support independent programs are being used to serve clients
12 very efficiently.

13 Without agencies with proven ability to manage such
14 funds, these funds now available to serve clients will dry up or
15 in the very least be eaten up by administrative costs. Further,
16 all private and public funding sources require that an agency
17 seeking funding show a track record; that is, the proven ability
18 to provide services and accountability necessary for
19 administration of the grant.

20 Without such requirements or any standards for
21 assessment, current grantees are basically in the position of
22 competing not with other qualified providers but potentially

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1 with anyone who thinks he might be able to build a better mouse
2 trap.

3 Legal services to the poor require continuity. As
4 mentioned before, people need to know where to go for the
5 services. It's not an easy kind of thing in the community to
6 build up that street knowledge among the eligible client
7 community.

8 As a bottom line, our clients are too important to us
9 for experimentation. We'd ask that the corporation thoroughly
10 think through this proposal before implementing it. I thank you
11 for your time and attention.

12 CHAIRMAN HALL: Thank you, Ms. Drolett. Does anyone
13 have any questions for this witness?

14 MR. VALOIS: Ms. Drolett, is your county, Berrien
15 County, an agricultural community?

16 MS. DROLETT: It's a mixed community. Mine is one of
17 the few one county programs in the state of Michigan or in most
18 of the country at this time. My service area is basically a
19 rural fruit producing area on the shores of Lake Michigan, just
20 north of the Indiana border.

21 We also serve the city of Benton Harbor and that's
22 where 60 percent of our population lives. Benton Harbor is a

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1 community in which approximately 80 percent of the people are
2 recipients of public assistance in some form.

3 The population is 75 percent black. The economic
4 development has been totally nil for the last 10 years and is
5 kind of a microcosm of Detroit 10 years ago. So we do have a
6 mixed community.

7 MR. VALOIS: What is your connection with the legal
8 service program there?

9 MS. DROLETT: I'm the director.

10 MR. VALOIS: Just briefly, if you can, what are your
11 priorities? What are your program's priorities?

12 MS. DROLETT: Our priorities are set in terms of
13 maintenance. That is, we place priority on income maintenance,
14 housing maintenance and family maintenance. That is, we do not
15 do uncontested divorces.

16 We handle divorce cases which involve spouse assault
17 or child abuse or if there is a child custody issue which seeks
18 to change a child's custody from the parent who has had custody.
19 We do eviction cases from residences as well as utility shutoffs
20 and that sort of thing.

21 We handle public assistance matters and that's what I
22 mean by income maintenance. That is broadly it. There are some

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1 exceptions that we also contract with the county and provide
2 defense for parents and child abuse neglect cases.

3 We have a Title III grant for which we receive salary
4 for an attorney who serves almost 400 senior citizens a year.

5 MR. VALOIS: Thank you.

6 CHAIRMAN HALL: Anything further.

7 MR. WEAR: In the program, it indicates that there are
8 four grants that you now compete for competitively; is that
9 right?

10 MS. DROLETT: Just a minute. I think that -- I am
11 representing the Legal Services Association of Michigan which is
12 the group of programs as such. I think that in the comments
13 that were submitted, there were comments from Bob Gillette who
14 is the director of the Legal Services program of Southeastern
15 Michigan in Ann Arbor.

16 MR. WEAR: Yes, I am confused. Thank you.

17 CHAIRMAN HALL: Is there anything else?

18 (No response)

19 CHAIRMAN HALL: Thank you, Ms. Drolett.

20 MS. DROLETT: Thank you.

21 CHAIRMAN HALL: Ms. Newsome.

22 PRESENTATION OF ROSIE NEWSOME

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1 MS. NEWSOME: Thank you. My name is Rosie Newsome. I
2 am from South Bend, Indiana, Legal Services of northern Indiana,
3 representative of Region 5. I do thank you for the invitation.

4 I only have a few things to say. I would just like to
5 say that we have talked about competitive bidding clients; I do
6 mean when I say clients. I have not talked to a client that has
7 been involved in the planning of this program for the poor.

8 I am asking this board as of today that has been so
9 generous in letting me come and talk to you, are you thinking
10 that you will be helping the poor and the needy by going to a
11 competitive bidding program?

12 Are you saying that we -- you can benefit the poor
13 better by bidding in some manner of getting better
14 representation for us? Are you saying that you're going to put
15 someone out there as they have said this morning to be able to
16 direct these people into a field in which they can get help?

17 I think it has taken us seven years from around
18 Indiana to enable people to come out of the closets and face the
19 people that can help them and openly discuss their problems with
20 them.

21 Now we are being told that what we have did as clients
22 as legal services attorneys, as paralegals, which we don't have

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1 anymore at our office, that they are going to have to find
2 different ways of being helped.

3 Do you feel that private attorneys and pro bono
4 attorneys, which we are already working with, if they are going
5 to be able to come in and bid against legal services or do you
6 feel that this is going to draw other legal services against
7 each other where now they are working together.

8 There are some services that some legal services
9 handle that other don't. I think that came from your board as a
10 guideline on the policy that services cannot be duplicated in
11 any manner.

12 So what we as clients have found is that there are
13 going to be legal services that is competing against each other,
14 which I don't know if any other office has impelled this problem
15 -- I'll say problem because pro bono attorneys are looking for
16 the least case that they can find but they are wanting to be
17 paid more for that job that legal services is getting.

18 I think it's unfair. We have good attorneys. I have
19 quite a bit of a turnover and I think all of the board know why
20 we have this turnover. Almost every attorney that I have been
21 under and that I have met in other states -- and I've met quite
22 a few -- they are dedicated people.

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1 They have to be because they've struggled to go to
2 school. They've had to pay. They've had to sacrifice after
3 they come out of school. There was no pay. Now there's still
4 no pay and they're still dedicated to the poor and the needy.

5 They don't seem to be getting any support. When I say
6 support, I mean from the government because they are being
7 underpaid. We know they are being underpaid. This is why we
8 have such a tremendous turnover with legal services.

9 I think there's quite a view that seeking directors
10 now due to the fact that they are just afraid -- you know what?
11 Truthfully, if I was an attorney today and I had been going
12 through this bidding process and reading all the material that
13 has been passed out and been mailed out, I would be somewhere
14 right now trying to find me a job.

15 They don't know just where they are going to stand. I
16 would just like to say last, but not least, I appreciate you
17 listening to me. In the future, I feel that you should consider
18 when you sit down around the table to discuss what poor and
19 needy people need, why not ask one to come and sit down and talk
20 to you about it and get the true feeling.

21 I can feel, as being a board representative, that I
22 can represent my people. When I say my people, please don't

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1 look at me and say I'm talking about black, brown; I'm talking
2 about poor and needy.

3 I have been there. I am living there. I mothered 14.
4 I have 13 grands, 6 great, 3 great grands. I have been there.
5 I know what it's like. Please try and consider the people that
6 you are helping. Get a feeling from them.

7 I don't say use it, just get a feeling from them. You
8 would be surprised at what we might could help you do without a
9 lot of expense being gone. Thank you very much.

10 CHAIRMAN HALL: Thank you, Ms. Newsome. Does anyone
11 have any questions?

12 (No response)

13 CHAIRMAN HALL: No, we don't. Thank you very much.

14 MS. NEWSOME: Thank you.

15 CHAIRMAN HALL: Janice Brown is the last speaker that
16 I have the name of. Ms. Brown.

17 PRESENTATION OF JANICE BROWN

18 MS. BROWN: I'm not going to give all of my testimony
19 because I just wrote up my testimony since I've been sitting
20 here because I do mine from observation. I do want to address
21 one issue and I think Mr. Uddo made an about the evaluation of
22 what legal services is doing today. How do we evaluate the

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1 system?

2 One of the things before I go into that that I think
3 we need to look at is in 1963 when legal services came into
4 being had people take an interest in the low income person's
5 needs and representation in the legal field. I think they would
6 have been out there jumping in their ^{would} ~~with~~ a be -- no need for
7 the present system today.

8 So since they did not do that, we've had to have the
9 system that we've had today. The question is, are they doing a
10 good job. I'm going to speak from personal experience here
11 because I am a board member but I am also a client board member.

12 Incidentally, I'm from Omaha, Nebraska. I'm on the
13 legal aid board in Omaha, Nebraska. When we're talking about
14 evaluation, one of the things we have to look at is that the
15 Legal Services Corporation has done one thing to interact with
16 the private bar association and interact with the client
17 community.

18 Through the efforts of present systems and educational
19 awareness, client advocates have established practice with the
20 system. In Omaha, we've had through our legal aid services and
21 through awareness, we've had people to go out and fight for a
22 moratorium with the gas company to keep people's gas from being

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1 shut off in the wintertime.

2 One of our directors from legal aid happened to live
3 in an area where black people lived and he was -- he was one of
4 our directors. He's in the private association now -- he was
5 not allowed alone in his house because he was living in an area
6 that was being redlined.

7 They were not giving loans to this particular area.
8 So this was brought out that redlining did exist. We've had
9 trouble with stack testing in the community. Through the work
10 with legal aid and other organizations, this has been done.

11 The main reason that the present system works is the
12 fact to cut the cost to government spending is to eliminate the
13 problems of poverty through self-sufficiency. To me, I feel
14 that I'm a good example of a client that helps within the system
15 to make the system better.

16 I feel that behind the efforts of legal services, it
17 has not only produced me but it has produced people like me.
18 Right now I am currently on the Legal Aid Board of Directors. I
19 am the secretary of the Legal Aid Board of Directors.

20 I'm also on the search committee which means we are in
21 the process of looking for a director. So I'm one of the people
22 who will be responsible for choosing a director. The summer, we

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1 work with the housing rule, the Omaha Housing Authority, as many
2 of you may be award of it.

3 We worked with Peter Jennings news staff and the
4 Nightline news staff and recently -- July 10, I will be doing an
5 interview with 48 Hours. I was in a group called Impact. I'm
6 with the Survival Coalition.

7 I'm with the Transportation Advisory Committee. I am
8 on the Income Maintenance Advisory Committee. I am with helping
9 our people economically. I'm doing the sensitivity training
10 with the Department of Social Services new employees which won a
11 national award.

12 I'm on the Empowering Black Families committee. I
13 organize tenant organizations. I went to the Police Academy
14 Citizens Review Process on the Black Farm. I'm in the Greater
15 Omaha Community Action Agency. I'm a vice president of that
16 board.

17 I've set up news conferences. I've appeared on talk
18 shows. I work with the penal complex. I do sensitivity
19 training to stop institutional racism. I was a Jefferson award
20 nominee for 1987, Hard Land Hero for 1987.

21 I'm on the gang and drug hotline volunteer. I've done
22 lobbying on the local, state, county and city level and

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1 testified at hearings. I went to the Washington, D.C. to the
2 defense building to find out now why they are spending \$2,000 on
3 screws when people are starving to death.

4 I also went to the HUD building to talk about housing
5 for the elderly program. I intend to go to Washington, D.C.
6 concerning this bill. Are there any questions?

7 CHAIRMAN HALL: Are there any questions?

8 MR. VALOIS: What are stack testing?

9 MS. BROWN: Stack testing is a test that the
10 Department of -- the employment offices using to determine
11 people eligible for jobs. A lot of the jobs in our community is
12 using this testing.

13 What it does is -- because they feel minorities do not
14 have a higher range of vocabulary skills, they use a lower
15 grading of measuring them for the job. Because of these low
16 scores, the people do not get the jobs.

17 We found out that it was unconstitutional and they are
18 going to have to stop using it depending it getting kicked out
19 by the state government.

20 MR. VALOIS: I've never heard that phrase before.

21 CHAIRMAN HALL: Thank you, Ms. Brown. Is there
22 anybody else that wants to come forward and testify or add

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1 anything to it regarding this draft proposal and competition?

2 (No response)

3 CHAIRMAN HALL: We will reconvene at 11:00 and I know
4 that Linda Perle is going to speak to us and I've been informed
5 that there may be another speaker or two.

6 (Whereupon, the meeting of the Legal Service
7 Corporation was adjourned at 5:00 to be reconvened at 11:00 on
8 6/13/89)

9 * * * * *

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