

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE

OPEN SESSION

Sunday, April 5, 1998

8:20 a.m.

Regency Ballroom D
Hyatt Regency Phoenix
122 North Second Street
Phoenix, Arizona 85004

BOARD MEMBERS PRESENT:

LaVeeda M. Battle, Chair
Hulett H. Askew
John N. Erlenborn
Edna Fairbanks-Williams
Maria Luisa Mercado
F. William McCalpin
Ernestine P. Watlington

STAFF PRESENT:

John McKay, President
Jim Hogan, Vice President for Administration
John Tull, Vice President for Programs
Victor M. Fortuno, General Counsel and
Corporate Secretary
David Richardson, Treasurer/Comptroller

Diversified Reporting Services, Inc.
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Approval of Minutes of the committee's meeting of February 6, 1998. 4

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MOTIONS: 4, 7, 48, 148, 150, 191, 194

4/98D

P R O C E E D I N G S

1
2 CHAIRPERSON BATTLE: So that we do not tarry
3 too long, why don't we begin to gather forward. We are
4 some minutes late, but I am very hopeful and optimistic
5 that we will be able to complete our meeting in a
6 timely fashion today.

7 I would like to call to order this meeting of
8 the Legal Services Corporation Operations and
9 Regulations Committee. We are here in Phoenix, Arizona
10 today by invitation of our esteemed director in our
11 midst, Lillian Johnson, as well as other directors here
12 in the State of Arizona, and we are delighted to be
13 here today.

14 We have a pretty aggressive agenda before us.
15 And so, therefore, I would like for us not to tarry,
16 but to go ahead and get started with what we have to do
17 today. You should have in your Board book a copy of
18 the agenda before you. All of the Board members should
19 have received this agenda prior to today. We have had
20 a chance to review it. Are there any corrections,
21 changes, or additions to it? If not, then I will
22 entertain a motion to adopt the agenda as written.

1 M O T I O N

2 MR. McCALPIN: So moved.

3 MR. ERLNBORN: Second.

4 CHAIRPERSON BATTLE: It has been properly
5 moved and seconded that we adopt the agenda as provided
6 to us. All in favor?

7 (Chorus of ayes.)

8 CHAIRPERSON BATTLE: All opposed?

9 (No response.)

10 CHAIRPERSON BATTLE: The motion carries. We
11 have in our Board book, as well, the minutes of the
12 February 6th meeting. You should have had an
13 opportunity to review those minutes. Are there any
14 changes or corrections to the minutes?

15 Bill?

16 MR. McCALPIN: It is probably my Alzheimer's
17 kicking in, but I don't recollect that we have
18 customarily put the regulations we worked on verbatim
19 in the minutes. I don't recall that we have done that.
20 Our minutes have usually been relatively brief, but
21 more importantly, it seems to me that it is kind of a
22 difficulty.

1 We have on page 5 a provision that the Chair
2 called for a motion to approve publication of the
3 revisions in the Federal Register, as amended, pursuant
4 to the discussion. Then we have 14 pages, I think it
5 is 13 pages, of the regulation itself and finally on
6 page 18 we have the motion.

7 So it seems to me that -- and the verbatim
8 1602 is in the minutes without any introduction of what
9 it is. And it seems to me that maybe what we ought to
10 do is, if we are going to do it this way, is have you
11 call for the motion, have the mover move the regulation
12 in the following form, or something of that sort, so
13 that we have the motion preceding what is being moved.
14 But I wonder, do we also put the verbatim regulation in
15 the minutes? I didn't think we did.

16 MS. WATLINGTON: This was the first time I
17 remember.

18 CHAIRPERSON BATTLE: Yes, I think this is the
19 first time, but let's see if there is some wisdom for
20 this departure today. Is there? No? I actually don't
21 think it is a bad idea because, you know, years from
22 now when the question is, "What is it that you all

1 really did," you have got the actual final in the
2 minutes. But we have not been doing that in the past.
3 So I don't have a particular feeling one way or the
4 other. I think it is more detailed to have it.

5 MR. McCALPIN: Well, if you are going to do
6 that, then I propose that you move what is on page 18
7 up to page 5 and say, "Mr. Erlenborn moved the
8 following draft resolution resulting from the Committee
9 discussion," or whatever, "and Ms. Whatley then
10 seconded." Then you have following exactly what it was
11 that is being moved.

12 CHAIRPERSON BATTLE: Okay. We can amend the
13 minutes today to do that.

14 MR. McCALPIN: And the same thing occurs with
15 respect to 1644. On page 19, you called for the motion
16 and it is over on page 21, and it is not quite as long
17 a regulation in between, but it seems to me that there
18 should a little introduction to what that is. What is
19 being moved and what that is.

20 CHAIRPERSON BATTLE: Okay. Are there any
21 other corrections or changes suggested to the minutes?
22 With those changes, I will entertain a motion to

1 approve the minutes of the Committee meeting of
2 February 6, 1998.

3 M O T I O N

4 MR. ERLNBORN: So moved.

5 MR. McCALPIN: So moved.

6 CHAIRPERSON BATTLE: Okay. It has been moved
7 in stereo and is there a second?

8 MS. WATLINGTON: Second.

9 CHAIRPERSON BATTLE: Seconded. Okay. All in
10 favor?

11 (Chorus of ayes.)

12 CHAIRPERSON BATTLE: Okay. All opposed?

13 (No response.)

14 CHAIRPERSON BATTLE: The motion will carry.

15 The first regulation that we will consider today is
16 45 CFR Part 1623, which addresses procedures for
17 suspension of financial assistance.

18 MS. GLASOW: Good morning. For the record, my
19 name is Suzanne Glasow from the Office of General
20 Counsel. To introduce Part 1623, I would also like to
21 give a brief summary of 1623 and 1606 and the major
22 changes in the law that have led to the revisions in

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1 these rules.

2 CHAIRPERSON BATTLE: Okay. Before you do
3 that, let me just introduce all of the members of the
4 panel today. We have John Tull, as well, from the
5 Corporation, and Linda Perle, who is here representing
6 the Legal Services Community. Okay.

7 You may continue.

8 MS. GLASOW: We present three proposed rules
9 to the Committee this morning. Part 1625, which is a
10 denial of refunding, we are asking the Committee to
11 pass a motion to -- a proposed motion to remove it from
12 the Code of Federal Regulations. And we are presenting
13 revisions, major revisions, to our suspension rule and
14 our termination rule.

15 Prior to 1996, LSC recipients had a
16 presumption of refunding. And this meant basically
17 that before the Corporation could deny annual refunding
18 or terminate a grant, that the recipients would do
19 extensive hearing rights. In 1996, the Corporation
20 implemented a new competition process for grants. This
21 eliminated the need for the denial of refunding
22 hearings because instead of renewing grants every year,

1 grantees receive a grant for a period of time and then
2 they have to become a new applicant.

3 In 1998, our appropriations act added judicial
4 changes to the law affecting our recipients' rights to
5 continued funding. In essence, a new law strengthened
6 the Corporation's authority to sanction recipients that
7 violate the terms of their grants. Section 501(b)
8 nullifies a recipient's hearing rights under
9 Section 1009(a)(9) and 1011 of the LSC Act.

10 And these two provisions in the LSC Act gave
11 extensive hearing rights to our grantees, including the
12 right to an independent hearing examiner from outside
13 the Corporation, to provide an evidentiary hearing and
14 to present a recommendation to the President of the
15 Corporation.

16 This law has now been nullified by our new a
17 appropriations act. However, other provisions in the
18 appropriations act do make it clear that before we can
19 suspend or terminate a grantee's funding, that we do
20 need to provide basic due process, notice, and hearing
21 procedures.

22 The new law has also given us authority to

1 debar a recipient from receiving additional awards,
2 under certain circumstances, and has given the
3 Corporation authority that when we terminate a grant in
4 whole, that we can recompute for that service area.

5 The new law has, in essence, shifted the
6 emphasis in the law to grant the Corporation more
7 authority to sanction its recipients and to make sure,
8 through a competition process and the new hearing
9 rights law, to ensure that the most effective
10 recipients are receiving LSC funds and that they -- the
11 recipients, who can provide the best legal aid to the
12 poor in the service areas.

13 The new rules that we present to you today are
14 more streamlined, require less time, we hope they are a
15 little clearer than they have been in the past, and we
16 hope, through the rule-making process, it will end up
17 with final rules that are even better.

18 The first rule that we present to you is
19 Part 1623 and that is suspension procedures. A
20 suspension is one act that can be taken by the
21 Corporation, and this is very similar to acts that are
22 taken in federal government agencies that provide

1 grants to private actors.

2 It is generally understood to be an
3 extraordinary measure that is used when there is a need
4 to safeguard federal funds or where it is believed that
5 prompt action will prevent further harm or just
6 eliminate the problem. Nip it in the bud, in essence.
7 And so we have revised this rule to take that into
8 consideration.

9 The purpose of this rule, on page 1 of the
10 rule that I have provided to you, is first to ensure
11 that the Corporation may take prompt action when
12 necessary to safeguard LSC funds or to assure
13 compliance with the LSC Act. The second purpose is to
14 provide procedures for prompt review that will ensure
15 that the Corporation's actions are based on informed
16 deliberation and that the grantee -- in essence, this
17 informed deliberation means the grantee had a fair
18 hearing. The definition --

19 CHAIRPERSON BATTLE: Before you go on to the
20 definition, in what we have as 1623.1(b), we there
21 speak about where the Corporation has made a
22 preliminary determination. And it is my understanding

1 that this preliminary determination is basically a
2 proposed decision for either termination or for some
3 effective action to take place. In my view, the term
4 "preliminary" means a decision has been made and it may
5 communicate to some that that decision has been made
6 prior to the due process rights that will follow.

7 So I would suggest that we use "proposed" as
8 opposed to "preliminary" as the decision that is being
9 made at that juncture because you really haven't made a
10 decision, you have considered, under some investigation
11 preliminarily, a decision and the decision will come
12 after the person has had an opportunity to present
13 their side of the story.

14 MS. GLASOW: I don't have a problem with that.

15 CHAIRPERSON BATTLE: Okay. And that will
16 reverberate, as I read it, throughout this rule.
17 Wherever we are referring to a preliminary decision
18 determination, we really mean proposed.

19 MS. GLASOW: Okay. We will fix that
20 throughout the rule.

21 CHAIRPERSON BATTLE: Okay. Thank you.

22 MS. GLASOW: The definition of suspension

1 means an action temporarily suspending financial
2 assistance to a recipient in whole or in part during
3 the term of the current grant or contract. And it is
4 with the Corporation pending corrective action by the
5 recipient or a decision by the Corporation to terminate
6 a grant.

7 So we suspend funding, once this final
8 determination to suspend has been made, in order to
9 allow the recipients to take the corrective action that
10 is necessary to end the suspension or if, at the end of
11 the suspension period, we are still not satisfied, then
12 we will go into a termination. But a suspension is
13 only intended to last for a short time for
14 extraordinary reasons.

15 Section 3 sets out the grounds for a
16 suspension. Paragraph (a) basically states that we can
17 suspend funds when there has been a substantial
18 violation of -- we list a whole category of law that is
19 relevant to LSC grants, and the Corporation has reason
20 to believe that prompt action is necessary to safeguard
21 LSC funds or to ensure immediate corrective action.

22 Paragraph (b) sets out the criteria that we

1 will consider to determine whether there has been a
2 substantial violation. That criteria includes, and we
3 are now on page 4, the importance and number of
4 restrictions or requirements violated, the seriousness
5 of the violation, the extent to which the violation is
6 part of a pattern, whether the violation was
7 intentional.

8 And we are suggesting or recommending to the
9 Committee that in the preamble to this rule for the
10 criteria, that is, whether the violation was
11 intentional, that we ask for comments on whether a
12 better standard should be put in this such as willfully
13 or knowingly violates, which is a different standard.
14 Or maybe there is another standard that is better. So
15 we are not ready to clearly recommend the intentional
16 standard, we would like to seek public comment on
17 whether that should be the standard or some other.

18 CHAIRPERSON BATTLE: Right. As I understand
19 it, the way that these particular elements will work is
20 in conjunction with each other. In each instance, in
21 order to determine whether there has been a substantial
22 violation, you will consider all four measures. And

1 the fourth measure has to do with the recipient knowing
2 what the regulation or restriction is and, violating it
3 notwithstanding, having knowledge of it, as opposed to
4 taking just an intentional act to do something without
5 possibly the knowledge.

6 MS. GLASOW: Yes.

7 CHAIRPERSON BATTLE: Okay.

8 MS. GLASOW: Paragraph (c) implements a
9 provision in Section 509 of the appropriations. It is
10 '96 appropriations act that is incorporated into this
11 year's appropriations act. And basically, Section 509
12 directs the Office of Inspector General to provide
13 guidances to our recipients on how to have an
14 acceptable audit. And their audit has to be in
15 compliance with this OIG guidance.

16 And 509 also states that if an audit is not in
17 compliance with the IG's guidance, that the Corporation
18 may suspend funding until that audit is completed in a
19 satisfactory manner. And so a grounds for suspension,
20 we have added in paragraph (c), to be that they have
21 not completed an audit that is not in compliance with
22 that. And we have put it in a separate paragraph

1 because the timing of the suspension here is different
2 than other suspensions, and so we are treating it a
3 little bit differently.

4 CHAIRPERSON BATTLE: Okay. Now how does this
5 one operate because in the other instances, you have
6 the Corporation making a determination that there has
7 been a substantial violation and then the second
8 paragraph tells us what those elements are that the
9 Corporation considers.

10 What does the Corporation actually consider
11 under (c) in making a suspension determination because
12 as I understand it, it will be the Corporation
13 determining what the term is, you are attempting to get
14 a program to comply with whatever the acceptable audit
15 requirements are of the IG, but the actual
16 determination as to the term and other elements of the
17 suspension will be made by the Corporation. Is that
18 correct?

19 MR. TULL: (c), Madam Chairman, is slightly
20 different from the others in that it is grounded in the
21 language in the appropriations act, Section 509, which
22 has language which, first of all, gives responsibility

1 to the Inspector General for oversight of audits in
2 determining if an acceptable audit has been accepted --
3 has been submitted. And in the event that they deem
4 that it is not, then to recommend to management that
5 there be a suspension of funding.

6 And under the terms of 509, the term of the
7 suspension is until an acceptable audit is submitted.
8 So unlike the other suspension provisions, it would not
9 be limited, number one, by the amount of time which
10 shows up later in this regulation, which is generally
11 30 days, but no more than 60 days. It could be longer
12 in the event that a recipient did not submit the audit.

13 CHAIRPERSON BATTLE: And who makes the
14 determination as to when an acceptable audit has been
15 submitted so that the suspension can be lifted in that
16 instance?

17 MR. TULL: The Inspector General would.

18 CHAIRPERSON BATTLE: Okay. So the Inspector
19 General then has to come back. The Corporation does
20 the suspension, the Inspector General continues to
21 monitor to see if there has been an acceptable audit
22 submitted, and then once it is acceptable to the

1 Inspector General, he informs the Corporation and
2 therein lies the power to lift the suspension.

3 MR. TULL: Correct. Correct.

4 CHAIRPERSON BATTLE: Okay.

5 MR. TULL: And the suspension would be imposed
6 by the Corporation's management because we are the part
7 of the Corporation empowered to take such action, but
8 under Section 509, the language is, "Upon
9 recommendation of the Inspector General." And our view
10 of that, and we would expect the preamble to reflect
11 this, would be that the determination of the
12 acceptability of the audit vests with the Inspector
13 General.

14 The determination of whether or not a
15 suspension is appropriate is management's
16 responsibility, although we would, in nearly all cases,
17 surely suspend because that is clearly what the intent
18 was of Congress in Section 509.

19 CHAIRPERSON BATTLE: Right. And that really
20 gets to the second issue that I wanted to make sure
21 that the regulation was clear on, the determination
22 about what is acceptable with regard to the audit. Of

1 course, that is with the Inspector General, but whether
2 there ought to be a suspension in the first place rests
3 with the Corporation. That determination rests with
4 the Corporation.

5 MR. TULL: Correct.

6 CHAIRPERSON BATTLE: Okay. So even though
7 there is a recommendation, the Corporation is able to
8 review that recommendation and make its independent
9 assessment as to whether a suspension is appropriate,
10 based on that recommendation.

11 MR. TULL: That is correct.

12 CHAIRPERSON BATTLE: Okay.

13 MS. GLASOW: Section 4 sets out the suspension
14 procedures. Paragraph (a), when the Corporation made
15 a -- we will change that to proposed -- determination
16 based on the grounds that we provided earlier, that
17 financial assistance should be suspended. And this
18 basically goes through a list of what has to be in --
19 what the Corporation must serve -- I think we should
20 change the word "serve" to "issue." It doesn't have
21 quite the formal legalistic meaning that serve does.

22 CHAIRPERSON BATTLE: Sure. Do we get the

1 sheriff or can we do it another way.

2 MS. GLASOW: Right.

3 CHAIRPERSON BATTLE: Okay.

4 MS. GLASOW: Shall issue a written preliminary
5 determination on the recipient. We list what that
6 preliminary determination should include. It should
7 state the grounds and effective date for the proposed
8 suspension, it should identify the facts and documents
9 the Corporation relied on.

10 It should specify, if any, corrective action
11 that the recipient should take to either forestall or
12 end the suspension, and it should advise the recipient
13 of its rights to request an informal meeting with the
14 Corporation in which it can attempt to show that the
15 suspension should not take place.

16 CHAIRPERSON BATTLE: Okay. Did you have a
17 question, Bill?

18 MR. McCALPIN: Yes. I looked at this. I
19 tried to figure out, from these various provisions,
20 what kinds of safe harbor a recipient would have after
21 there arose evidence of -- which might lead to a
22 suspension. I guess it is a minimum of 10 days and

1 probably longer than that because some things are days
2 after receipt and then -- but I guess what I was
3 wondering if it is really a serious problem, there may
4 be two, three, four weeks while all this is going on
5 before there is actually a suspension; is that right?

6 MR. TULL: Your counting, I would think we
7 would trust, is accurate. I think that is right from
8 the time that the actual notice of the proposed
9 determination was sent until the time that we had gone
10 through the processees and the opportunity for an
11 informal meeting, the time when we would instruct our
12 grants unit as to whether to issue a check or not would
13 be that long.

14 It might actually vary -- on a practical
15 level, it might vary somewhat because the -- we issue
16 checks on a monthly basis. So the check which would be
17 affected and would be suspended would be the next check
18 after the suspension process had taken place. So there
19 is some slippage that way, which could actually make
20 the time period somewhat longer.

21 MR. McCALPIN: Well, I guess I was just
22 wondering how long funds might be at risk.

1 MR. TULL: I think for conceivably up to six
2 weeks from the time that we made the determination
3 until the time that an actual action was taken. The
4 times that we have in the course -- during the period
5 of time that I have been associated with CMA or the
6 Corporation, we have, under the old rule, suspended two
7 programs.

8 One for a significant violation where a class
9 action had not been, in our view, properly divested of
10 after the August 1st period and another where we did
11 not receive an audit and the program seemed to be
12 paralyzed to the degree to which it was not going to be
13 able to submit an audit. This was prior to the 509
14 changes when audit oversight still rested with
15 management.

16 In both cases, the suspension had the result
17 intended, which was to get the immediate attention of
18 both programs and to solve the problem. We have not
19 encountered -- I don't believe that we have
20 encountered, in the course of the Corporation's
21 history, a time when a 30-day period would -- such
22 process would involve a risk of actual loss of funds.

1 That is, if we were in a situation where we
2 had evidence that a program was taking the funds and
3 literally going off to Acapulco with them or some such,
4 whether we would be able to take some more immediate
5 action of a different order based on the fact of a
6 potential criminal violation or something.

7 This does not really encompass that. It is
8 really focused on circumstances where we need to act
9 immediately to bring about an immediate result on the
10 part of the program to change a situation, which is a
11 serious lack of compliance, or potential for a serious
12 lack of compliance, or now we have in 509 quite precise
13 language about the need to submit an acceptable audit.

14 MS. GLASOW: I would like to add that in Part
15 1640, the appropriate use of federal funds and the
16 sanctions in there, really ensure -- there is a
17 provision in that rule that says, you know, if the
18 Corporation suspects that there is waste, fraud, or
19 abuse under the federal law of funds, we can take
20 whatever action is necessary to safeguard those funds.

21 So for really serious problems with the use of
22 LSC funds in the federal criminal or civil false claims

1 area, we can step in and do whatever is necessary to
2 safeguard funds.

3 CHAIRPERSON BATTLE: One issue, I think, that
4 Mr. McCalpin raised about the term. When we state in
5 the proposed determination the grounds and the
6 effective date, are we also going to state a term at
7 that point of the suspension or are there instances
8 where the term is still at issue because what you
9 intend to do is, for example, ensue to have the term be
10 until you have brought your audit into compliance or,
11 in other instances, until you have met the requirements
12 of divesting yourself of a class action?

13 And so you are not really making the
14 suspension for a specific time certain. I just wanted
15 to see whether or not that was part of what you would
16 inform a recipients of the expectation because it may
17 be if the suspension is going to be for one day and
18 that that is the only action you are going to take,
19 that they aren't going to take any kind of appeal of
20 that, they are just going to take their lick and go on.
21 And the term may be important.

22 MR. TULL: Well, a suspension -- because the

1 nature of a suspension is not permanently to withhold
2 the funds, it is to withhold them temporarily for a
3 period of up to 60 days, a 1-day suspension really
4 would be unnoticeable because we don't send monies out
5 that way, we send monies out in monthly checks.

6 We are really not set up to -- I mean, we
7 could, I suppose if we wanted to -- probably the main
8 sanction would be having them -- forcing them to cash
9 more than one check a month. It probably would be the
10 ones who would suffer the most under a sanction that is
11 under a suspension which was shorter than 30 days.

12 So the intent is really to say, "We have
13 significant concern about a circumstance which is
14 grounded in the grounds for a suspension. We are going
15 to withhold your funds until this is remedied." If it
16 is not remedied, our next step then is to begin
17 termination procedure.

18 And we would presumably, if it were not
19 remedied, would start that process. But then we would,
20 during the time period of the termination, we would,
21 under the terms of 1606, which we are about to
22 consider, would continue interim funding because we

1 have got -- we always in this area have dual
2 responsibilities.

3 CHAIRPERSON BATTLE: Sure.

4 MR. TULL: One is to assure compliance, the
5 other is to make certain monies go to that service area
6 so that clients continue to get served. So we don't
7 have an interest ever in completely stopping monies
8 going, we want to make certain they go in a way which
9 assures compliance and proper performance.

10 MS. PERLE: My question, John, however is
11 having said that, I don't think there is any place in
12 this rule that suggests that once the program has done
13 whatever it needs to do to bring itself back into
14 compliance, or having completed an appropriate audit,
15 there is nothing in this rule that says they get back
16 the money that was suspended. There is a provision for
17 interim funding, but that is just providing the
18 recipient with assistance pending the completion of the
19 suspension procedures.

20 In other words, if a recipient gets a notice
21 of suspension in the middle of February and the
22 Corporation says, "We are going to withhold your March

1 check unless you do X, Y, or Z," and the program starts
2 down the road of doing X, Y, or Z, but it may take them
3 until March sometime, until the end of March or maybe
4 even the beginning of April, to correct the problem,
5 but they do do -- they do make the effort and do make
6 the corrections, there is nothing in here that suggests
7 that the Corporation has the authority to give them
8 their February and March checks.

9 CHAIRPERSON BATTLE: And really the question
10 that comes if you would --

11 MS. PERLE: March or April checks, excuse me.

12 CHAIRPERSON BATTLE: -- analogize to an
13 employment situation, you can suspend somebody with or
14 without pay. And even though there is a suspension,
15 there is this interim funding that goes on and if there
16 is interim funding, then how does that operation of
17 suspension --

18 MS. PERLE: The interim funding, as I see it,
19 during this -- in 1626.6 -- 1623.6, pardon me, is just
20 to ensure that they get funding until a final
21 determination is made on suspension.

22 CHAIRPERSON BATTLE: Sure.

1 MS. PERLE: My question is if there is a
2 decision to suspend, to say, "You are not going to get
3 your March check until you correct this," and then at
4 the end of March they correct it, are they going to
5 then get their March check?

6 CHAIRPERSON BATTLE: Okay. Suzanne?

7 MS. PERLE: I don't think it is addressed by
8 the rule and I think it should be.

9 MS. GLASOW: I actually addressed the issue in
10 the footnote of 1606, third footnote. And we could
11 either discuss this in the preamble or we could add it
12 to the rule. It has been the internal interpretation
13 of the Corporation for some time I know because I have
14 written the legal opinions of a suspension.

15 And that is why we use the word "temporary" to
16 mean that we withhold the money temporarily, but the
17 recipient gets it back. And we can either clarify that
18 in the preamble or add language to the rule that makes
19 that clear. So we don't disagree at all with what
20 Linda is saying.

21 CHAIRPERSON BATTLE: Sure. I think it would
22 be helpful, actually, to put it in the rule because I

1 think as time goes on, the question of how you treat --
2 I mean, right now I am dealing with that in the
3 statutory context in an employment arena whether or not
4 somebody is supposed to get paid or not.

5 And if it is silent, even if you say suspend
6 and your intent is suspend means you just don't get it
7 until you do what I have asked you to do, that needs to
8 be explicit so that it is real clear on a going forward
9 basis more than in a preamble.

10 MS. GLASOW: Okay.

11 CHAIRPERSON BATTLE: Okay. So there will
12 be --

13 MS. GLASOW: I can add a line that says that
14 very clearly.

15 CHAIRPERSON BATTLE: Okay. Now we can go back
16 to where we were on I think it is 1623.4(a).

17 MS. GLASOW: May we go back to the very
18 first -- is it first page, John?

19 MR. TULL: Second page.

20 MS. GLASOW: Second page. We want to change a
21 word.

22 CHAIRPERSON BATTLE: Okay.

1 MS. GLASOW: It is the definition of
2 suspension. We are using the word "suspending" to
3 define suspension and we would like to change that to
4 "withholding," please.

5 MR. ERLNBORN: I am glad you did that. I was
6 going to raise the issue and I thought, well --

7 MR. TULL: We were testing the Committee.

8 MS. GLASOW: We did that with termination, but
9 somehow we missed suspension.

10 MS. PERLE: So just to make it clear that
11 suspension means an actual temporary holding of
12 financial assistance?

13 CHAIRPERSON BATTLE: Yes.

14 MS. PERLE: Okay.

15 MS. GLASOW: We were on page 5. We stated the
16 grounds, identified the documents, talked about
17 corrective action. I think we are on page 6.

18 CHAIRPERSON BATTLE: Okay.

19 MS. GLASOW: Paragraph (b). If the recipient
20 requests an informal meeting with the Corporation, the
21 Corporation lets them know where, when, and how, sets a
22 time frame.

1 CHAIRPERSON BATTLE: I suggest that we just
2 move that sentence around a little bit.

3 MS. GLASOW: How would you like to do that?

4 CHAIRPERSON BATTLE: If the recipient requests
5 an informal meeting with the Corporation, the
6 Corporation shall designate and then give the time, at
7 least five days after the recipient's request is
8 received, the place for such meeting and set the time.
9 Because it sounds like "the place for such a meeting
10 and shall set the time at least five days after the
11 recipients receipt" might lead you to believe that that
12 is the date.

13 MS. GLASOW: Okay.

14 CHAIRPERSON BATTLE: And it is not. You are
15 really referring -- that last piece should go earlier
16 on in the sentence.

17 MS. GLASOW: Okay.

18 CHAIRPERSON BATTLE: Okay.

19 MS. GLASOW: Paragraph (c) talks about how the
20 Corporation will consider any written materials
21 submitted or any oral presentation given. And after
22 considering all these materials, the Corporation will

1 determine whether the recipients has failed to show
2 that suspension should or should not become effective.

3 And after all of that consideration, the
4 Corporation may suspend financial assistance to the
5 recipient, in whole or in part, and under such terms
6 and conditions the Corporation deems appropriate and
7 necessary.

8 CHAIRPERSON BATTLE: Okay.

9 MS. GLASOW: Paragraph (d) requires the
10 Corporation to send written notice of suspension to the
11 recipient promptly and that the suspension will become
12 effective when the notice is either received by the
13 recipient or on the date specified in the notice.

14 Paragraph (e) --

15 CHAIRPERSON BATTLE: Does that conflict with
16 the earlier, "State the grounds and effective date"
17 that you have got in 1623.4(1)? I guess you could say
18 the effective date is upon receipt, but you are just
19 stating that earlier on.

20 MS. GLASOW: Mm-hmm.

21 CHAIRPERSON BATTLE: Okay. All right.

22 MS. GLASOW: And the first one is a proposal.

1 CHAIRPERSON BATTLE: Yes.

2 MS. GLASOW: And by the time we get to the end
3 of the process, it may be different.

4 MR. McCALPIN: There was some discussion
5 yesterday about playing with receipt of notice.

6 CHAIRPERSON BATTLE: That was on another rule.

7 MR. McCALPIN: I understand, but the concept
8 is the same. Suppose you just don't open the envelope?

9 MS. GLASOW: This situation is different than
10 the debarment of auditors. We are in consistent
11 contact with our recipients and we have program
12 officers assigned to various states. And so we are not
13 as concerned, I don't believe, John, unless you have a
14 different opinion on this, with putting something very
15 specific in here that shows that we have evidence that
16 they actually received it. I mean, that is a
17 programmatic issue. If you would like to add something
18 there, we could do that.

19 MR. TULL: Was your concern, Bill, that the
20 event being the receipt as opposed to the mailing?

21 MR. McCALPIN: It may not make such a
22 difference because the suspension action really takes

1 place at our level, rather than at the recipient's
2 level. So it probably doesn't make any difference if
3 the recipient puts the notice of suspension at the
4 bottom of the pile and doesn't get to it for a while
5 because we do the suspending.

6 MR. TULL: Correct.

7 MR. McCALPIN: So it may not make so much
8 difference here.

9 MS. PERLE: I mean, you could require that,
10 that the notice be sent in some fashion that requires a
11 receipt, you know, a signature so that --

12 CHAIRPERSON BATTLE: The initial notice, it
13 seems to me, is important from this standpoint and
14 view. I think the Corporation -- I understand what you
15 are thinking from the program standpoint of view that
16 you are in contact, but someone could be out, the
17 notice could come in, there could be an operation of 30
18 days in which the person doesn't see it, and all of a
19 sudden they don't get the check the next month. We
20 have assumed that they have chosen not to appeal, but
21 there could -- we may need to have some sort of legal
22 receipt provision.

1 MR. TULL: We consider failure to open our
2 mail a serious offense.

3 (Laughter.)

4 MR. TULL: We typically, when we have -- under
5 the old rule when we have suspended, have faxed it --
6 first of all, we have been in contact with the program,
7 as Suzanne points out, have faxed the notice, and then
8 have sent it to them. Certainly whether it is in the
9 rule or not, we could --

10 MS. GLASOW: We could say in a manner that
11 ensures verification of receipt.

12 MS. PERLE: Some type of signature.

13 MR. TULL: Certainly something of this gravity
14 we would.

15 MR. ERLNBORN: You know, I haven't practiced
16 law in this area for a long time, but years ago my
17 understanding of the law was that there is constructive
18 receipt upon the mailing properly posted, with postage
19 on it, in the United States mail.

20 MS. PERLE: The problem is the mail from the
21 Corporation goes through the U.S. post office in
22 Washington, which we all know is something of a

1 problem.

2 MR. ERLLENBORN: It may be legal fiction, but
3 there is a legal standing to say that once it has been
4 posted, the law perceives it as having been received.

5 MS. PERLE: But I think -- I mean, there are a
6 variety of ways that the Corporation could send a
7 notice of this nature to a recipient where they would
8 have some evidence that it was received by the
9 recipient. Either, you know, certified mail or Fed Ex,
10 which requires a signature.

11 MR. ERLLENBORN: See my experience has been
12 that if I am dealing with a recalcitrant defendant that
13 I am trying to sue and he gets a letter from me receipt
14 requested, he refuses to sign. And effectively, then,
15 he has not received it. And I always sent mine just
16 plain mail. Return receipt was not, to my way of
17 thinking, necessarily a good thing, it was a way for a
18 recalcitrant defendant to avoid the receipt rather than
19 me getting proof of it.

20 MR. TULL: I understand from Mr. Fortuno that
21 we have always -- in this circumstance, have always
22 sent the notice certified mail in order to have a

1 receipt. And I think we don't have the circumstance
2 that you described because, of course, our -- as Bill
3 points out, the failure to sign doesn't -- I mean, we
4 are the ones that are taking the action to withhold the
5 funds or not. And there is not -- a program does not
6 have an interest in hiding from us.

7 And certainly I think it would be appropriate
8 if we, as a matter of course, send it certified as a
9 matter of just making certain we have a proper record
10 demonstrating that it was mailed and that we can trace
11 the course of it from the time we sent it.

12 MR. ERLNBORN: Under these circumstances,
13 that probably is sufficient.

14 CHAIRPERSON BATTLE: Yes. Under these
15 circumstances where you are not going to get any money
16 if you don't respond, it is not in your best interest
17 not to respond, but secondly, I would like for us when
18 we get to notice in the new context of electronic mail
19 and faxing and other things that you can do, I think
20 having a legal fiction as a backup if you are
21 challenged on whether or not someone has notice is
22 always good.

1 So sending it by certified mail never hurts
2 us, but we can also probably be able to assure that we
3 can document notice if they don't go pick up their
4 certified mail by electronic fax and all of the other
5 measures that are available to us. So let's just have
6 some sort of method that we use when we talk about
7 notice that encompasses what is available to us to
8 ensure the people know and that we can document that
9 they have received notice.

10 MS. GLASOW: Paragraph (e) allows the
11 corporation to rescind or modify the terms of the
12 suspension, reinstate the suspension without further
13 proceedings, and except -- the total time for most
14 suspensions would be 30 days unless the Corporation and
15 recipient agree, without further proceedings under this
16 part, to a continuation up to 60 days.

17 And this is based on the presumption that
18 suspending funding for too long a time would enable a
19 recipient -- disable a recipient from providing legal
20 assistance. And it is for extraordinary measures. So
21 it should be short-term and the Corporation should
22 either, in the suspension, give them their money or

1 institute a termination procedure.

2 CHAIRPERSON BATTLE: Yes. And then you cover
3 in the next one the instance where you are talking
4 about the acceptable audit being the end point for
5 terminating the suspension.

6 MS. PERLE: On paragraph (e), I think that
7 there is one thing -- I mean, I don't have any
8 difficulty with what the Corporation intended in here,
9 but when it says, "The Corporation may at any time
10 rescind or modify and, on written notice, reinstate,"
11 it strikes me that you need to make it clear that they
12 can reinstate the suspension without further
13 proceedings assuming the proceedings were completed or
14 reinstate the suspension proceedings if they have
15 interrupted them because of some agreement.

16 In other words, all that I am saying is if the
17 Corporation -- what this says, I think, the Corporation
18 begins a suspension proceeding, they have some
19 negotiation and the programs says, "Okay. I will do X,
20 Y, and Z. Don't suspend us." And if they then don't
21 do it, what this says is the Corporation can reinstate
22 the suspension without further proceeding when, in

1 fact, they haven't completed the proceedings the first
2 time.

3 CHAIRPERSON BATTLE: And the question is --

4 MS. GLASOW: Suspension means we have -- when
5 we actually suspend, that means we have completed
6 proceedings. So by using the term "suspension" we have
7 completed proceedings. And let's say we suspend for 30
8 days, during that time we can rescind or modify the
9 terms of that suspension.

10 MS. PERLE: Well, maybe you want to say the
11 Corporation may, at any time after the completion of
12 these proceedings, suspend, rescind, or modify the
13 terms of the suspension or and reinstate the suspension
14 without further proceedings."

15 MS. GLASOW: I can clarify.

16 MR. TULL: Sure.

17 CHAIRPERSON BATTLE: Let me see if I
18 understand this, because, Linda, I think you have
19 raised an interesting point. Let's say that you --
20 that what you are trying to do is to get somebody to
21 get out of a class action and you have gone through the
22 proceedings, they are still in it, you say, "Okay. We

1 are going to suspend your funds for 30 days." You
2 start it, they say, "Well, hold up. We figured out a
3 way to get out of it. We are going to be out of it."

4 Though you have already made the decision and
5 the time is supposed to run, you agree not to do the 30
6 days. But then at the end of the 30 days, they still
7 haven't done what they said they were going to do.
8 Without going back through notice, hearing, and all of
9 that, you could take the funds for 30 days.

10 Let's take another scenario. The same thing,
11 you suspended it for 30 days, they say at the end of
12 the 30 days, because your suspension period was only 30
13 days, "Okay. We are out of it." But then you find out
14 they are not.

15 Do you, without having to go back through the
16 process, have the authority to do another 30 days or 60
17 days or are you limited, because the original term was
18 30, based on this, can you, based on having already
19 gone through suspension proceedings, continue to
20 exercise your authority to suspend based on the
21 previous proceedings beyond the term that may have been
22 noticed initially?

1 MS. GLASOW: After 30 days, the Corporation
2 and recipient have to agree to an extension of 60.

3 CHAIRPERSON BATTLE: Okay.

4 MS. GLASOW: And then no more than that. Then
5 you have to go into termination. I mean, if we are
6 still having problems after the 60 days, we should
7 either go into a termination or decide everything is
8 okay, in essence. So even that rescission modifying
9 provision is limited by this 60 days provision.

10 CHAIRPERSON BATTLE: Well, I understand it,
11 but I am asking about a second 30 days. Your initial
12 notice said 30.

13 MS. GLASOW: And we never suspended it?

14 CHAIRPERSON BATTLE: No, we did. Let's say we
15 did for 30, but at the end of the 30, they tell us they
16 have done it, they send us something, but we find out
17 it is really not done in conformity with what we asked
18 for. Do we have the authority under this to suspend
19 for another 30 without going through the process?

20 MR. TULL: No. I think the answer to that is
21 no.

22 MR. ERLENBORN: The total time shall not

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1 exceed 30 days.

2 CHAIRPERSON BATTLE: Oh, I see.

3 MR. TULL: Their incentive to agree would be
4 if such an event should happen, we would clearly,
5 seriously considering termination because if they told
6 us they had -- if it was significant enough that we had
7 suspended and therefore a substantial violation and
8 there was a failure to cure that they had indicated had
9 taken place, they would be, I presume, fortunate to
10 agree to an extension of 60 days because that obviously
11 would be to --

12 CHAIRPERSON BATTLE: Okay. I got you.

13 MS. GLASOW: And, of course, paragraph (f)
14 talks about the length of a suspension, if there is an
15 unacceptable audit. Yes?

16 MR. ERLENBORN: Could I go back to the prior
17 paragraph. The first line on page 7, I would move to
18 strike the word "without."

19 MS. GLASOW: Oh, yes that is -- I actually
20 fixed that in my version. I noticed that. Yes. It is
21 an extra word that doesn't belong there on some
22 versions of this and you don't have it.

1 MS. PERLE: Okay.

2 CHAIRPERSON BATTLE: Good eye.

3 MS. GLASOW: Thank you. Paragraph (f) talks
4 about the length of time for a suspension for an
5 unacceptable audit. Section 5 basically allows
6 provision for time periods and waivers.

7 CHAIRPERSON BATTLE: Okay.

8 MS. GLASOW: And Section 6 basically says that
9 while these suspension procedures are underway, that
10 the recipient will receive the same level of financial
11 assistance provided for under their current grant of
12 contract with the Corporation. This is the due process
13 provision that says we cannot suspend until proceedings
14 have been provided.

15 In paragraph (b), we are going to suggest some
16 different language. It says the same thing, but it
17 says it, I think, a little more clearly. We are
18 keeping most of the first line that says, "Failure by
19 the Corporation to meet a time requirement of this
20 part," cross out the rest of the sentence and add,
21 "does not preclude the Corporation from terminating a
22 recipient grant or contract with the Corporation." And

1 there is case law on this.

2 MR. McCALPIN: How can you terminate --

3 MS. GLASOW: I am sorry, suspending. I took
4 the -- this same provision is in the termination rule
5 and I didn't change that.

6 CHAIRPERSON BATTLE: I thought you meant
7 suspending.

8 MS. GLASOW: Thank you. "From suspending a
9 recipient grant of contract with the Corporation." And
10 there is case law on this. There is a footnote in the
11 1606 that talks about the fact that failure by an
12 agency to meet either a statutory regulatory deadline
13 does not preclude them from taking action when Congress
14 clearly wants them to take action.

15 CHAIRPERSON BATTLE: Okay. Is there anything
16 else on 1623?

17 MS. PERLE: I just want to reiterate this
18 business about the interim funding to make sure that it
19 is in -- perhaps that needs to be stated again in
20 Section (a) in terms of getting the money back if they
21 complete the action the Corporation wants them to.

22 CHAIRPERSON BATTLE: Okay. That has been

1 noted. Bill?

2 MR. McCALPIN: May I make a request to staff
3 that deals with these that you think, in terms of this
4 other -- I guess 1606 and others that we talked about,
5 of tasking them in terms of the traditional show cause
6 approach, rather than the preliminary distinction
7 approach. In effect saying, that if the Corporation
8 has reason to believe that grounds exist for
9 suspension, debarment, termination, whatever, then a
10 notice to incorporate all the things you have here is
11 sent to the recipient and the recipient has the
12 opportunity to show cause why the suspension,
13 termination, debarment, or so on should not take place.
14 I simply suggest to you that that is more of import
15 with the kinds of legal procedures that I am familiar
16 with. It clearly eliminates any suggestion that there
17 has been pre-judgment in the form of even a proposed
18 decision or termination, and it clearly puts the burden
19 of proof on the recipient to show cause why the action
20 shouldn't be taken. I am not making any suggestion of
21 changes at this point, I am just asking that you think
22 about that approach rather than this preliminary

1 decision approach.

2 MS. GLASOW: Okay.

3 MR. TULL: I would be happy to do that.

4 MS. PERLE: I am sorry. Are we going to
5 change that or are we going to put it in the preamble?

6 MR. TULL: Or even just consider it as the --
7 yes, we could reference it in the preamble so that
8 there is comments --

9 MS. GLASOW: As long as we understand it means
10 the same thing and so we can --

11 MS. PERLE: We could just, on page 5 at
12 number 4 it said, "At which it may attempt to," instead
13 of show, "that the proposed suspension should not be
14 imposed," it could be show cause.

15 MR. McCALPIN: I think it would be a mistake
16 to try and do anything along those lines now, and we
17 really talked about this some yesterday and it applies,
18 I think, to 1606 as well. It may apply to the
19 debarment thing as well. It is just a question of
20 whether we ought to be in the position of having the
21 Corporation make a preliminary determination or simply
22 advise that grounds exist, evidence has been presented

1 to indicate that this action may be taken. Now you
2 tell us why it shouldn't be.

3 MS. GLASOW: We will look into that.

4 MR. McCALPIN: Yes. I think it would be a
5 mistake to try to do any changes now.

6 MR. TULL: Okay. Thank you. We will
7 certainly look at that.

8 MR. ERLENBORN: As temporary chairman, I ask
9 is there anything further to be said on this? I think
10 we then would entertain a motion.

11 MR. McCALPIN: Well, is this a proposed --

12 MS. GLASOW: This is a proposed rule that we
13 are suggesting has a 60-day notice period, public
14 comment period.

15 M O T I O N

16 MR. McCALPIN: I move that 16 --

17 MS. GLASOW: 23.

18 MR. McCALPIN: -- 23., as discussed and
19 potentially amended here, be approved for publication
20 with a notice period of 60 days.

21 MR. ERLENBORN: Is this for us to decide or we
22 as the Board?

1 MS. GLASOW: Just the Committee, yes.

2 MR. McCALPIN: We decide.

3 MR. ERLENBORN: Is there a second?

4 MS. WATLINGTON: Second.

5 MR. ERLENBORN: All in favor say aye.

6 (Chorus of ayes.)

7 MR. ERLENBORN: Opposed?

8 (No response.)

9 MR. ERLENBORN: No? So ordered.

10 MS. GLASOW: Thank you.

11 MR. TULL: For the record, just to clarify
12 Linda's point, we presume that the motion includes the
13 inclusion of language regarding the -- what happens
14 with the funds at the end of the suspension.

15 MR. ERLENBORN: I think that is why the
16 gentleman said potentially.

17 MR. TULL: Excellent.

18 MR. McCALPIN: Actually and potentially.

19 MR. ERLENBORN: The next proposed rule is
20 1606.

21 MS. GLASOW: That is correct.

22 MR. ERLENBORN: You may proceed.

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1 MS. GLASOW: This rule is on termination and
2 debarment procedures and recompetition. The purpose of
3 this rule is to ensure the Corporation may take timely
4 action to deal with incidents of substantial
5 noncompliance. Also to provide timely and fair due
6 process procedures, and third to ensure that scarce
7 funds are provided to recipients who can provide the
8 most effective and economical legal assistance to
9 eligible clients.

10 The definitions in Section 2 on page 2, the
11 first one is debarment. And debarment is an action
12 taken by the Corporation to exclude a recipient from
13 receiving an additional award from the Corporation or
14 from receiving LSC funds from a recipient of the
15 Corporation pursuant to a subgrant, subcontract, or
16 similar agreement for the period of time stated in the
17 final debarment decision.

18 And we suggest adding to the third line of
19 that definition where it says, "Receiving LSC funds
20 from a recipient," to add, "from another recipient."
21 It clarifies --

22 MR. McCALPIN: Where are you?

1 MS. GLASOW: On page 2, Section 2,
2 paragraph (a), the definition of debarment, third line.
3 "Receiving LSC funds from a," and take out "a" and put
4 "another recipient."

5 CHAIRPERSON BATTLE: Would it be another or
6 any recipient?

7 MS. GLASOW: Well, the recipient who is
8 debarred, then cannot turn around and enter into a
9 subgrant with another recipient.

10 CHAIRPERSON BATTLE: Okay. All right. I
11 understand.

12 MS. GLASOW: Okay.

13 MR. ERLENBORN: Would it also be true that,
14 and I am trying to recall some of the discussion
15 yesterday, that the person or entity being debarred may
16 continue to receive funds under a current contract?
17 They are not suspended and debarred. If they are
18 debarred, they may be able to complete the audit or
19 whatever the contract is.

20 So if you said, "any recipient," that would
21 then prohibit continued funding. Is that true? To
22 complete the contract. I think we were talking

1 yesterday about an auditor, for instance. An auditor
2 may be debarred. Do you stop the auditor then in the
3 middle of an audit or is the auditor able to continue
4 the audit and complete it?

5 MS. GLASOW: Okay. That is the IG's rule and
6 we say an additional award of financial assistance.
7 And so that would mean the next competition around they
8 cannot be a competitor from the award. Because if we
9 want to take their funds now, we do a termination, but
10 what we are saying is, "If you are debarred, next time
11 around, you cannot be an applicant. You cannot get an
12 additional award of financial assistance from the
13 Corporation."

14 MR. ERLENBORN: In this it says additional.

15 MS. GLASOW: Yes.

16 MR. ERLENBORN: And is that additional
17 modifying only financial assistance from the
18 Corporation or also from recipient of the Corporation?

19 MS. GLASOW: It doesn't because only the
20 Corporation gives an award of financial assistance.
21 Recipients give subgrants. We haven't really reached
22 that issue.

1 MS. PERLE: I hadn't even noticed this before.
2 I think Mr. Erlenborn is right in terms of the effect
3 on -- I mean, if they already have another -- a
4 subgrant --

5 MR. ERLENBORN: They already have a subgrant
6 and they are debarred and that subgrant has not been
7 completed. Are they able to receive funds to complete
8 that subgrant or are they cutoff at the moment of
9 debarment?

10 MR. TULL: Well, yes, I think they would
11 continue -- they would be entitled to end, to work
12 through to the end of that subgrant. Because a
13 debarment is, by definition, a foreclosure of future
14 grants. So it doesn't -- it is not a termination. It
15 doesn't go to the current grant.

16 MR. ERLENBORN: The reason I asked that
17 question is whether you use the word "any" or
18 "another." If you use "another," that would then
19 permit the completion of that subgrant. If you say
20 "any," it would prohibit it.

21 CHAIRPERSON BATTLE: That is right.

22 MS. PERLE: But subgrants, correct me if I am

1 wrong, John, subgrants are generally done on an annual
2 basis. And the Corporation has to approve them on an
3 annual basis even though a grant to a recipient could
4 be up to three years, the subgrants are annual.

5 And so I think that what this would say is
6 that it is really -- even though they are entitled to
7 continue to the end of the subgrant, it is only through
8 the balance of the calendar year. The Corporation has
9 substantially more control over whether to approve or
10 not to approve the subgrant.

11 MR. ERLENBORN: What I am looking at is if we
12 put the word "any" before recipient, it would read,
13 "would be prohibited from receiving LSC funds from any
14 recipient of the Corporation pursuant to a subgrant,
15 subcontract or similar agreement." It would seem to me
16 that that would shut off the subgrant, contract, or
17 agreement midterm. Whereas if you said "another," then
18 that would mean other --

19 CHAIRPERSON BATTLE: Other than the existing.

20 MR. ERLENBORN: Some other contract or
21 subgrant.

22 MR. TULL: I think --

1 MR. McCALPIN: I think we are saying debarment
2 means preventing him from receiving LSC funds from any
3 source.

4 MR. ERLNBORN: Well, that is the question.
5 Are they shut off then at that point, at debarment, or
6 can they complete the contract or subgrant that they
7 are currently receiving?

8 MR. TULL: This actually -- we are wrestling
9 with a problem which, under the current model, I don't
10 believe we would actually ever encounter. And what
11 this -- this language is really seeking to address
12 another problem, which is what we are -- what it seeks
13 to do is to say that if a current recipient is
14 debarred, what we want to prevent is that recipient
15 then working an arrangement with someone else.

16 You applied for the funds for our service area
17 and we will subgrant with you and we will just continue
18 to provide the service. I don't believe that we have
19 any current recipients. That is, someone to whom we
20 directly pay money who is also a subrecipient of
21 another entity. And this does not contemplate
22 debarment of subrecipients. A debarment proceeding

1 only lies against a current recipient, not a
2 subrecipient because -- and we had that conversation --

3 MR. ERLENBORN: I think I understand that, but
4 the question is the current recipient being debarred
5 midyear. Does that end the contract? Does that end
6 that --

7 MR. TULL: No.

8 MS. PERLE: Debarment is a perspective --

9 CHAIRPERSON BATTLE: See, there is termination
10 and then there is debarment.

11 MR. TULL: But the termination might. If we
12 sought to end the contract now, we would have to file
13 both a termination and a debarment proceeding.

14 MR. ERLENBORN: I guess I am not making myself
15 clear, but it seems to me if you say you prohibit this
16 debarred person or entity from receiving LSC funds from
17 any recipient of the Corporation, that would terminate
18 the current contract or subgrant midterm. Because to
19 complete the contract, the debarred entity would be
20 receiving money from the recipient under the contract
21 he or she or the entity has with the recipient.

22 MS. PERLE: In other words, you are saying

1 that the language in the second phrase of this would
2 suggest that it would happen now as opposed to
3 perspectively.

4 MR. ERLENBORN: Well, if it says, "Prohibits
5 the debarred entity from receiving any funds pursuant
6 to a subgrant," that would cutoff in midterm of that
7 contract or subgrant.

8 MS. PERLE: But it also says, "For the period
9 of time stated in the final debarment decision."

10 MR. ERLENBORN: Well, that is how long it
11 continues. The question is when does it begin? With
12 the next contract that is contemplated or are you going
13 to cut them off during the current contract?

14 MS. GLASOW: We could put some language in
15 here that talks about any future -- pursuant to any
16 future subgrant or subcontract or something like that.
17 Would that do it?

18 MR. ERLENBORN: Well, I thought -- well, maybe
19 that is the best language. Right.

20 CHAIRPERSON BATTLE: Let me see if I can take
21 what I am hearing John say and give you an example, a
22 scenario, where the issue that he is raising comes up.

1 For purposes of training, let's say you have got three
2 programs in a state and instead of each of them taking
3 their training money individually, they decide to
4 consolidate and develop some sort of subgrant
5 relationship with one program and to provide training
6 for the duration of their contract.

7 Let's say the two of them have three-year
8 terms that extend out into three years, but this
9 particular recipient term ends this year, they are up
10 for debarment, they are going to lose their funding,
11 but they are now subrecipients at the same time of two
12 other grantees for a period that extends into the
13 future. So it is existing at the time that they are
14 debarred from doing their work.

15 Now his question is the way that this reads,
16 if it is only future, this particular recipient has an
17 existing contract at the time that they are debarred
18 from being a recipient.. Do they get to complete the
19 term of their contract with the other two programs to
20 provide training to them without it also being
21 terminated as a result of this debarment proceeding?

22 MR. TULL: And I think the answer to that is

1 yes, they would be under the -- I mean, I think John is
2 correct. I am finally now getting your concern. I
3 apologize for being slow. I had just one cup of coffee
4 this morning.

5 MR. ERLNBORN: No, I think the example you
6 gave was more convoluted. I am saying you have a
7 recipient that has issued a one-year contract to a
8 subrecipient, to another entity. And that other
9 entity, the subrecipient, is debarred midyear. Can
10 that entity complete the contract?

11 MR. TULL: Yes.

12 MS. PERLE: But debarment is not a midyear
13 remedy.

14 MR. TULL: Yes, but he is --

15 MS. PERLE: I understand. But debarment
16 always starts, you know, the next time of the contract.
17 The subcontracts are only for one year.

18 MR. ERLNBORN: This is exactly what I
19 thought, but again I say if you look at this language
20 and it excludes a recipient from -- oh, it says an
21 additional award of financial assistance. All right.
22 I guess that is what I was missing. And so forget what

1 I said.

2 MS. GLASOW: I think we put the future
3 language in there to make it very clear.

4 MR. TULL: Yes. We are adding "additional" to
5 the second clause as well as the first because I think
6 you are correct. It is only in the first clause as it
7 now is written. I think that is correct.

8 MR. ERLNBORN: Award here would mean a
9 contract or agreement.

10 MR. TULL: Yes.

11 MS. GLASOW: Yes. As a matter of fact, all
12 the appropriations language we have now is awards of
13 financial assistance in a competitive process. So that
14 is why we are using this language.

15 CHAIRPERSON BATTLE: Okay. Do you feel that
16 it has been clarified now?

17 MR. ERLNBORN: Yes. Yes. And I apologize
18 for taking up all your time.

19 MS. GLASOW: No problem.

20 MR. TULL: You were vindicated. We are the
21 ones that should apologize for taking so long to get
22 there.

1 MS. GLASOW: Paragraph (b) defines recipient
2 as 1006(a)(1)(A) recipient, which are really the only
3 recipients we have right now, I believe. Termination
4 means that a recipient level of financial assistance is
5 reduced in whole or in part prior to the expiration of
6 the term of the grant or contract with the Corporation.

7 And we have listed situations that the terms
8 "termination" will not include, and that would be a
9 reduction in funding required by law. That could be a
10 recision, for instance of our appropriations. We have
11 had to go through this at one time. Two is a reduction
12 or deduction of LSC support for a recipient under the
13 fund balance rule, 1628. A recovery of disallowed
14 costs under our costs standards and procedures rule,
15 which is 1630.

16 And four is new to termination, but it is
17 similar to a provision in our current denial of
18 refunding rule. And this is what we call lesser
19 sanctions provision. And it says, "A reduction of
20 funding of less than 10 percent of a recipient's
21 current annual level of financial assistance imposed by
22 the Corporation as a lesser sanction."

1 And I have an extensive footnote explaining
2 that the Corporation would like to be in a position, as
3 we were in denial of refunding rule, to take less
4 serious actions, such as to levy fines on recipients,
5 that doesn't reach the level of a real termination
6 taking a huge hunk of money away and would not require
7 these extensive hearing rights.

8 And we propose bringing before this Committee
9 in the near future what we would call, in essence, a
10 lesser sanctions rule that would set out the standards
11 and procedures that the Corporation would use so that
12 we could give notice to our recipients of our intent
13 and the way we would go about imposing lesser
14 sanctions.

15 Although we have done in this past, there are
16 other types of lesser sanctions, such as month-to-month
17 funding. So we have authority to do that, but we would
18 like to clarify it in the process. Do a recipient and
19 that in a proposed rule in the near future.

20 CHAIRPERSON BATTLE: What are some of the
21 lesser sanctions? You mentioned month-to-month
22 funding, of course a temporary withholding is another.

1 What are the other?

2 MS. GLASOW: Special grant conditions,
3 short-term funding, giving recipients correction action
4 plans. These are things we have done in the past.

5 CHAIRPERSON BATTLE: Okay. All right. You
6 have got those in the footnote.

7 MS. GLASOW: Yes. And this type of a
8 definition has been upheld in the courts when it is
9 clearly spelled out in the agency's regulations.

10 CHAIRPERSON BATTLE: Isn't a suspension, by
11 definition, a lesser sanction though because you are
12 only going to take 60 -- two months. Two out of twelve
13 is one-sixth. So that is more than one-tenth.

14 MS. GLASOW: Suspension I wouldn't put in a
15 lesser sanction. I am sorry if I said that. Because
16 we do have a separate rule on suspensions. It is an
17 extraordinary measure. It is a way of moving very
18 quickly to do something and it is only temporary.. So I
19 wouldn't call it a lesser sanction. Just a different
20 beast.

21 CHAIRPERSON BATTLE: Okay. Linda?

22 MS. PERLE: Yes. I have actually several

1 concerns about this definition of termination. The
2 first is the use of the word "permanently." Suzanne
3 and I have spoken about this and we have kind of been
4 back and forth on it. I think that the use of the word
5 in subsections (c) in the definition, the first
6 paragraph of the definition, where it says that "The
7 grant or contract with the Corporation will be
8 permanently reduced in whole or in part."

9 And then in the footnote there is a sentence
10 sort of a little bit below where it says, "The term
11 'permanent' in the definition of 'termination' is
12 intended to mean that once funds are terminated, they
13 will not be provided to the recipient. The definition
14 of termination is not intended to mean that a reduction
15 automatically affects the level of funding for all
16 subsequent years of a recipient's grant term."

17 Well, I don't know what permanent means if it
18 doesn't mean that. So I think that there needs to be a
19 better way of saying what the Corporation means here
20 because I think that, you know, it does mean -- when
21 you say permanently reduced, it means until the end of
22 the grant term, as far as I can see. And if that is

1 not what the Corporation means, then I think they need
2 to say something differently.

3 The second, I have a second concern about that
4 also, which is that there is an allocation formula in
5 our appropriations bill which says that you need to
6 give funds out on a per person poor person basis in the
7 area served.

8 And I mean, I think it -- I might be able to
9 concede that the Corporation could, as a sanction,
10 reduce the money until the end of the current year.
11 But then in future years, assuming we continue to have
12 the same allocation provision, I think that the
13 Corporation has to do something with any money it
14 reduces in order to ensure that there is service
15 providers to the people in that service area.

16 So I have some problems -- two problems. One
17 with the use of the word "permanently," and second with
18 the issue of what happens, how the money that you take
19 back is used and whether it is used to provide service
20 in that area. Maybe it is awarded on a temporary basis
21 to an adjacent grantee to provide service in an area or
22 something, but I think that, at least arguably, our

1 rule suggests that -- our appropriations provision
2 suggests that that money is for the service in that
3 area. The next --

4 CHAIRPERSON BATTLE: Can we get a response to
5 those two first and then we will move on to your next
6 issue.

7 MS. PERLE: Okay.

8 MS. GLASOW: In the footnote, I really -- I
9 tried to clarify that all I am saying by permanent
10 means, as opposed to a suspension, is when you take the
11 money away, you don't get it back. And we can either
12 clarify that in the preamble or I can try to say it a
13 little bit better in the text. I am trying to clarify
14 that the use of the word "permanent" does not imply
15 that it means more than one year or two years or three
16 years of a recipient's grant. And that that should be
17 specified in the termination decision.

18 The Corporation could decide to take only 15
19 percent of this year's grant amount or the Corporation
20 could decide to take 15 percent of the entire term of
21 the grant, which would maybe be three years, but the
22 Corporation would have the discretion to clarify that

1 in the termination decision, depending on the
2 seriousness of the violation.

3 CHAIRPERSON BATTLE: By saying, "Permanently,
4 but in whole or in part prior to the expiration of the
5 term," does that language address the concern, Linda,
6 that you are raising?

7 MS. GLASOW: No.

8 MS. PERLE: No, because a termination could
9 mean all of the recipient money. In other words, this
10 is no longer a recipient. Or it could mean that 25
11 percent of the grant is withheld. I just think that
12 the use of the word "permanent," suggests something
13 that they don't want to suggest. my proposal would be
14 to take out permanent and then maybe add a sentence
15 which says that it could mean, you know, that it could
16 mean for the remainder of the year or it could mean for
17 a longer period.

18 CHAIRPERSON BATTLE: Or that defines the
19 reduction and how it might impact the remaining portion
20 of the term of the grant. It seems to me that might be
21 the best way to get at it.

22 MS. GLASOW: I will add a sentence.

1 CHAIRPERSON BATTLE: By defining the term
2 "reduce" and then defining how that may be used. And I
3 think the Corporation does have the authority to make
4 that a reduction for the balance of the term, but you
5 also have the authority to do it for a lesser period of
6 time.

7 MS. GLASOW: Right.

8 CHAIRPERSON BATTLE: And having it clarified
9 in the rule itself probably is helpful so that
10 recipients are aware of the measure and the elasticity
11 of it that is available to the Corporation.

12 MS. GLASOW: Okay. As to the other issue --

13 MR. TULL: I just want to clarify one thing
14 for the record that I think is also implicit here, but
15 just to make sure that it is clear, that the intent of
16 the language is to make clear that the termination does
17 not affect the amount of money which is on an
18 annualized ongoing basis allocated to that service
19 area, that the reduction for the period of the
20 termination before the term of the grant does not --

21 CHAIRPERSON BATTLE: Help us from a
22 programmatic standpoint of view to understand that

1 because I think Linda raises a very critical point.
2 For example, if you do a 25 percent reduction, do you
3 then do a subgrant for another recipient in that state
4 to provide services in that area so that those funds
5 continue to for service in that area or is that
6 reduction -- are those funds used in some other manner?
7 What has been the practice of the Corporation around
8 that?

9 MS. GLASOW: This is really the second issue
10 too because we have a funding formula that we must
11 follow by statute and it allocates a certain amount of
12 funds for particular service areas. But it is very
13 clear in the legislative history -- I mean, we are
14 given that formula that that did not preclude taking
15 actions for cause.

16 In other words, just because we have this
17 funding formula doesn't mean we have to continue giving
18 this amount to this recipient because we do, with cost
19 standards and fund balances, we take money back in
20 different sanctions. And that is one of the reasons
21 why we are trying to clarify that a permanent taking
22 does not affect this annual level that is, by statute,

1 required to be given to this service area.

2 CHAIRPERSON BATTLE: And that affects the
3 contract to come after this one.

4 MS. GLASOW: Right.

5 CHAIRPERSON BATTLE: But I guess the question
6 becomes what happens to the funds on the existing
7 contract once they are permanently reduced from that
8 existing recipient. They are taken back to the
9 Corporation and used and --

10 MS. GLASOW: Yes. Management has had a
11 variety of ways of handling this, and John will
12 probably want to speak to that, and there is nothing
13 that would preclude this Committee from asking for
14 something to be put in this rule that if we terminate
15 funding of a large amount that, you know, to direct the
16 Corporation to use it in a variety of manner or to
17 recompute the funds for another recipient.

18 . I mean, there is a variety of ways this can be
19 handled. And we administratively and under the -- I
20 think the budget operating guidelines are directed to
21 deal with fund balance returns and money returned from
22 service areas in a variety of ways.

1 CHAIRPERSON BATTLE: I would expect that there
2 might be start-up costs, for example, in the new grant
3 if you are saying that "I am going to reduce you for a
4 measure for the rest of the balance of your contract
5 and grant term, and we are going to debar you. We
6 don't want you doing business here anymore."

7 I am just trying to -- I am trying to get a
8 feel for what does happen. We aren't looking to come
9 up with any particular percentage to, say, if you make
10 a determination that is 25 percent or more, then it
11 seems to me that we need to hold those funds out to go
12 back to that service area because you are going to
13 create, by virtue of taking the funds away, a need for
14 those clients to be served in some way somewhere else.

15 MR. TULL: I believe the Board has dealt with
16 this issue twice within the last two years in the
17 resolution that is adopted regarding grant recoverees.

18 CHAIRPERSON BATTLE: Okay.

19 MR. TULL: And David probably can help us here
20 in terms of specifically how they are applied, but let
21 me take a run at it and David can at least correct me
22 if I am wrong and perhaps add to it if there is

1 dimensions that are missing.

2 The policy that the Board adopted regarding
3 funds which we recover from an entity, which is no
4 longer going to be a grantee of ours and where we are
5 then contracting with or making a grant to a new
6 entity, the Board adopted a policy that grant
7 recoverees, that is, monies we recover back from that
8 entity, can be used and should be used in the same
9 service area for the new grantee.

10 CHAIRPERSON BATTLE: Okay.

11 MR. TULL: Now that came up in a different
12 context in termination. We have never had a
13 temporary -- a partial termination or we have not had a
14 termination under 1606. We have -- this issue has
15 arisen in the context of competition where we have
16 chosen not to fund a prior recipient and are funding a
17 new recipient.

18 And the specific circumstance was where there
19 was a significant fund balance and, under 1628, the
20 fund balance rule, we have covered that fund balance
21 and made it available to the new recipient serving that
22 area and sought clarification with the Board that under

1 the -- it is really -- it is a question of how -- it
2 arises, I believe, under the policies of the Board
3 regarding how monies can be used as an accounting
4 matter.

5 CHAIRPERSON BATTLE: Sure.

6 MR. TULL: But I want to also say that I don't
7 believe, and this is really to take a slight issue with
8 one thing that Linda said, and that is, I don't believe
9 the Board has taken the position that the requirement
10 that monies be available on a per capita basis in a
11 service area and distributed that way has meant that
12 any grant recoverees, which may arise, either under the
13 fund balance rule or the question cost rule, we are
14 forced -- have to be spent in that area. In fact, the
15 policy --

16 CHAIRPERSON BATTLE: No. And I think that she
17 acknowledged that there are some disciplinary, which is
18 what this really amounts to, procedures that probably
19 are exempt from that. And so in making that statement,
20 I think that she was addressing a larger issue of what
21 you are talking about now, grant recoverees and the
22 needs in that service area not being ignored with those

1 funds that come back, but if need be, being made
2 available to cover that service area.

3 MR. TULL: If I could just finish this then
4 before I accede the microphone to Linda. I am not sure
5 that the best place to address this issue is in the
6 rule itself, although it is obviously a hard question.

7 It does strike me it is an important policy
8 question that certainly I would think that the policy
9 ought to be that if there is a permanent termination,
10 that the expectation is that the monies which are taken
11 from that grantee clearly go to the new grantee, which
12 we would have to find and have available to provide
13 service in that area, and that we would look to follow
14 the current policy that any monies recovered from the
15 old grantee would be available to the new grantee.

16 And I think your observation, Laveeda, about
17 start-up costs, et cetera, is all a part of what
18 informed the Board's judgment about that. We have not
19 faced the question of what do we do if we have a 25
20 percent termination, for instance, and I am not sure,
21 as a practical matter, the circumstances under which we
22 would terminate a grant at a 25 percent level.

1 That is not a lesser sanction, that is a
2 termination under the terms of this regulation and
3 would be -- it would be certainly a very unusual
4 procedure to take given the fact that we -- I mean, we
5 would either be making a choice, presumably, that this
6 is a grantee which is substantially out of compliance
7 and we no longer cease to fund them or we wouldn't.

8 So a 25 percent termination would be a highly
9 unusual step to take, which is not to say that some
10 future administration of the Corporation might choose
11 to do that.

12 I think in those circumstances, there ought to
13 be a policy, if we were ever to do that, which does
14 require the recovery of such a large amount of monies
15 to be available to the clients in that area because, as
16 I said sometime ago, I think we are -- always in this
17 area there is a difficult balance that is being sought
18 between responsibility to making certain that clients
19 continue to be served properly and the Corporation
20 carrying out its responsibilities to assure compliance
21 with act and regs.

22 MS. PERLE: Right. I agree basically with the

1 thrust of what John has said. I mean, I can think of
2 an example, though, where there could be some large
3 percentage. I mean, if you have a grantee that -- the
4 service area encompasses a number of counties.

5 And for some reason, whether it be
6 geographical or otherwise, one of those counties just
7 appears not to be being served, the Corporation might
8 make a determination that they want to reduce that
9 grantee by the amount that potentially should be
10 allocated to that county.

11 I think that there should be something in here
12 that suggests that the Corporation has an obligation to
13 ensure that services in that area are continued. And
14 that might be that they take off that part of the
15 service area and award it to an adjacent program or
16 some other --

17 CHAIRPERSON BATTLE: Yes, but I think that is
18 a recovery measure. I think that at an appropriate
19 time, and Suzanne you make sure you let us know when
20 that is, we need to have the Board consider a policy of
21 how to handle the particular issue that Linda has
22 raised and that comes from this as it relates to

1 recovery of --

2 MS. PERLE: I mean, I guess what I would be --
3 I would feel comfortable with is if the Corporation put
4 in some language in this rule, not necessarily in the
5 termination definition, that just says in the event of,
6 you know, a partial termination, which has a
7 substantial affect on the ability of the recipient to
8 provide service in an area, the Corporation has an
9 obligation to ensure that services continue.

10 I mean, we have some similar language
11 elsewhere in some of these rules. So I think we should
12 think about something in the nature of that without
13 being very specific as to what the Corporation needs to
14 do, but just to make it clear that there is an
15 obligation there.

16 MS. GLASOW: I would be more comfortable at
17 this point to put it in the preamble as an issue for
18 comment so that we can look at the consolidated
19 operating budget resolutions that have already been
20 passed and make sure everything is consistent and what
21 is the most appropriate way to handle this.

22 CHAIRPERSON BATTLE: Okay. That is a good

1 idea.

2 MS. PERLE: Can I make my second point or
3 third point or whatever?

4 MR. TULL: No, I am sorry. You only get one a
5 day.

6 CHAIRPERSON BATTLE: I did cut Linda off to
7 try to get a response to the first two points and I
8 know that you have another point you would like to
9 make.

10 MS. PERLE: Okay. My other point is on page 4
11 in paragraph 4, it says, "A reduction of funding of
12 less than 10 percent of a recipient's current annual
13 level of financial assistance imposed by the
14 Corporation as a lesser sanction." And that is not
15 considered to be a termination.

16 And then the footnote discusses this and it
17 suggests repeatedly that a reduction of 10 percent is a
18 minor reduction and it is a minor sanction. And I
19 would like to take issue with that. I mean, I think
20 that -- well, first of all some history. Some of you
21 may remember that there was a period of time in the not
22 too distant past when the Corporation decided that it

1 was going to -- well, okay.

2 It was in the context of a denial of refunding
3 them. But I don't think -- for this purpose, I don't
4 think it is really a substantial difference. That what
5 they were going to do was to say -- I don't remember
6 the number, whether it was 5 or 10 percent in that
7 ruling, and that what they were going to do was deny --
8 that they were going to tell a recipient that in the
9 future their grants would be 9.999 percent less than
10 what they have been getting.

11 And the position of the Corporation was
12 because it was less than 10 percent, they were not
13 required to give a hearing, which is exactly what this
14 rule says, that they could terminate 9.99 percent of a
15 recipient's grant for the future and that, you know,
16 that that is a lesser sanction and that the programs
17 don't have any specific rights.

18 Now I understand that the staff, at the bottom
19 of the footnote on page 4, suggests that they would
20 bring to the Committee in the near future a proposed
21 rule setting out rules and grounds and procedures for
22 application of lesser sanction, including one up to 10

1 percent. But I think that it would be inappropriate
2 for the Corporation to adopt a rule that says 10
3 percent, which is not a minor sanction, can be taken
4 away without knowing what those procedures and grounds
5 would be.

6 I would recommend two things. One of which is
7 that I would say that the reduction of funding of less
8 than -- an appropriate amount, maybe less than 10
9 percent -- excuse me, less than 5 percent, which is, I
10 think, more reasonably characterized as a minor
11 sanction, and also that the Corporation bring these
12 proposed rules on grounds and procedures for
13 application of lesser sanction to the Corporation Board
14 very quickly.

15 CHAIRPERSON BATTLE: Suzanne?

16 MS. GLASOW: The 10 percent is in there
17 because that was the number in the denial refunding
18 rule and I think that is just a call by the Committee
19 on what they feel comfortable with.

20 CHAIRPERSON BATTLE: Now I was going to ask a
21 question. Do we now have rules that address, for
22 example, short-term funding, corrective action plans?

1 Those things are done just internally by management.

2 MR. TULL: Well, corrective action plans, yes,
3 although not -- they are not Board adopted rules.

4 Corrective action plans are now under the protocols we
5 have established with the Inspector General pursuant to
6 OMB Circular A-50, which comes from the --

7 CHAIRPERSON BATTLE: In the accounting area.

8 MR. TULL: And there is in -- that is correct.
9 In 1630, the cost for -- questioned cost procedures,
10 there is also language authorizing corrective action
11 plans, which is a standard term in the industry, which
12 arises in the context of audits and audit follow-up.
13 There is not -- we do not have standards now regarding
14 when we make a grant for a period of one month or just
15 two months.

16 CHAIRPERSON BATTLE: But when you do that, do
17 you do that with less than what the annualized figure
18 would be for that month?

19 MR. TULL: That we do not do.

20 CHAIRPERSON BATTLE: Okay. So you really
21 aren't reducing the amount when you do short-term
22 funding.

1 MR. TULL: No.

2 CHAIRPERSON BATTLE: So you really don't get
3 into this 10 percent issue with short-term funding or
4 month-to-month funding.

5 MR. TULL: Correct. That is correct. It is
6 not -- a month-to-month grant is not a termination and
7 therefore has never been subject to the same
8 procedures. That is not to say -- I believe the
9 Inspector General has suggested to us a time or two in
10 the past that we should adopt at least internal
11 standards, which are clear as to when we apply such
12 a -- I am not even sure sanction is the proper term to
13 such a response.

14 CHAIRPERSON BATTLE: Sure. But I guess the
15 question I am raising is each of the other measures
16 available, in order to ensure compliance, are measures
17 that the Corporation takes from a management level and
18 they are short-term funding, we just talked about
19 corrective action plans or special grant conditions,
20 which don't really tie into a reduction in the amount
21 of the funds to be received.

22 MR. TULL: Correct.

1 CHAIRPERSON BATTLE: So I guess my question
2 becomes then in what instance would there be a need for
3 the Corporation, given our history in this area of
4 using these other measures in order to assure
5 compliance with whatever we are trying to seek
6 compliance on, would you need to have available this
7 amount of 10 percent to reduce it without going through
8 a hearing process?

9 MR. TULL: I think the judgment is -- well,
10 there is two, I think, points which are probably
11 appropriate in response. One is the reason this is
12 specifically referenced here is an acknowledgment that
13 to have a right to a lesser sanction, that is, the
14 taking of money of less than 10 percent or 5, whatever
15 amount the Committee ends up arriving at, we would
16 still presume that there would be standards for when
17 such action should be taken and some procedures to make
18 certain that there is some right that the recipient has
19 to respond to that.

20 But our judgment is that I think we have over
21 the course of the years, as we have dealt with the
22 issue of how to assure compliance and to have an array

1 of ways to respond to instances of non-compliance, that
2 we have had a problem of having the range between doing
3 a very serious -- on one end a questioned cost, which
4 is just recovering, under the terms of 1630, the amount
5 of the cost of the violation, which in some instances
6 may be a de minimis amount of money, even though the
7 violation may be something which would be a significant
8 violation.

9 Not substantial enough to call for a
10 termination, but certainly significant enough to want
11 to take some action. And if the cost of the actual
12 violation was -- it could be a matter of cents or
13 dollars.

14 And so the questioning of the costs and the
15 disallowance of it would really not be a significant
16 deterrence to the behavior and the leap from that to
17 the next possible action is termination. And it leaves
18 a middle ground where we really don't have, in the
19 arsenal of responses, what is really properly leveled,
20 modulated reactions.

21 And so this is really an acknowledgment of
22 that and a suggestion that such a middle step be

1 sanctioned by this, as in allowed by this Committee.
2 And I think Linda's point is correct. We would only be
3 able to do that if it is authorized by the Committee
4 and having come forward to you with a suggestion as to
5 a rule which would govern when it take place and how.

6 CHAIRPERSON BATTLE: Now this really arose and
7 we have on the table either 5 or 10 percent and we are
8 trying to determine whether or not -- which level is
9 appropriate. And the 10 percent came from where,
10 Suzanne, again?

11 MS. GLASOW: It was in the denial of refunding
12 rule. Well, it is in because we haven't removed it yet
13 from the Code of Federal Regulations.

14 CHAIRPERSON BATTLE: Now is this denial of
15 refunding a rule that was -- has been in place for a
16 long time?

17 MS. GLASOW: Yes.

18 CHAIRPERSON BATTLE: Okay.

19 MS. GLASOW: It is common in the federal
20 government for the federal government to define either
21 a termination or a denial of funding with some cutoff
22 like that so that it allows them to issue fines, for

1 instance, for minor amounts without going through a
2 full-fledged hearing process.

3 CHAIRPERSON BATTLE: Okay. All right. Bill?

4 MR. McCALPIN: John, I understand that these
5 criteria for lesser sanctions, which you talked about,
6 are the subject matter of the last paragraph on page 4
7 of what is before us. And my question is, will what
8 you propose have the status of a regulation and
9 therefore should it not be included in this one?

10 MR. TULL: The answer is, what we would
11 propose is a rule, but not in the this because this is
12 the rule which governs terminations. And by
13 definition, such a sanction would not be a termination,
14 it would be a different sanction, which we believe
15 should be governed by a different rule simply because
16 it is a different -- and we have not brought that
17 forward to you all yet.

18 CHAIRPERSON BATTLE: Where will we be in the
19 interim? In other words, the concern I think that Bill
20 is raising, we will be adopting now a rule that says,
21 "These are your due process rights up to when you have
22 got a 10 percent amount at issue." Then where will we

1 be in the interim if we adopted this and we had no
2 guidance as to how the Corporation could take 10
3 percent?

4 MR. TULL: I think our view would be that --
5 this is really sort of a practical matter as to what is
6 the best way to proceed. Our view would be that absent
7 the adoption of the other rule, the reference to a
8 lesser sanction does not create the right in the
9 Corporation to impose the sanction, it merely, in the
10 definition, makes it clear that a reduction of funds
11 below the 5 or the 10 percent, subject to a lesser
12 sanction proceeding, would not be a termination.

13 That language could be added to this rule at
14 the time that the lesser sanction rule is adopted. It
15 is really -- it was an effort to not have to amend two
16 rules at once at the time that that would come before
17 the Committee and to provide a basis now for what we
18 would -- what we intend to bring to the Committee at an
19 early date.

20 CHAIRPERSON BATTLE: Well, what do the
21 Committee members think? We have got the 5 or 10
22 percent, and this is really a window kind of remedy

1 beyond the other lesser non-economic remedies, other
2 than the corrective action plan, the little bit of
3 economic remedies that are available to the Corporation
4 for assuring compliance.

5 MS. PERLE: I would just like --

6 CHAIRPERSON BATTLE: I am trying to hear first
7 from my Committee members if you have got any thoughts
8 about that.

9 MR. ERLENBORN: Well, I don't have any very
10 strong feelings, but it would seem to me 10 percent is
11 a substantial amount, 5 percent would make me think of
12 a lesser penalty more readily than 10 percent.

13 MS. PERLE: I mean, I just want to put out we
14 have some, you know, we have some grantees that get
15 maybe what, \$2 million a year from the Corporation. So
16 10 percent of that is \$200,000. It is a lot of money
17 and a lot of clients who could get served with that
18 amount.

19 MR. McCALPIN: I wonder if we would be advised
20 to state it in terms of a percent or a dollar amount,
21 whichever is more or less, because I agree with you.
22 For a \$350,000 grant, 5 percent is only \$17,500, and

1 you don't want to get into a lot of process and
2 procedure for --

3 MS. PERLE: Right, but 10 percent is \$35,000,
4 which is an attorney.

5 MR. McCALPIN: Yes, 10 percent would be
6 significant. I don't know. About 350 -- 250, 300 is
7 about the smallest grant we make?

8 MR. TULL: We have one much smaller than that,
9 but yes, I think the small grants tend to be in that
10 area, 200,000 to 300,000.

11 CHAIRPERSON BATTLE: what about the large --
12 what is the largest amount that we grant?

13 MR. TULL: Thirteen million, I think, or
14 sixteen million.

15 CHAIRPERSON BATTLE: Thirteen million. So 10
16 percent would be \$1.3 million.

17 MS. PERLE: That is a lot of money.

18 MR. McCALPIN: What is that, Puerto Rico?

19 MR. TULL: (Nodding.)

20 CHAIRPERSON BATTLE: So I think that we do
21 recognize the need for a penalty that gets the
22 attention of a program much more so than possibly

1 month-to-month funding, short-term funding, or some of
2 the -- working with special grant conditions. So there
3 does need to be some middle ground. The question here
4 is, how we construct it. Even 5 percent of \$13 million
5 is significant.

6 MR. McCALPIN: \$650,000.

7 CHAIRPERSON BATTLE: Yes. So is --

8 MS. PERLE: I would think that maybe we could
9 do something like, I think this is what Mr. McCalpin
10 was suggesting, if we said something like 5 percent or
11 \$500,000, whichever is less.

12 MR. McCALPIN: Oh, I would think of maybe a
13 hundred thousand.

14 CHAIRPERSON BATTLE: Well, but you may not get
15 somebody's attention if they have got 13 million with
16 100, depending on what else is going on. And the whole
17 purpose here is to have a sanction that gets someone's
18 attention.

19 MR. McCALPIN: I don't know. I think \$100,000
20 would get your attention.

21 MR. ERLBORN: Would get mine, but I don't
22 have the 13 million.

1 CHAIRPERSON BATTLE: But if you have got
2 13 million plus funds from other places, you might be
3 able to, you know --

4 MR. TULL: Would the effect of that be,
5 though, then that with the \$200,000 grantee we could
6 take \$100,000 of their money?

7 CHAIRPERSON BATTLE: Whichever is less.

8 MS. PERLE: Whichever is lower. My suggestion
9 was whichever was less. In other words, with a
10 \$200,000 grant, you couldn't take more than \$20,000 of
11 that.

12 CHAIRPERSON BATTLE: What we may need to do --
13 why don't we revisit. Let's say 5 percent now and
14 revisit this. What I would like to get back,
15 particularly from our staff, is in a practical sense,
16 how this needs to work because the percentage piece is
17 something that causes us some concern given the breadth
18 of the kind of grants that we make from \$250,000 to
19 13 million.

20 You know, 5 or 10 percent means a big
21 difference in that scheme. Yet I think we do
22 acknowledge that there is a need to have some ability

1 to met out a penalty that doesn't take you into this
2 gross hearing process, but that does get the attention
3 of a grantee so that they realize that you mean
4 business when you are trying to get compliance around
5 some of the issues.

6 We have got now some very difficult
7 restrictions that we know that there are grantees that
8 don't agree with them. And we do need to have some
9 measure of being able to bring grantees into compliance
10 with what it takes to be an LSC grantee or recipient,
11 more so than say, "Well, we are going to tell you every
12 month that we are going to give you all the money,"
13 which is really what we have right now.

14 MS. GLASOW: So what you are asking is we put
15 it 5 percent and maybe in the preamble discuss whether
16 there is a need for a dollar amount cap too?

17 CHAIRPERSON BATTLE: That is right.

18 MS. GLASOW: Okay.

19 CHAIRPERSON BATTLE: That is right. And then
20 also give us some thought -- I think the rest of what
21 Bill has raised is we would like some thought as to how
22 that 5 percent, plus or minus the amount of money, is

1 going to work in a practical sense as to what kind of
2 procedures you are thinking about.

3 Because even though we don't get into a
4 full-blown hearing process, I think it does make sense
5 to have some level, even it is a minimal level, in the
6 due process around, "Well, we think you aren't doing
7 what you are supposed to do." If they can come tell us
8 first, I don't think we ought to be just taking the
9 money because we have gotten some word that somebody is
10 not in compliance.

11 MS. GLASOW: May I suggest that we take a
12 break?

13 CHAIRPERSON BATTLE: Yes. We can take a
14 break. I took mine. I know everybody else needs
15 theirs. Let's take a five-minute break.

16 (A brief recess was taken.)

17 CHAIRPERSON BATTLE: Gather back around. I
18 think we have got everybody but John Tull at the table.
19 I think we resolved the issue revolving around the
20 lesser sanction, and it will go out for comment and we
21 should be hearing back from commentators as well as from
22 the staff with regard to how we might devise something

1 to address the issues that we have discussed today.
2 Okay. Can we go on to 1606.3, grounds for termination?
3 Okay.

4 MR. ERLENBORN: I have a question in the
5 footnote on that page.

6 CHAIRPERSON BATTLE: Okay.

7 MR. ERLENBORN: The word "compliment," the
8 third sentence.

9 MS. GLASOW: What footnote?

10 MR. ERLENBORN: The word "compliment" in the
11 footnote or attached to the -- yes, it is a footnote in
12 the bold space at the bottom.

13 CHAIRPERSON BATTLE: It was just that the
14 staff was going to --

15 MR. ERLENBORN: I think it is misspelled.

16 MS. GLASOW: Okay. I will fix that. What is
17 the number of the footnote.

18 MR. ERLENBORN: It is 7.

19 MS. GLASOW: Oh, I am on the wrong page.

20 MR. ERLENBORN: It is the bold -- yes, page 4.

21 MS. GLASOW: Okay. We will fix that.

22 MR. ERLENBORN: I mean, it could be a

1 compliment or it could complement.

2 MS. GLASOW: I was in a congratulatory mood
3 when I wrote this.

4 MR. ERLNBORN: That is one of those that the
5 spell check doesn't necessarily catch.

6 MS. GLASOW: Okay. Grounds for a termination.
7 A grant or a contract may be terminated when it is
8 required by law, in essence, paragraph (a)(1), (a)(2),
9 when there has been a substantial violation of the
10 grant or contract with the Corporation. Number (3),
11 when there is a substantial failure by the recipient to
12 provide high quality, economical, and effective legal
13 assistance. And that is from the current rule.

14 And (b) sets out the criteria the Corporation
15 will look at to determine, under (a)(2), whether there
16 has been a substantial violation of the terms of the
17 grant or contract. And the criteria we look at are
18 very similar to the criteria we looked at for a
19 suspension, but we have added one.

20 Again, it would be the importance and number
21 of restrictions or requirements violated, (2), the
22 seriousness of the violation, (3), the extent to which

1 the violation is part of a pattern, and the new one is
2 the extent to which the recipient has failed to take
3 corrective action when it became aware of the
4 violation.

5 (5) is whether the violation was intentional.
6 And again, just like in a suspension, we will in the
7 comments, as for whether that should be the standard or
8 some sort of willfully and knowingly violating would be
9 more appropriate.

10 CHAIRPERSON BATTLE: Well, actually, since you
11 now have four, that takes into account knowingness of
12 the -- the knowledge of the violation because you have
13 to consider the extent to which the recipient has
14 failed to corrective action when it became aware of the
15 violation. And when you say violation, that means they
16 have to know that there is a restriction or that there
17 is a provision that they have not complied with.

18 MS. GLASOW: There may be a situation where
19 they argue that their violation was not knowingly and
20 wilfully and therefore they didn't take corrective
21 action because they didn't know it violated the act.
22 The fourth one would come into play when they didn't

1 argue the fifth standard, but didn't take corrective
2 action. So I think they are both necessary.

3 MR. TULL: I am going to suggest that the
4 intent of (4) was to cover when the recipient became
5 aware of the violation from whatever source, not just
6 if it was brought to its attention by us. And as I
7 look at this, I realize the term "corrective action" is
8 a term of art to us which has to do with A-50
9 procedures. And so I would suggest that language
10 which -- something like this, "Failed to cure the
11 violation when it became aware of it."

12 CHAIRPERSON BATTLE: Okay.

13 MR. McCALPIN: Take action to cure?

14 MR. TULL: Cure.

15 CHAIRPERSON BATTLE: "Failed to cure the
16 violation when it became aware of a violation."

17 MS. GLASOW: I will fix it.

18 CHAIRPERSON BATTLE: Okay.

19 MR. McCALPIN: Or as failed to take action to
20 cure the violation.

21 MS. PERLE: That is probably better.

22 MR. TULL: Yes.

1 CHAIRPERSON BATTLE: Okay. Linda?

2 MS. PERLE: Yes, I just want to make it clear
3 that these criteria do not apply to the grounds for
4 termination that are listed in (a)(3), which is, "A
5 substantial failure by the recipient to provide high
6 quality, economical, and effective legal assistance."
7 And so there are no criteria by which that is judged in
8 this rule.

9 CHAIRPERSON BATTLE: I was about to ask what
10 criteria we would use to judge a substantial lack of
11 compliance when providing high quality and economical
12 services.

13 MR. McCALPIN: Well, we use the ABA standard.

14 MR. TULL: We would use the performance
15 measures. Linda correctly points out that that is not
16 spelled out. This is a hold over, although much of the
17 language is precisely the same, from the basis for
18 termination and for denial of refunding in the prior
19 regulations.

20 This is really designed to, as the footnote
21 suggests, to address a circumstance where we would feel
22 we would need to take action very quickly before the

1 termination of a grant. Normally where there is a
2 failure of performance, such a failure would be
3 addressed in competition because we have elaborate
4 procedures in place to review the applications and to
5 review the quality of applicants in that process.

6 We felt it was appropriate, notwithstanding
7 that, to keep the provision regarding failure of
8 performance in place in the event that, for instance,
9 some event should happen that a program should, you
10 know, suddenly just really literally stop -- cease
11 providing service because of some major problem which
12 is addressed.

13 All of that is not to quarrel with Linda's
14 point that there is not a set of standards, it is
15 really -- we did not have standards set forth in the
16 old regulation and just carried this language forward,
17 but certainly could, in the comment period, ask for
18 comments about how to address that.

19 And I think, as Bill points out, it would
20 be -- I mean, presumably whatever the question of
21 performance and what the standards for performance are,
22 are the performance measures. And that is what is set

1 forth in the composition there.

2 CHAIRPERSON BATTLE: You have got about five
3 or six that you mention, generally accepted
4 professional standards, provisions of the Legal
5 Services Act, rule, regulation or some guidance. So it
6 has to be some written measure, is what I am assuming.

7 MR. TULL: That is correct.

8 CHAIRPERSON BATTLE: Okay.

9 MR. TULL: I think the question you -- or I
10 assume you are raising, though, is what is a
11 substantial violation, as opposed to any old violation.

12 CHAIRPERSON BATTLE: Right. That is right.
13 That is true.

14 MS. PERLE: Yes. I think you said basically a
15 complete failure to provide -- I don't know if it has
16 to be complete, but the kind of thing that, you know,
17 that they are not serving clients when you are really
18 not providing adequate client service in Blairs or
19 whatever.

20 I mean, whatever the Corporation comes up
21 with, I think there also has to be the notion that they
22 haven't taken adequate steps to cure the problem once

1 they have been aware of it. That has to be one of
2 their criteria as well. So I think that -- I am not
3 quarreling with the inclusion of (3), I am just saying
4 that there has to be a similar list of criteria, as you
5 have in (b), in reference to Section (a)(3).

6 MS. GLASOW: We can ask for that in comments.

7 CHAIRPERSON BATTLE: Okay. Moving on.

8 MS. GLASOW: Section 4. Oh, paragraph (c) in
9 Section (3) basically sets a time limit that we cannot
10 terminate for any action that was taken five years
11 back. Section 4, the grounds for debarment. The
12 Corporation -- and these grounds really come right out
13 of the statute in our appropriations act.

14 The Corporation may debar a recipient. I am
15 showing a good cause from receiving additional award or
16 financial assistance from the Corporation. And
17 paragraph (b) sets out what good cause is, and this
18 comes right out of the statute.

19 Termination of financial assistance of a
20 recipient pursuant to 1640, which is the law governing
21 use of federal funds and it lists the laws very clearly
22 and it has to do with bribery, false claims, fraud.

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1 (2) is termination of financial assistance in whole of
2 the most recent grant or financial assistance.

3 (3) The substantial violation by the recipient
4 of the restrictions delineated in Section 10.2(a) and
5 (b) of this Chapter. And, as you know, those are all
6 the restrictions listed in Section 504 of the
7 appropriations act and the 1010(c) prohibitions in the
8 LSC Act. And those are basically the restrictions that
9 Congress is very concerned about, that the types of
10 cases or way of handling cases that Congress has
11 prohibited to recipients.

12 (4) is the knowing entry by the recipient into
13 a subgrant, subcontract, or other agreement with an
14 entity debarred by the Corporation. And I think we
15 would like to suggest adding the word "similar" before
16 the word "agreement" to clarify that it is just not any
17 old agreement. That it is, again, it is a subgrant or
18 a subcontract agreement.

19 (5) is the filing of a lawsuit by the
20 recipient on behalf of themselves related to their --
21 any grant they may have from federal funds and where
22 the lawsuit names the Corporation or any agency or

1 employee of federal, state, or local government as the
2 defendant, and that was initiated after the effective
3 date of this rule.

4 Basically this says that recipients are
5 precluded from judicial review on their own behalf of
6 any grant -- post grant dispute that they may have with
7 a grant that they have gotten pursuant to federal
8 funds.

9 CHAIRPERSON BATTLE: Linda?

10 MS. PERLE: Yes. First of all, I think what
11 Suzanne -- the last thing Suzanne said is a little
12 misleading. I don't think that that says they are
13 precluded, I think it says that they do so at their
14 peril because the Corporation has the authority, but
15 they are not required to debar. I just want to make
16 that clear.

17 I just want to note here that there are, I
18 think, many people who feel that this provision, which
19 is in our appropriations bill, raises some serious
20 constitutional concerns, to the extent that it is used,
21 in the event that a program brings a lawsuit
22 challenging some action of the Corporation or some

1 other federal entity for, you know, raising
2 constitutional questions, for actions that they have
3 taken that raises constitutional questions.

4 And I think that -- I am not suggesting
5 necessarily that the Corporation has to make any change
6 in this proposed rule, but I think that the preamble
7 ought to note that there are these questions and
8 that -- to invite comment and to get a sense of how
9 those out there in the community feel about this.

10 I understand that the Corporation, you know,
11 that they are basically using the language of the
12 statute and, you know, that I think that probably the
13 staff felt that it didn't have much discretion to make
14 the suggestion to change that, but I do think that
15 there are those issues and they should be pointed out
16 and people will comment on them.

17 CHAIRPERSON BATTLE: Okay. I think we can
18 address that in the commentary. Okay.. All right.
19 1606.5, termination and debarment procedures.

20 MS. GLASOW: This basically sets the ground
21 for the procedures. It says, "Before a recipient's
22 grant or contract may be terminated or a recipient may

1 be debarred, the recipient will be provided notice and
2 an opportunity to be heard as set out in this part."

3 CHAIRPERSON BATTLE: Okay.

4 MS. GLASOW: And Section 6 actually starts the
5 due process procedures. "When the Corporation has made
6 a," and do you want proposed here "decision"?

7 CHAIRPERSON BATTLE: Yes.

8 MS. GLASOW: Instead of "preliminary?"

9 CHAIRPERSON BATTLE: Yes.

10 MS. GLASOW: "Proposed decision that a
11 recipient's grant or contract should be terminated or
12 that a recipient should be debarred, the Corporation
13 employee," and with this long-winded sentence here, we
14 want to call that employee the designated employee.

15 CHAIRPERSON BATTLE: Can't we just define
16 designated employee at the beginning or do we need to
17 do it here?

18 MS. GLASOW: We could do it either place. But
19 it is a person who is designated by the President of
20 the Corporation to handle these types of actions. So
21 the President of the Corporation could designate a
22 person in the Office of Program Operations as the

1 person to handle any actions that would come forward
2 like this. And this person will issue, instead of
3 serve, a written notice on the recipient and the
4 chairperson of the recipient's governing body.

5 And then we listed things that that notice
6 shall include. It shall state the grounds for the
7 proposed action, identify again the facts or documents
8 relied on, inform the recipient of the proposed
9 sanctions, advise the recipient of its right to serve
10 upon the -- do you want serve there too? To provide
11 the Corporation?

12 MS. PERLE: How about just request?

13 MS. GLASOW: Okay. We will fix that.

14 CHAIRPERSON BATTLE: Okay.

15 MS. GLASOW: A request for an informal
16 conference under Section 7 or a hearing under
17 Section 8, and inform the recipient of its right to
18 receive interim funding pursuant to Section 13. If the
19 recipient doesn't respond or request an informal
20 hearing or a hearing, the preliminary or proposed
21 determination shall become final.

22 MS. PERLE: Suzanne, one place you used

1 "determination" and the other place you used
2 "decision." Do you want to use the same word for both
3 of those?

4 MS. GLASOW: Yes.

5 CHAIRPERSON BATTLE: Just change all of that
6 to proposed decision.

7 MS. GLASOW: Yes. And again we may want to
8 ask for comment on this show cause issue that Bill
9 mentioned in the suspension procedures.

10 CHAIRPERSON BATTLE: Okay. Bill?

11 MR. McCALPIN: My own view was that this
12 business about designated employee is an unnecessary
13 detail, but I would point out to you that this, maybe
14 for good reason, is not consistent with 1623.4(a) in
15 the suspension where we have said the Corporation can
16 serve the notice. Now maybe there is a difference
17 between the two procedures, but I frankly think that
18 the business about designated employee is unnecessary.

19 MS. GLASOW: There is a difference in the
20 sense that the hearing in a suspension is very quick.
21 And what we are trying to do here is have a lower level
22 employee do the preliminary action so that when it goes

1 on appeal up to the President, he is then --

2 CHAIRPERSON BATTLE: Insulated.

3 MS. GLASOW: -- insulated, in a sense. And
4 because this is longer process with more people
5 involved at the second stage, if it would go to a
6 hearing stage, you end up with a hearing officer. And
7 so we are just trying to say that each of these persons
8 should be a different person.

9 The current rule, I believe, uses the term
10 "corporation." And we were asked, internally, I
11 believe for the IG's office, and I can't remember if
12 CLASP asked, to just clarify who we are talking about,
13 and that is why they are here, but legally if we say
14 "the Corporation," it would have pretty much the same
15 legal significance. The Corporation internally would
16 have to decide what employee would handle each of these
17 actions. We are just trying to be very clear for the
18 field's purposes.

19 Section 7 sets out how an informal conference
20 would be run, it tells the time frame that a recipient
21 must request the informal conference, how quickly the
22 Corporation must respond giving the information on

1 where and when and how. The designated employee will
2 conduct the informal conference.

3 Each, the designated employee and the
4 recipient, will be able to state their case, seek to
5 narrow the issues, and explore possibilities of
6 settlement and compromise. And the designated employee
7 would be the person to modify, withdraw, or affirm the
8 proposed determination in writing, a copy of which
9 shall be provided to the recipient within 10 days of
10 the conclusion of the conference.

11 CHAIRPERSON BATTLE: Does that decision then
12 have to be made on the date of the conference by the
13 designated employee? The way this reads, it appears
14 so.

15 MS. GLASOW: It has to be done within -- the
16 recipient has to receive the written decision within 10
17 days. So it has to be done quickly, but it doesn't
18 necessarily have to be done on the day that the
19 conference hearing ends, that the employee would have
20 time to mull over all of the evidence submitted and
21 come to a decision.

22 CHAIRPERSON BATTLE: Okay.

1 MS. PERLE: I have a small point, going back
2 to 1606.6, which I think that there should be -- I
3 don't think this necessarily has to be in the rule, but
4 I think that maybe there needs to be some comment in
5 the preamble making it clear that if you ask for an
6 informal conference, you are not giving up your right
7 to a hearing.

8 In other words, I think you say "and/or."
9 Yes. Or you put a footnote in that says later, you
10 know, that it is clear later that after you have an
11 informal conference, you still have the right to ask
12 for a hearing.

13 MS. GLASOW: There is a couple of places, but
14 you have to really look all over the rule to figure
15 that out. So we could say on page 10, subparagraph (3)
16 up at the top where it says, "Inform the recipient of
17 the proposed sanctions." Oh, it is (4). "Advise
18 recipient of its right to request an informal
19 conference," and we would put "and/or a hearing."

20 CHAIRPERSON BATTLE: Yes. "And/or" would take
21 care of it right there.

22 MS. GLASOW: It is not the best way to do it,

1 but it is clear.

2 MR. McCALPIN: You don't want an informal
3 conference and a hearing both.

4 MS. GLASOW: Yes. The informal conference
5 allows the parties to get together very informally and
6 decide whether there is room to negotiate, or whatever,
7 without going through this long process of a hearing.
8 The current rule also includes a pre-conference meeting
9 and hearing. So we have taken out a lot of steps, but
10 these are the ones we felt that we could --

11 CHAIRPERSON BATTLE: Couldn't the informal
12 conference be used as a prehearing conference? In
13 other words, I envision, in some instances, just based
14 on my experience with administrative procedures and the
15 fact that this going to be a lawyer intensive process,
16 that some lawyers will take whatever the reasons for
17 the sanctions and develop a really limpy and involved
18 kind of hearing where the Corporation may have some
19 interest in what they plan to present and may not have
20 any interest in other things that are to be presented.

21 And it would serve to expedite the hearing
22 process, in some instances, if informally the parties

1 had an opportunity to get together and discern what was
2 critical to whether or not sanctions might be imposed
3 so that the hearing could be focused on those issues
4 that are clearly the most critical.

5 MS. GLASOW: Okay.

6 CHAIRPERSON BATTLE: So that is possible,
7 right?

8 MS. GLASOW: Yes.

9 CHAIRPERSON BATTLE: Okay.

10 MS. GLASOW: We are to the hearing. And here
11 in paragraph (a) is where it becomes clear that if you
12 have had an informal conference, you also get a hearing
13 because it says, "Recipient may make written request
14 for a hearing within 30 days of its receipt of the
15 proposed decision or within 15 days of receipt of the
16 written decision issue by the designated employee after
17 the conclusion of the informal conference." So it is
18 there again. Yes, Bill.

19 MR. McCALPIN: Issues of this nature, the
20 question frequently arises whether there is any right
21 to discovery and right to subpoena. How do you address
22 those?

1 MS. GLASOW: We have said somewhere in here
2 that the federal rules of --

3 MR. McCALPIN: Oh, that is --

4 MS. GLASOW: -- procedure don't apply, don't
5 necessarily apply. It doesn't mean the hearing officer
6 can't use some of them.

7 MR. McCALPIN: That doesn't get to the
8 question of discovery or the right of the person to
9 subpoena.

10 MS. GLASOW: No.

11 CHAIRPERSON BATTLE: All of the information,
12 it seems to me, is in the recipient's hands for these
13 kinds of proceedings because the question is, whether
14 you comply with the rules or not, what information
15 would the Corporation have?

16 MR. McCALPIN: Well, they may have information
17 from third sources.

18 MS. GLASOW: Well we are -- in this rule, it
19 says the Corporation must make it clear what
20 information -- I mean, when it issues the preliminary
21 decision or the proposed decision, it must -- that must
22 include the information documents that we are relying

1 on. So we can't hide the information.

2 CHAIRPERSON BATTLE: It says, "Identify with
3 reasonable specificity any facts or documents relied
4 upon as justification for proposed actions." So you
5 have identified them. The question is can they get
6 access to them. I think that is the question that he
7 is asking.

8 MS. GLASOW: This rule is not intended to
9 provide anybody with the right of subpoena or
10 discovery, but however, we can, if that is not clear,
11 make it clear that -- I don't know. Do we want to say
12 that?

13 MR. TULL: Well, we may want to seek comment
14 on this because I think you are correct, Bill, that it
15 does not provide for it, the kind of document I would
16 think might be relevant, but potentially problematic.
17 And I just am not sure what is proper or right in terms
18 of fairness and effective operations of the
19 Corporation.

20 If we have a series of internal reports
21 regarding a recipient that we then take action against,
22 then we do have an obligation under this rule to set

1 forth fully the basis on which we seek to terminate
2 them or debar them. But they may believe that we have
3 a report by someone that is favorable to them or there
4 may be reports. They may believe it is in their
5 interest to have internal memoranda back and forth
6 between members of the compliance office regarding
7 their view on the issue.

8 And it strikes me at the first instance that
9 to provide such a right could potentially significantly
10 elongate and complicate the proceeding, one, and two,
11 could, in terms of the internal operation of the
12 Corporation, would certainly be something which could
13 well chill the sort of free flow of sort of interchange
14 in writing and through e-mail, et cetera, of what we
15 ought to do about the circumstance.

16 On the other hand, obviously, we do have a
17 responsibility to be fair to the recipients. My
18 instinct would be not to provide such a right, but I
19 think that is certainly the Corporation's interest is
20 that such a right not be present, but whether the due
21 process -- whether that begins to encroach upon some
22 due process interest I am not --

1 CHAIRPERSON BATTLE: The only thing that I
2 have been seeing is if you identify a particular
3 document as the one that you have relied on, that that
4 is the document that the recipient needs to have access
5 to.

6 But beyond that internal memoranda, the
7 information that -- the exchange between staff members,
8 I am looking at this, I am going down tomorrow, I will
9 tell you what I find, and then whatever it is that they
10 find, that information probably should not be a matter
11 of discovery because that is your internal deliberative
12 process as to how you come up with the proposed
13 decision.

14 But it seems to me if you identify a document,
15 I am relying on this and this is why I want to debar
16 you, then I think that probably the recipient needs to
17 at least have access to that document if they don't
18 already have it. But it should be something.

19 MS. PERLE: It would seem a little bizarre to
20 have the Corporation identify the document and then
21 say, "We are using this document, but you can't have
22 it."

1 MS. GLASOW: Right. From what I have read, in
2 terms of due process under federal grants, I have seen
3 nowhere where there is a right to discovery and
4 subpoena unless it is clearly in the statute giving
5 hearing rights to the recipients.

6 CHAIRPERSON BATTLE: And I don't think we
7 should do it here either. I am just saying as a
8 practical matter, I think that is the way it ought to
9 be.

10 MS. PERLE: Well, I think that the rule -- I
11 mean, I think -- while I agree that people shouldn't
12 necessarily have access to all of the internal
13 deliberations, I think that it probably should specify
14 in the rule that if there are documents that the
15 Corporation has relied on, that the recipient has a
16 right to get copies of those documents.

17 MR. McCALPIN: Even though they may
18 potentially be subject to an attorney-client privilege.

19 MS. PERLE: Between the Corporation's general
20 counsel's office and the Corporation?

21 MR. McCALPIN: Internally in the Corporation.
22 There may be a document from the general counsel to

1 OPO.

2 MS. PERLE: Well, then it strikes me that the
3 Corporation could assert attorney-client privilege.

4 CHAIRPERSON BATTLE: If you specify the
5 document in your notice, those are the only things that
6 I think possibly the recipient has a right to. An
7 attorney-client privileged document, which assists the
8 OPO office in making a decision, to me is part of the
9 deliberative process. And you wouldn't say, "My lawyer
10 told me I need to debar you."

11 MS. PERLE: That is right.

12 CHAIRPERSON BATTLE: You would say, "I looked
13 at these facts, I looked at this evidence, I looked at
14 this rule. And based on these three things, we decided
15 to debar you.

16 MS. PERLE: Right.

17 CHAIRPERSON BATTLE: So the deliberative -- it
18 seems to me that opinion piece is not something that
19 would be explicitly set out in the letter.

20 MR. McCALPIN: I don't know, but if you rely
21 on that document for the establishment of the
22 violation, in other words, when OPO gives facts to the

1 general counsel and says, "Does this constitute a
2 violation of the law, the regulation, or whatever," and
3 the general counsel renders an opinion that it does,
4 then you are relying on that to debar or suspend --

5 MR. TULL: Isn't the distinction that is
6 proper and should be reflected is reliance upon a
7 document which provides evidence of facts which are a
8 part of the violation, not documents which are the
9 basis for the legal interpretation as to why that
10 constitutes a violation.

11 MS. PERLE: I think that is right. And the
12 rule does say, "Identify with reasonable specificity
13 any facts relied upon." So in other words, well maybe
14 that document isn't available, at least the facts which
15 were discussed in the document should be made
16 available. And I think the rule requires that. I
17 think the rule should also require that if there are
18 specific documents, maybe not subject to the
19 attorney-client privilege, that could be implicit, that
20 they are entitled to have a look at those documents.

21 CHAIRPERSON BATTLE: I think what I am
22 hearing, at least from the Committee and from the

1 staff, is that we are not interested in developing a
2 subpoena power and discovery provision in this rule,
3 but we are ensuring that as we identify with reasonable
4 specificity the facts relied upon, that any documents
5 reflected in those facts are something that, within our
6 discretion, we can make available to them.

7 MS. PERLE: Well, when you say within your
8 discretion, I mean, I think that it has to be something
9 other than -- it has to be -- if you are going to rely
10 on a particular document, then I don't think it should
11 be within your discretion to withhold it unless there
12 is something else such as the attorney-client
13 privilege.

14 CHAIRPERSON BATTLE: In that document. I
15 guess what I am saying is there is a judgment piece in
16 this, but I think, just as with all discovery, if you
17 were engaged in discovery under the federal rules or
18 under some state rules, there is going to be a judgment
19 piece involved, but that what we are suggesting is that
20 there be an internal measure available to staff to
21 assure that if you are -- if there is a critical factor
22 you are relying on and there is a document that

1 contains those facts, that those documents are made
2 available. But again there is this discretion.

3 MR. ERLNBORN: I would think, from a
4 practical standpoint, if we made it clear here that if
5 there were documents that were being relied upon for
6 the facts, that those would have to be disclosed to the
7 respondent, then the Corporation knows this before
8 relying upon them and realizes that relying upon them
9 waives the attorney-client privilege, if that happens
10 to be the case. It is just the Corporation is put on
11 notice. And then they can either rely on that document
12 or not, as they see fit.

13 MS. GLASOW: I think we pretty much agree what
14 we want, we are just not ready with the language. So
15 this is something I think would be better dealt with in
16 the preamble and ask for comments on it. And by the
17 time we come back, we will have made sure the language
18 we have covers all bases and does what we want.

19 CHAIRPERSON BATTLE: Okay. All right. Let's
20 move on.

21 MS. GLASOW: Where are we. Are we on
22 paragraph (c), page 12?

1 MS. PERLE: Yes, I think so.

2 MS. GLASOW: Okay. This deals with the
3 hearing officer and the hearing officer shall be
4 appointed by the President, or somebody designated by
5 the President to act in his or her behalf, and this
6 person may be an employee of the Corporation. This is
7 a change. 1011 of the LSC Act has always required that
8 we have an independent, outside person as a hearing
9 examiner, and the appropriations act has clearly
10 changed this.

11 And the whole emphasis seems to be from
12 Congress from several provisions that they want us to
13 have -- they want our hearings to be simpler, faster,
14 and enable the Corporation to sanction for violations.
15 And so we have reflected that here. However, due
16 process requires that a hearing officer in a due
17 process to meet due process requirements must be an
18 impartial decision-maker..

19 And this is a person who has not formed a
20 prejudgment on the case and does not have a pecuniary
21 interest or personal bias in the outcome of the
22 proceeding. And the President needs to appoint someone

1 who meets those qualifications.

2 MS. PERLE: I think there is a need to make
3 some -- this is really a clarification. The use of the
4 word "designee" here I think can cause some confusion
5 with the use of the word "designated employee." So I
6 think there has to be some clarification or distinction
7 made that this designee is not the same.

8 In other words, the designated employee who is
9 bringing forth the charges against the program,
10 shouldn't have the right to appoint the hearing
11 examiner because that would compromise the whole
12 process. So I think maybe you have to use a different
13 word other than designee on page 12.

14 MR. ERLBORN: Well, isn't that spelled out
15 here? "The hearing officer shall not have been
16 involved in the current termination"?

17 MS. PERLE: We are not talking about the
18 hearing officer, we are talking about the person who
19 appoints the hearing officer.

20 MS. GLASOW: Yes. I will change that word in
21 one place or the other.

22 MS. PERLE: Okay. And then put a footnote

1 or -- I mean, put something in the preamble to make it
2 clear that those people --

3 MS. GLASOW: Are two different persons. Okay.
4 Paragraph (d), the hearing shall be scheduled to
5 commence at the earliest appropriate date, ordinarily
6 not later than 30 days after the notice. The hearing
7 officer is the person who will preside over and conduct
8 a full and fair hearing, avoid delay, maintain order,
9 and ensure that a record sufficient for full disclosure
10 of the facts and issues is maintained. That is pretty
11 much out of the current rule.

12 The hearing shall be opened to the public,
13 unless for good cause in the interest of justice the
14 hearing officer determines otherwise; (g) the
15 Corporation and the recipient shall be entitled to be
16 represented by counsel or by another person; (h) at the
17 hearing the Corporation and recipient may each present
18 its case by oral or documentary evidence, conduct
19 examination and cross examination of witnesses, exam
20 other documents, and submit rebuttal evidence.

21 (i) The hearing officer shall not be bound by
22 the technical rules of evidence and may make any

1 procedural evidentiary ruling that may help to ensure
2 full disclosure of the facts, maintain order, and avoid
3 delay. I am basically reading this. This is basic
4 procedure. (j) Official notice may be taken, of a
5 variety of documents listed there. (k) requires that a
6 stenographic or electronic sound record shall be made
7 in a manner determined by the hearing officer.

8 CHAIRPERSON BATTLE: I thought about video, as
9 well as stenographic or sound, today as an option.
10 Today under the federal rules when you get ready to do
11 a deposition, you don't have to request special
12 approval by the court to do your deposition by video as
13 opposed to just stenographically. So I just wondered
14 for a hearing having that as an option probably
15 wouldn't hurt.

16 MR. TULL: You could just extract sound --

17 MS. GLASOW: Or electronic record.

18 MR. TULL: -- to get an electronic recording
19 of a proceeding.

20 MS. GLASOW: Okay.

21 MR. TULL: That would do it.

22 CHAIRPERSON BATTLE: Yes.

1 MS. GLASOW: Okay. And the last paragraph is
2 "The recipient shall have the burden of proof in the
3 hearing under this section."

4 Section 9 is the recommended decision. Within
5 20 days after conclusion of the hearing, the hearing
6 officer shall issue a written, recommended decision,
7 which may terminate financial assistance, continue the
8 current grant or contract, but still may modify the
9 current grant or contract on conditions that may be
10 deemed necessary on the basis of information adduced at
11 the hearing, and/or debar the recipient from receiving
12 an additional award or financial assistance.

13 Paragraph (b). The recommended decision shall
14 contain findings of the significant and relevant facts
15 and shall state the reasons for the decision. They
16 should be based solely on the record and the evidence
17 adduced at the informal conference and the hearing or
18 on matters on which official notice were taken. And
19 this is so that that record exists if appeal goes up to
20 the President.

21 MR. McCALPIN: Do you have a record at the
22 informal conference?

1 MS. GLASOW: A requirement for a record? I
2 don't remember. If not, we should have one.

3 CHAIRPERSON BATTLE: I also, understanding
4 that the burden of production of evidence and proof is
5 on the recipient at this juncture, questions whether
6 the Corporation, in presenting its case, has to present
7 all of the information relied upon at that juncture for
8 the hearing officer so that there is nothing outside of
9 that that could be considered as part of the record. I
10 am asking that as a question.

11 In other words, the Corporation's
12 representative or attorney has to come forward and
13 present the entire case upon which the proposed
14 decision was made and the recipient has to respond is
15 what would happen.

16 MS. GLASOW: Right. Right.

17 CHAIRPERSON BATTLE: Okay. So it is a
18 full-blown kind of evidentiary hearing.

19 MS. GLASOW: Back and forth, right.

20 CHAIRPERSON BATTLE: With both sides
21 presenting the case. It is not just a matter of the
22 recipient presenting their side and the Corporation

1 considering the evidence it already has.

2 MS. GLASOW: That is right.

3 CHAIRPERSON BATTLE: Okay.

4 MS. GLASOW: The final decision in Section 10,
5 if neither the Corporation nor the recipient requests
6 review by the President, the recommended decision will
7 become final. The recipient or the Corporation may
8 seek review by the President of a recommended decision.
9 That gives a time frame for that request.

10 And I haven't even talked to John about this,
11 but it seems to me we should have a paragraph here that
12 says, "The President's review shall be based solely on
13 the record of the hearing below" so that we are being
14 consistent throughout. Is that okay?

15 MR. TULL: Yes.

16 MS. GLASOW: Okay.

17 MS. PERLE: I wonder if there is a
18 determination made by the President that they are not
19 the appropriate person to appoint the hearing examiner,
20 because they have had prior dealings with that, is the
21 President then the appropriate person to make the
22 review?

1 MS. GLASOW: Now again, I mean, there is law
2 that we have always followed at the Corporation that is
3 pretty clear, an agency law, that if someone is already
4 biased or unable or has been involved in it, that the
5 President would have to designate someone to step in
6 his shoes. And we could say that forthwith -- I mean,
7 clearly here we are using the term "designee" again.

8 MS. PERLE: Well, whatever term we decide to
9 use in the paragraph above, or in the section above, we
10 should use here.

11 MS. GLASOW: Is that okay, John?

12 MR. TULL: Yes.

13 CHAIRPERSON BATTLE: Why don't we just make
14 those two people that we define out at the beginning
15 and then when you get here, we know exactly who they
16 are because you are now really getting into something
17 that really will need to be clarified because they have
18 standing terms at the appellate process.

19 MS. GLASOW: Okay.

20 CHAIRPERSON BATTLE: Okay.

21 MS. GLASOW: (c) As soon as practicable, after
22 receipt of request for review, but not later than 30

1 days -- we have a time frame in here -- the President
2 may either adopt, modify, or reverse the recommended
3 decision or direct further consideration of the matter.
4 In the event of modification or reversal, the
5 President's decision shall conform to the requirements
6 of Section 7(b).

7 And that basically says the decision has to
8 include all the facts and rationale that went into it.
9 So it is really clear from reading the decision what it
10 was based on and why the President made that decision.
11 Paragraph (d), the President's decision shall become
12 final upon receipt by the recipient.

13 CHAIRPERSON BATTLE: Is there a time frame for
14 the hearing officer to make his decision?

15 MR. TULL: Hearing officer as opposed to the
16 President?

17 CHAIRPERSON BATTLE: Within 20 days? Okay.
18 At conclusion of the hearing?

19 MS. GLASOW: Yes, I think so.

20 CHAIRPERSON BATTLE: And then the President
21 has 30 days?

22 MS. PERLE: Is this calendar days or working

1 days?

2 MS. GLASOW: We don't say.

3 MS. PERLE: Should you clarify that?

4 MS. GLASOW: If you like. Business days,
5 working days, calendar days? Calendar days?

6 MR. TULL: It would be, would it not, under
7 the federal rules?

8 MS. GLASOW: When we say 10 days. It really
9 depends on what we pick. I mean, we can use the
10 federal rules or not.

11 MR. TULL: I don't know where we reference it,
12 but that seems the proper way to address it. A 10-day
13 period, I think yesterday --

14 CHAIRPERSON BATTLE: Under the federal rules,
15 you don't --

16 MR. TULL: Under some conditions you don't
17 count weekends of a statutory time period, but if you
18 get into 30 days, then that is -- typically it would be
19 30 days, including weekends, which I think is what --
20 the way we have always counted it, in terms of our own
21 application of these rules now, and it would seem like
22 the proper way to do it.

1 CHAIRPERSON BATTLE: How do you do it now?
2 Anything over 10 you count weekends or you don't count
3 weekends? How do you do it?

4 MR. TULL: Well, I am trying to remember when
5 we did the suspensions, which I believe, under the
6 current rule, is where there are some 10-day periods.
7 I believe we counted -- this is going from memory. I
8 believe that we did count those as 10 working days, not
9 10 days including weekends. But we do, when we have
10 rules, which are for 30-day, we do follow the federal
11 rules, basically.

12 CHAIRPERSON BATTLE: Yes. Well, that makes
13 sense. When you probably write this, just say 10
14 working days. That will make it real clear.

15 MS. PERLE: And then the 20 days is 20
16 calendar days?

17 CHAIRPERSON BATTLE: Yes.

18 MS. GLASOW: Okay.

19 MR. ERLNBORN: Could I ask a question about
20 (c) beginning on 15. It requires that the decision
21 shall conform the requirements of 7(b). What is the
22 procedure or what right does the grantee have if that

1 is not followed? I am not suggesting that it won't --
2 that it not be followed, but what remedy? Would you
3 subpoena them?

4 CHAIRPERSON BATTLE: It takes 30 days?

5 MR. ERLENBORN: Well, this is the decision of
6 the President.

7 CHAIRPERSON BATTLE: Okay. If it does not
8 conform.

9 MR. ERLENBORN: If it doesn't conform to 7(b),
10 do they go to court?

11 MS. GLASOW: They can file suit,
12 unfortunately.

13 MS. PERLE: They can file suit, but they do so
14 at their peril.

15 MS. GLASOW: Right.

16 MR. ERLENBORN: Yes, they may lose their
17 funding.

18 MS. GLASOW: That is right. We are pretty
19 much bound to follow our own procedures. I mean, that
20 is pretty clear law too, but they really don't have a
21 really good remedy at this point, I guess.

22 CHAIRPERSON BATTLE: And under that theory, if

1 I were a lawyer, I would request reconsideration and
2 point out whatever was not done and say, "I know that
3 you have got the 30 days and it is not in the rules,
4 but I would request," as you would if there were an
5 error in the record, under the federal rules if you are
6 just asking the court to reconsider it, that you just
7 bring that to their attention.

8 MS. GLASOW: Okay. 7(b) is incorrect. We are
9 going to have to find the right reference.

10 CHAIRPERSON BATTLE: The right reference?

11 MS. GLASOW: Yes.

12 CHAIRPERSON BATTLE: Okay. Let's correct
13 that. Okay.

14 MS. GLASOW: Section 11 entitled,
15 "Qualifications on hearing procedures," clarifies what
16 the Corporation can do if it wants to simultaneously
17 take action to debar and terminate at the same time or
18 not. And it sets out the variety of options a
19 corporation has.

20 Paragraph (a) says the Corporation may
21 simultaneously take action to debar and terminate a
22 recipient within the same hearing procedure, in which

1 case the same hearing officer will receive both the
2 termination and debarment actions.

3 Paragraph (b) says if we don't do what we set
4 out in paragraph (a), but we are debarring a recipient
5 on the grounds in 4(b)(1) or (2), which are grounds
6 where there have been prior terminations, that they
7 don't get -- the recipient doesn't get the hearing
8 procedures under Section 6 through 10 that we just went
9 through.

10 The reason being that the reason we are
11 debarring them is because we have already gone through
12 a termination hearing that has gone through all this
13 process on those grounds. And so instead, we will
14 provide the following due process for debarment, that
15 it is not done simultaneously with the termination.

16 And (1) the President shall appoint a hearing
17 officer to review the matter and make a written
18 recommended decision on debarment, (2) the hearing
19 officer's recommendation shall be based solely on the
20 information in the administrative record of the
21 termination proceedings providing grounds for the
22 debarment and any additional submissions, either oral

1 or in writing, that the hearing officer may request.

2 CHAIRPERSON BATTLE: Therein lies, I think,
3 Bill's question earlier about assuring that you have
4 requirements for a record all along the way.

5 MS. GLASOW: Right.

6 CHAIRPERSON BATTLE: You need to have a record
7 all along the way in determination proceedings so that
8 it is available if it turns out that you need to do a
9 debarment.

10 MS. GLASOW: That is correct.

11 CHAIRPERSON BATTLE: Okay.

12 MS. GLASOW: (3) If neither party appeals the
13 hearing officer's recommendation within 10 days, that
14 decision shall become final. Either party may appeal
15 the recommended decision to the President who shall
16 review the matter and issue a final written decision
17 pursuant to -- maybe that is 9(b) instead of 7. I will
18 check all those references.

19 CHAIRPERSON BATTLE: Okay

20 MS. GLASOW: Okay.

21 MS. FAIRBANKS-WILLIAMS: Could I say
22 something?

1 CHAIRPERSON BATTLE: Yes. I just want to
2 recognize -- I didn't recognize you when you came in,
3 but we have one of our other Board members with us,
4 Edna Fairbanks-Williams.

5 MS. FAIRBANKS-WILLIAMS: You are saying either
6 oral or in writing. Well, if they do it in oral, can't
7 they back it up in writing so it is there?

8 MS. GLASOW: Yes. And that is clear earlier
9 on, I think, that they can submit any written or
10 oral -- I mean, any written or oral presentations they
11 want in the hearing.

12 MS. FAIRBANKS-WILLIAMS: Yes, but if they just
13 do it oral and not in writing -- you are saying oral or
14 in writing. But if they do it orally, is it backed up
15 with writing.

16 MS. GLASOW: They can do that, yes.

17 CHAIRPERSON BATTLE: What she is saying is if
18 it is only oral, are we taking a stenographic record of
19 that oral presentation made however so that it can be
20 considered?

21 MS. GLASOW: Yes.

22 CHAIRPERSON BATTLE: That is the point. Isn't

1 that what you are saying?

2 MS. FAIRBANKS-WILLIAMS: Yes.

3 MS. GLASOW: Yes, we are saying -- well, what
4 did we say. The record has to be either --

5 CHAIRPERSON BATTLE: Stenographic or
6 electronic.

7 MS. GLASOW: Yes.

8 CHAIRPERSON BATTLE: So the hearing officer
9 would need to sit and watch -- and that is why a video
10 makes sense sometimes because you can sit and watch
11 that a lot better than you can listen to a tape if, in
12 fact, you don't get a record, a stenographer record, of
13 a proceeding.

14 MR. ERLNBORN: And sometimes those shifty
15 eyes give you a different affect.

16 MS. GLASOW: The trier of fact views the
17 witness, right?

18 CHAIRPERSON BATTLE: That is right.

19 MS. GLASOW: Paragraph (c) all final debarment
20 decisions shall state the effective date of the
21 debarment and the period of debarment, which shall be
22 commensurate with the seriousness of the cause for

1 debarment, but shall not be for longer than six years.

2 The reason we picked six years is because
3 we -- a debarment affects the future award or financial
4 assistance. We are empowered by Congress to give
5 grants up for a period of no more than five years. So
6 if we can do a debarment for six years, that means that
7 that is long enough to affect the next competition go
8 around.

9 Paragraph (d) the Corporation may reverse a
10 debarment decision upon request for the following
11 reasons. And this is patterned after other federal
12 debarment regulations and (1) would be newly discovered
13 material evidence, (2) reversal of a conviction or
14 civil judgment upon which the debarment was based.

15 The reason I included this, because it would
16 be pertinent to a debarment for a termination under
17 1640. (3) bona fide change in ownership or management
18 of a recipient, (4) elimination of other causes for
19 which the debarment was imposed, or (5) other reasons
20 the Corporation deems appropriate.

21 MR. ERLNBORN: As to number (1), would that
22 contemplate, it doesn't in the presentation here,

1 another hearing to determine the relevancy and
2 sufficiency of the newly discovered material evidence?

3 MS. GLASOW: Not necessarily. I mean, if some
4 evidence comes up and the Corporation is fully
5 convinced that it should undo this debarment, the
6 recipient would be glad to have the debarment lifted.
7 So, you know, to decisions made right up front, I don't
8 think there would be anybody requesting a hearing.

9 MR. ERLENBORN: Well, what I am thinking of is
10 if the adversely affected party, the one who has been
11 debarred, requests a rehearing based on additional
12 evidence or requests the Corporation to take action
13 because of additional new evidence, how do they present
14 that, what rights do they have in presenting that?

15 MS. GLASOW: It would be the president of the
16 corporation. Because once we have debarred someone,
17 that action is over. So someone would have to come to
18 us with evidence that is very convincing and say, "I
19 want a new hearing." But on its face, it would have to
20 be pretty convincing, I assume, for the President to
21 take that action. But it is in the discretion of the
22 Corporation to either give another hearing or make an

1 instant decision, in essence, that will lift the
2 debarment.

3 CHAIRPERSON BATTLE: One of the questions that
4 I have about this whole process is the debarment is of
5 a recipient and a recipient is a legal entity
6 incorporated under not for profit law somewhere in the
7 United States. If the management of that entity
8 reconforms itself into another entity and makes
9 application, this debarment has no affect on that new
10 entity, does it?

11 MS. GLASOW: That is correct, but there we
12 would use the competition process to determine whether
13 this new entity was really the same old entity in a
14 different -- with a different name. And certainly we
15 would not allow that entity to -- we wouldn't provide a
16 grant or financial award to that entity. So the
17 competition process, I think, would take care of that.

18 MR. TULL: Yes, and a standard question in our
19 proposal -- requests for proposals is a submission of
20 who the managers are and the key principals so that we
21 would immediately be able to identify if such a change
22 had taken place.

1 CHAIRPERSON BATTLE: Okay.

2 MS. GLASOW: Section 12 sets out time and
3 waiver provisions. Section 13, again, assures that
4 until the procedures are finished for a termination or
5 debarment hearing, that the -- oh, this would just be
6 termination -- that the recipient would receive the
7 same level of financial assistance provided under its
8 grant or contract with the Corporation.

9 MS. PERLE: I have a question about that.

10 MS. GLASOW: Yes.

11 MS. PERLE: Does that mean that if a program
12 had been -- a recipient had been suspended prior to the
13 beginning of the termination proceeding, that they
14 would automatically get the money back during the
15 period of suspension?

16 MS. GLASOW: Yes. If we have done a
17 suspension and we have decided to go from a suspension
18 into a termination, we cannot suspend those funds, they
19 must be returned to the recipient, and they will
20 continue to get interim funding until the termination
21 proceeding is over. And that, again, is based on due
22 process and just the need to make sure the funds are in

1 that service area and providing legal aid until we have
2 made a decision to change that.

3 MS. PERLE: I think that needs to be stated
4 somewhere. I don't know whether it needs to be stated
5 in the rule itself, but I think it needs, certainly, to
6 be stated in the preamble.

7 CHAIRPERSON BATTLE: I have a question as to
8 from start to finish, what is your vision as to how
9 much time it takes, once the Corporation has made a
10 proposed decision that a particular recipient needs to
11 be terminated, that it will take from that decision
12 being issued to actual termination under this scenario?

13 MS. GLASOW: I haven't put a really clear time
14 because I feel we need some discretion, not to be bound
15 one way or the other, but the intent is to do this
16 quickly.

17 CHAIRPERSON BATTLE: This is the experience I
18 have in administrative things where you have an entity
19 that is continuing to get funding in the interim,
20 pending a decision, a final decision, is that the
21 strategy oftentimes is to delay the final decision
22 because the longer you delay it the more they get

1 funding and the closer they get to the end of their
2 term.

3 So I guess on the one hand you have got
4 competing interests. You want to balance the interest
5 of assuring that there is a full and fair hearing
6 process that allows for due process up against -- and I
7 notice that you have provisions in here that address
8 the issue of delay.

9 But I really do want us to have, if that
10 becomes the strategy, the legal strategy, which is
11 let's have a long-term hearing, let's have lots of
12 people come in to testify about every single fact that
13 is specified in here and in doing so, delay the
14 Corporation having an opportunity to make a decision,
15 that we have some measure to be able to address how
16 that happens.

17 MS. GLASOW: Right. Somewhere in a footnote
18 here I have talked about taking out certain stages or
19 rights that the recipients had under the old rule, such
20 as requesting some delay for various reasons. And we
21 took all of that out. I mean, we are really trying to
22 make this a streamlined fast procedure and yet allow

1 enough time for a fair process.

2 CHAIRPERSON BATTLE: Okay.

3 MR. ERLLENBORN: If I can address the issue
4 that Linda raised a minute ago about suspension and
5 then termination. It seems to me that a 30-day limit
6 on suspension probably takes care of that issue,
7 particularly since the provision here is looking to the
8 current grant or contract, not the current provision of
9 funds. So after 30 days suspension, then the funds
10 must be given to the recipient and you don't look at
11 the suspension figure, you look at the grant or
12 contract to determine the amount.

13 MS. PERLE: I don't disagree with that. I
14 just think it ought to be noted in the preamble or
15 somewhere that that is what happens so it is clear that
16 people understand that.

17 MS. GLASOW: There are several issues that
18 have come up in both of these rules that it might be
19 helpful in the preamble to kind of run through a
20 scenario of how the process would go. Give everybody a
21 picture of what is happening.

22 CHAIRPERSON BATTLE: Yes. The final section

1 on recompetition.

2 MS. GLASOW: Yes, recompetition. This
3 implements 501(c) of our appropriations act, which
4 authorizes the Corporation, when it has terminated a
5 recipient in whole, to implement a new competitive
6 bidding process for the affected service area. But it
7 also says that until a new recipient has been awarded a
8 grant pursuant to that process, the Corporation shall
9 take all practical steps to ensure the continued
10 provision of legal assistance in that service area.

11 And we refer here to Section 1634, Section 11.
12 That is our competition rule. And Section 11 provides
13 the Corporation with authority when it loses a
14 recipient, for whatever reason in a recipient area, to
15 do whatever is necessary. It gives us discretion to
16 allocate those funds to whomever, maybe a neighbor and
17 recipient or where there is a variety of ways of doing
18 that, to ensure continued legal assistance in that
19 area.

20 CHAIRPERSON BATTLE: Okay. All right. Are
21 there any other questions about any other provisions in
22 1606 that we have gone over today?

1 MS. GLASOW: I actually have that same -- oh,
2 we have another page? Before recompetition, it is the
3 last paragraph in Section 13, I am sorry, we have that
4 same revision we made in suspension.

5 CHAIRPERSON BATTLE: Yes. Yes.

6 MS. GLASOW: "Failure by the Corporation to
7 meet a time requirement of this part does not preclude
8 the Corporation from terminating a recipient's grant or
9 contract with the Corporation."

10 CHAIRPERSON BATTLE: Okay.

11 MS. GLASOW: John, did you have a comment?

12 Oh, okay.

13 CHAIRPERSON BATTLE: Anything from any of our
14 members present? If not, this is a proposed rule. So
15 our administrative procedure for a review of these
16 rules has generally been that we report to the Board
17 tomorrow with that.

18 Since this is a proposed rule, it will go out
19 with a preamble that I will approve, after it has been
20 drafted by the staff, for publication. And after it
21 has been published and we have received comments and
22 had an opportunity to review the comments, then we will

1 present it to the Board for adoption.

2 I would now entertain a motion for us to
3 approve for publication this Part 1606 termination and
4 debarment procedures and recompetition in a form that
5 conforms to the discussion that we have had today
6 regarding this rule.

7 M O T I O N

8 MR. ERLNBORN: So moved.

9 MR. McCALPIN: What is the comment period?

10 CHAIRPERSON BATTLE: The comment period is 60
11 days. Okay? Is there a second to that?

12 MS. WATLINGTON: Second.

13 CHAIRPERSON BATTLE: Okay. It has been
14 properly moved and seconded. All in favor?

15 (Chorus of ayes.)

16 CHAIRPERSON BATTLE: All opposed?

17 (No response.)

18 CHAIRPERSON BATTLE: The motion will carry.
19 Thank you very much. This is a very important rule, a
20 very tedious one, but I think that once we get the
21 commentary together and a full picture of how it is
22 going to operate, it will serve us well in informing

1 recipients of the new procedure for us to execute a
2 debarment in the very exceptional circumstances where
3 that becomes an issue.

4 MS. GLASOW: Okay. May I ask that the
5 Committee pass a similar resolution to remove Part 1625
6 from the Code of Federal Regulations?

7 CHAIRPERSON BATTLE: Okay.

8 MR. McCALPIN: I can't recall -- well, maybe
9 we did remove 1600 or 1601 once upon a time, but do we
10 have to publish for comment a rescission of a rule?

11 MS. GLASOW: Yes, we do.

12 CHAIRPERSON BATTLE: Okay. So it is in effect
13 until it is actually --

14 MS. GLASOW: It is a proposed action. And
15 actually I will be able to include it just within
16 probably 1606. And I will just state, the Corporation
17 is proposing to remove Part 1625, as nullified by
18 current law, and explained in that memo I gave you
19 where I sat out the reasons for that and then we are
20 revising 1606 for the following reasons.

21 MR. McCALPIN: I think our motion would simply
22 be to rescind 1625 as a regulation of the Corporation.

1 MS. GLASOW: That is fine. Either one is
2 fine.

3 CHAIRPERSON BATTLE: Is that a motion on your
4 behalf?

5 MR. ERLNBORN: Do you put a time element on
6 that?

7 MR. McCALPIN: Well, yes, I am going to ask
8 that. Publish a notice of rescision with a 60-day
9 comment period.

10 MS. GLASOW: Right. I see these three as a
11 package.

12 M O T I O N

13 CHAIRPERSON BATTLE: Yes. Is that a motion?

14 MR. McCALPIN: All right. I so move.

15 CHAIRPERSON BATTLE: Okay.

16 MR. ERLNBORN: Second.

17 CHAIRPERSON BATTLE: The motion has been
18 seconded. It has been properly moved and seconded that
19 we remove or rescind 45 CFR Part 1625, denial of
20 refunding, with a 60-day comment period. All in favor?

21 (Chorus of ayes.)

22 CHAIRPERSON BATTLE: All opposed?

1 (No response.)

2 CHAIRPERSON BATTLE: The motion carries.

3 Okay. Are we ready to move forward? Does anyone need
4 a break or can we press on? We do have room, it seems,
5 to take a break because we have got -- we are way ahead
6 of schedule, but if everybody is fine, we can move
7 forward.

8 MS. GLASOW: I am fine.

9 CHAIRPERSON BATTLE: Okay.

10 MR. ERLENBORN: I may need a break to run up
11 to my room to get the text of the next one. What are
12 we going on to now?

13 MS. GLASOW: I have copies here.

14 CHAIRPERSON BATTLE: 1644, disclosure of case
15 information.

16 MR. ERLENBORN: Yes.

17 CHAIRPERSON BATTLE: And we also received
18 comments.

19 MR. ERLENBORN: That is probably in my Board
20 book and I didn't bring that down.

21 CHAIRPERSON BATTLE: Okay.

22 MR. ERLENBORN: I do remembering reading that,

1 but I didn't put it in here. I did have it in here
2 after all. I found it.

3 CHAIRPERSON BATTLE: All right. We get lots
4 of papers. Sometimes it is hard to tell.

5 MS. GLASOW: It is after all of the
6 attachments. It went with 1606.

7 CHAIRPERSON BATTLE: It is kind of where
8 everybody -- something that looks like this.

9 MS. GLASOW: You have one that says the
10 comments to 1644 and then you have one that says,
11 "Summary of Public Comment and Recommendations."

12 CHAIRPERSON BATTLE: 1644.

13 MS. PERLE: It is towards the back of your
14 package.

15 MS. GLASOW: Yes.

16 CHAIRPERSON BATTLE: Okay. I am going to wait
17 until Bill finds his copy.

18 MR. McCALPIN: I got it.

19 CHAIRPERSON BATTLE: He has got it. Okay.
20 All right. We are prepared to go forward on 1644.

21 MS. GLASOW: Okay. We bring this forward as a
22 draft final rule. We published for comment and we

1 received four comments on the proposed rule and case
2 disclosure. And as you know, this rule is intended to
3 implement Section 505 of our fiscal '98 appropriations
4 act, which requires basic field recipients to disclose
5 certain information to the public and to the
6 Corporation regarding cases filed in court by their
7 attorneys who are employed by the recipient.

8 The comments have agreed, for the most part,
9 that the rule accurately reflects legislative intent,
10 but they have asked for clarification in a few areas
11 and disagreed with some actions that they felt went
12 beyond the statutory language. And I will address each
13 of those issues separately.

14 CHAIRPERSON BATTLE: Now Bill just asked, so
15 we can confirm, the copy that we are now referring to
16 is the same copy that we got in advance, right? There
17 have been no changes.

18 MS. GLASOW: No changes. I have another copy.
19 Does Bill --

20 CHAIRPERSON BATTLE: Yes, he has got his copy.

21 MS. GLASOW: I am going to put this on here
22 this time because I need to juggle back and forth

1 between the text and the comments. The proposed rule
2 applied the rule to what we intended to be were
3 subgrants, but we were -- the comments pointed out that
4 we were not clear about the scope of that because we
5 used one term in the rule, another in the preamble, and
6 they asked for clarification. And they felt that the
7 interplay of the language was confusing.

8 And basically they also disagreed with
9 application of the case disclosure requirement to
10 subrecipients because the statute did not mention
11 subrecipients. And basically what we propose is that
12 we apply the case disclosure to subgrants, rather than
13 to subrecipients -- and I will explain why -- for
14 subgrants that are for the direct legal assistance to
15 eligible clients.

16 And we have done that by actually taking out
17 reference to subrecipients in the definition of
18 recipient, which is paragraph (b) in Section 2 on
19 page 5. So now a recipient means any grantee or
20 contractor receiving funds from the Corporation under
21 Section 1006(a)(1)(A) of the LSC Act.

22 And instead, at the end of the rule on the --

1 Section 4 is applicability and on page 8 it says the
2 case disclosure requirements this part apply, number
3 (4), "To cases filed pursuant to subgrants for the
4 direct representation of eligible clients, except for
5 subgrants for private attorney involvement activities
6 under Part 1614 of this chapter."

7 CHAIRPERSON BATTLE: Okay.

8 MS. GLASOW: And what we mean by this is that
9 if the recipient does a subgrant to a subrecipient for
10 the direct legal aid to eligible clients, cases filed
11 under that subgrant must -- the information must be
12 disclosed, unless, of course, it is a PAI subgrant.

13 CHAIRPERSON BATTLE: Sure.

14 MS. GLASOW: But any other legal aid or
15 representation that subrecipient does under any other
16 of its grants that are not LSC grants, are not required
17 to be disclosed. And paragraph (b) clarifies again
18 that the part does not apply to cases filed by private
19 attorneys.

20 CHAIRPERSON BATTLE: Paragraph (b) where?

21 MS. GLASOW: It is on page 8.

22 CHAIRPERSON BATTLE: On page 8. Okay. That

1 is right. Okay. So now we are not using subrecipient
2 in any context in this particular rule, we are only
3 speaking of subgrants.

4 MS. GLASOW: That is correct.

5 CHAIRPERSON BATTLE: Okay. All right.

6 MS. GLASOW: Okay. The definition of attorney
7 clarifies that the term includes part-time attorneys
8 employed by a recipient. The preamble explains that
9 the case disclosure rule does not apply to any cases
10 filed by a part-time attorney outside of the attorney's
11 employment with the recipient.

12 One comment asked that this clarification be
13 made explicit in the rule. And we have done that. And
14 if you look at the definition -- if you look at page 6,
15 and you look at the case disclosure requirement.

16 MR. McCALPIN: Where are you?

17 MS. GLASOW: Page 6.

18 MR. McCALPIN: Page 6? We are in the
19 definition of attorney?

20 CHAIRPERSON BATTLE: She skipped that one, but
21 do you have questions about it?

22 MR. McCALPIN: Oh, yes. I got --

1 MS. GLASOW: Why don't we go back to that and
2 deal with that.

3 CHAIRPERSON BATTLE: All right.

4 MR. McCALPIN: I am aware of programs where
5 the only actions filed in court are by ajudicare
6 attorneys who are not part of any real PAI program, but
7 in fact, everything that is paid to the ajudicare
8 attorneys qualifies for the PAI requirement so that
9 those programs would, as I read your definition of
10 attorney, not have to comply with the Burton amendment
11 at all. I think that you would be better off to put a
12 period after employee in the second line on your
13 definition of attorney and forget the rest.

14 MS. GLASOW: Okay. I agree and actually we
15 have discussed that because we have made it clear
16 elsewhere in the applicability section that it doesn't
17 apply to subgrants for PAI and it is not -- it is
18 unnecessary here and it does cause that confusion, I
19 think.

20 MR. McCALPIN: Ajudicare attorney is not the
21 recipient of a subgrant. Ajudicare attorney is simply
22 paid by the program according to its normal method of

1 operation.

2 MS. PERLE: Unless they receive more than
3 \$25,000 a year.

4 MR. McCALPIN: Pardon?

5 MS. PERLE: Unless they receive more than
6 \$25,000 a year from the recipient under the definition
7 of subrecipient in 1627.

8 MS. GLASOW: If it is a PAI subgrant and that
9 happens, that is okay, but I think most cases Bill is
10 talking about wouldn't.

11 CHAIRPERSON BATTLE: Is an adjudicare attorney
12 a contract employee?

13 MR. McCALPIN: Not necessarily, no.

14 CHAIRPERSON BATTLE: No?

15 MR. McCALPIN: But the Kansas City program,
16 for instance, has contract attorneys providing service
17 in various areas who are not considered -- who would
18 not be considered adjudicare attorneys. They are a
19 contract attorneys. Adjudicare attorney is one who
20 simply takes a case by reference from the program then
21 may take one or more cases in the course of the year.

22 Linda, what were you referring to on the

1 \$25,000? Was it 1627?

2 MS. PERLE: Section 1627.2 definitions. It
3 says -- they are talking about representation of
4 eligible clients or support for representation. Then
5 it says, "Such activity would not normally include
6 those that are covered by a fee for service arrangement
7 such as those provided by a private law firm or
8 attorney representing a recipient's client on a
9 contract or a judicare basis, except that any such
10 arrangement involving more than \$25,000 shall be
11 included."

12 MR. McCALPIN: It is certainly in the areas
13 that I am familiar with. I don't know of any judicare
14 attorney who gets \$25,000. In Canada that would not be
15 unusual at all, but I am not aware of any in --
16 certainly in the Missouri programs and I have no
17 familiarity with others.

18 CHAIRPERSON BATTLE: So if we remove the
19 qualifying information in this, really is qualifying an
20 entity or a person who in no way could be a full-time
21 or part-time attorney? So what you are saying is the
22 qualifying is inappropriate because these are not

1 people who either work for the program, are employed,
2 or on contract, which is really all that you are
3 talking about.

4 MR. TULL: I think Bill is correct.

5 CHAIRPERSON BATTLE: All right. So we can
6 strike that. 1644.3, case disclosure requirements.

7 MS. GLASOW: Okay. We added language in
8 paragraph (a) for each case filed in court by its
9 attorneys on behalf of a client of the recipient. And
10 that is just clarifying that it is a client of the
11 recipient. It is just a clarification.

12 MR. McCALPIN: In 1644.3(a)(1), is the
13 difference or the juncture between (A) and (B) or or
14 and?

15 MS. GLASOW: Or.

16 MR. TULL: Or. That is a good point.

17 MS. GLASOW: Thank you.

18 CHAIRPERSON BATTLE: Or? Okay.

19 MS. GLASOW: The third issue raised by
20 comments dealt with that provision we were just looking
21 at, that we have to disclose the name and address of
22 parties to the case and that they give us exceptions by

1 statute for when the recipient's attorney determines
2 that physical harm will come to the client if that name
3 or address is released. And one of the comments asked
4 for a blanket exception for clients under a grant that
5 the recipient receives for victims of violence.

6 And the Corporation management is just not
7 convinced that all clients under such a grant would
8 fall within that exception, although many might, and we
9 didn't feel it was such an administrative burden to
10 make that specific determination for each client by the
11 recipient because that is the remedy that Congress gave
12 us. So we recommend not including a blanket exception
13 for all clients that a recipient serves under a grant
14 for violence victims.

15 CHAIRPERSON BATTLE: But I think it is worthy
16 of mention in our commentary to this rule so that to
17 the extent that there are programs out there that have
18 those grants and have the concern, they will have some
19 guidance as to how it can be handled.

20 MS. GLASOW: Okay.

21 MR. ERLNBORN: Could I ask as to (a)(1), the
22 full name and address of each party to a case, does

1 that assume that the attorney filing the suit will be
2 advised of the addresses of all of the defendants or
3 would it be sufficient to say "address unknown" if that
4 were the case?

5 MS. GLASOW: Yes, we had a provision in the
6 preamble to the proposed rule, which I would recommend
7 including in the final rule. It says when there is a
8 situation where our recipient's attorney simply cannot
9 get the information, it is not available or the other
10 attorney on the other side simply won't release it,
11 that if they can substantiate that to us, that that is
12 something we won't take action against.

13 And that is consistent, I think, with the
14 legislative history on this provision, that Congress
15 was saying, "All we want is information that is already
16 public. We want it compiled in a particular place and
17 we want it available to the man on the street if it is
18 so requested."

19 MR. ERLNBORN: I don't know whether it would
20 ever be applicable, but you might have a John Doe or
21 Jane Doe that their address is likely unknown.

22 CHAIRPERSON BATTLE: And many times in, at

1 least state court, you file a fictitious parties, you
2 put in A through Z because you don't know who else you
3 may need to sue. So you are going to have instances
4 where what you disclose is what you have. Okay. And
5 initially you may not have all of the other parties
6 that you ultimately bring into a lawsuit.

7 MR. ERLENBORN: So we will cover that with
8 commentary?

9 CHAIRPERSON BATTLE: Yes.

10 MR. ERLENBORN: Okay.

11 CHAIRPERSON BATTLE: Okay. Is there anything
12 else in 1644.3 on the case disclosure requirement?

13 MS. GLASOW: Manner of disclosing the
14 information. One comment asked whether a request
15 entitles a person to a copy of the most recent
16 semi-annual report only or whether a person may request
17 a report for a specific time period or periods. In the
18 proposed rule or Section 3(b), we said the case
19 information required --

20 MR. McCALPIN: Where are you reading from?

21 MS. GLASOW: Actually, I skipped an issue, I
22 think. I am sorry. Let's go to page 3.

1 MR. McCALPIN: Page 3?

2 CHAIRPERSON BATTLE: Yes, 3 is back in the
3 commentary.

4 MS. GLASOW: The heading, "Identity of
5 requester." One comment asked us to make it clear
6 whether the case information available -- asked for a
7 clarification as to whether the word "person" includes
8 government agencies, departments, or subdivisions,
9 non-profit corporations, public corporations, et
10 cetera.

11 We intend the term to include any person and
12 to be all inclusive. It is not limited by geography
13 and whether it is an entity such as a corporation. It
14 is clear that Congress wanted this information
15 available upon request by any person. And this term --
16 both the term "person" and "public" in the Freedom of
17 Information Act are interpreted very broadly by the
18 federal government. So we are basically just
19 suggesting -- clarifying this in the preamble.

20 CHAIRPERSON BATTLE: Let me see if I
21 understand. The disclosure of case information is to
22 be made to us; is that correct, to LSC, or is it also

1 to anybody else who wants it?

2 MS. GLASOW: There is three -- there is two
3 sections in the rule. One says that the recipient must
4 make the information upon -- available upon request by
5 any person. So if someone writes a letter to our
6 recipient in New York and asks for their case
7 information, the recipient must make that information
8 available to that person.

9 The recipient is also required to provide a
10 semi-annual report on that information to us. And
11 we -- that information provided to us is available
12 under the Freedom of Information Act.

13 CHAIRPERSON BATTLE: Well, then that raises a
14 question to me. Is the recipient required -- someone
15 tomorrow writes a letter to gather up this information
16 in some form and make it available or is the
17 information that is available to the public the
18 information that is available to us, which is a
19 semi-annual report of the listing?

20 MS. GLASOW: What we said in the proposed rule
21 is that the Corporation would provide guidances to the
22 recipients on how to maintain, but we didn't want to

1 specify in the rule specific requirements about how
2 they maintain that information. And so we recommend
3 doing the same in the final rule, that we will provide
4 guidances to the recipients programmatically because it
5 may change over time as through our experience we find
6 that there is a better way of keeping the information.

7 MR. ERLENBORN: But it probably would not
8 conform to legislative intent if only the same
9 semi-annual report information were available from the
10 recipient as it is from the Corporations.

11 MS. PERLE: Do you mean that there should be
12 different information available?

13 MR. ERLENBORN: Maybe more current.

14 MS. PERLE: Well, current. Okay. But not
15 different information than what is in this.

16 MR. ERLENBORN: No-no. Just more current.

17 MS. FAIRBANKS-WILLIAMS: The other thing to
18 think about is if Mr. Reporter from the Times-Herald
19 would ask how many of this type of case you have done
20 in the last six months and want that information and
21 have a person hunting through and doing this, this is
22 going to cause quite a lot of extra time and money.

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1 Should you have the idea that they have to pay for
2 various frivolous things that they --

3 CHAIRPERSON BATTLE: Yes. The recipient may
4 charge reasonable mailing and document copying fees.
5 You can charge your costs.

6 MR. ERLNBORN: But there is no requirement
7 that the recipient process this information to answer
8 the type of question --

9 MS. FAIRBANKS-WILLIAMS: That is what I
10 said --

11 MR. ERLNBORN: I would think only the names,
12 addresses, court, and so forth, and if the reporter
13 wants to pick out from that, process it, and pick out
14 from that particular types of cases, he can do that
15 himself.

16 MS. PERLE: On the other hand, though, if the
17 reporter does ask about specific types of cases, the
18 program would not be under an obligation to give
19 information on all of the cases, if they prefer to just
20 give information on those cases; is that right? In
21 other words, if the specific request is for only a
22 certain type of case, the program could give only that

1 information if they wish to just respond to the
2 request.

3 MR. TULL: But they are not obligated.

4 MS. PERLE: They are not obligated.

5 CHAIRPERSON BATTLE: What about an inspection
6 on that? I mean, in other words, someone says, "I want
7 to see," following up on what Edna said, "I want to see
8 all of the cases you have got of handling family
9 violence. Who do you have? Who are your plaintiffs,
10 who are your defendants? What cases you have filed."

11 Do you then have to provide a sheet or
12 something with all of that information on it or can you
13 have somebody -- if you have got 300 of those cases,
14 can you say, "Come on in and look and see which one you
15 want and get it out of here"? Is that an option?

16 MS. PERLE: Well, that is a suggestion that we
17 had made at an earlier time.

18 MS. GLASOW: The recipient can compile this,
19 has to compile this information some way you have
20 available. And we are allowing the recipient
21 discretion to compile it their own way.

22 If someone comes in and says, "I want all of

1 your domestic violence cases," and the recipient has
2 not separated those types of cases, they can say, "What
3 I can give you is my listing of cases that we have
4 filed and you may, you are perfectly free to go through
5 there and find those cases." But they don't have to
6 prepare a special report with just those cases. But
7 they clearly have to have some report listing all of
8 the cases that are under this rule and have it
9 available.

10 MR. TULL: Do I understand your question to be
11 would it satisfy the rule if the person came to the
12 programs office to review the list there as opposed to
13 having it sent to them?

14 CHAIRPERSON BATTLE: Pay for copying. You
15 know, you have got reasonable --

16 MS. FAIRBANKS-WILLIAMS: No, because then they
17 are looking at all your things, they got their paws in
18 them.. I don't like that.

19 CHAIRPERSON BATTLE: Well, but I am just
20 looking at also the copying and just the
21 administrative -- it could be a hassle and it could be
22 easier to say, "Hey, here they are, go sit in the room,

1 tell me what you want."

2 MR. TULL: Well, I think the question is
3 whether that -- I mean, there is two cuts to that. One
4 is, can the program require the requester to go to the
5 office, is one question, and this does not contemplate
6 that. But if the requester says, "Please send it to
7 me," that it would -- that there is an expectation it
8 would be sent to the requester.

9 If, on the other hand, the requester is a
10 local reporter and is down the street and the program
11 says, "We can send you that list or if you want to come
12 sit in our office and look at it, you are welcome to do
13 either one," I think -- my instinct would be the rule
14 should contemplate that the latter is permissible and
15 satisfies the requirement of regulation.

16 It may be that this language doesn't precisely
17 say that, because it does say, "Available in written
18 form." Although I suppose if you come and sit down in
19 the office and look at the records, you are looking at
20 them in written form. So it is probably --

21 MR. ERLBORN: In the latter case, it is
22 really not a matter of satisfying the regulation, it is

1 a matter of satisfying the requester. Because if the
2 requester is satisfied with that, that is the end of
3 the case.

4 MS. GLASOW: That is right. Now what the
5 recipient cannot do is get a letter saying, "I want you
6 to send me, and I will pay for the mailing and all of
7 that, your report," and they say, "No, you have to come
8 to our office and look at it yourself," the recipient
9 cannot do that. They must make it available, and I
10 think the intent of Congress is to get it in the mail
11 or something somehow available to that person.

12 MS. WATLINGTON: Is the case filed before that
13 date, are clients now aware that their names and things
14 can be published?

15 MR. McCALPIN: They are public when they are
16 filed in the court anyway.

17 MS. FAIRBANKS-WILLIAMS: Cases that are not
18 filed are not public.

19 MR. McCALPIN: What?

20 MS. FAIRBANKS-WILLIAMS: Cases that are not
21 filed are not public.

22 MR. McCALPIN: Well, that is right. This only

1 relates to cases filed in court.

2 CHAIRPERSON BATTLE: So once they are filed in
3 court, they are already a public document, but now this
4 requires that it be kept in a manner that one can
5 review.

6 MR. TULL: We did, in the program letter,
7 which was sent to programs last fall, in anticipation
8 of adoption of this rule, suggest to programs that they
9 consider the disclosure requirements that were
10 appropriate to their clients. Because I think you are
11 correct. While they are a matter of public record,
12 clients don't necessarily expect, when they go to a law
13 office, that their name is going to be sent to some
14 government agency in Washington and made available
15 under a FOIA request.

16 So it is not -- our judgment has been, based
17 on a review of this, that that is not ethically
18 protected information because it is a matter of public
19 record. But notwithstanding that, I think you are
20 right that a client is entitled to know that that is
21 the rules under which the law office they are going to
22 operates. And we did recommend to programs that they

1 so advise clients and would continue to do that because
2 I think they should know that.

3 MS. GLASOW: And actually the last comment I
4 dealt with was a comment asked that disclosure not be
5 required for cases filed since January 1, 1998, but
6 prior to the effective date of this final rule if the
7 client refuses to permit disclosure, since the client
8 may have had no prior information about the rule and
9 could not have known, consented to disclosure as a
10 condition of the representation.

11 And we point out that in our program letter
12 that we encouraged recipients to deal with this in
13 their dealings with the client. So we weren't inclined
14 to give relief here.

15 MS. PERLE: Victor Fortuno just sent up a
16 note, which addresses an issue that we had discussed at
17 some point in the past, which is that in certain
18 jurisdictions, at least, client addresses are not
19 necessarily in the pleadings.

20 MR. McCALPIN: Clients are not what?

21 MS. PERLE: Their addresses. The addresses of
22 clients are not necessarily in the pleadings. They

1 might say, "Joe Smith, a resident of Phoenix, Arizona,"
2 but the only actual address information would be the
3 address of the attorney. So this is information that
4 might not be part of the public record. So I think
5 that really does make it --

6 CHAIRPERSON BATTLE: Does the statute require
7 us to do a full address?

8 MS. GLASOW: Yes. Yes. And we -- did we
9 address anywhere what address is sufficient?

10 MS. PERLE: I think at one time, at least, in
11 some of the materials covering this there was, you
12 know, it said basically an address that was sufficient
13 to get in touch with the person. So it could be a post
14 office address or it could be no permanent fixed
15 address, if you are dealing with a homeless person.

16 MS. GLASOW: But the, you know, the statute
17 really clearly says address. So we felt we had to
18 include that.

19 CHAIRPERSON BATTLE: Yes. We don't have any
20 wiggle room. We have to ask for their address.

21 MS. PERLE: Well, your wiggle room may be if
22 the -- I mean, I don't know, what would happen if the

1 client came in and refused to tell you his or her
2 address, gave you just a post office box or said, "You
3 can reach me through my uncle."

4 CHAIRPERSON BATTLE: That may be the only
5 address that the client has. I mean, I have had some
6 mailing issues around how to serve somebody when the
7 post office box is all they are willing to give you.
8 If that is the only known address, I think that
9 inherent in the law is that you can only disclose the
10 known address.

11 MS. PERLE: Well, you can only disclose what
12 you know.

13 CHAIRPERSON BATTLE: Yes.

14 MS. PERLE: And maybe the preamble ought to
15 say this, that it doesn't obligate the program to take
16 any extraordinary measures to find out.

17 CHAIRPERSON BATTLE: That is right. You are
18 disclosing information that is available to you. And
19 that is all, I think, that can be required.

20 MR. McCALPIN: Is there is no room in this for
21 the protection of the safety of a client such as we
22 have in other --

1 MS. PERLE: Yes, there is, but that is
2 specifically stated in here, that if the attorney --
3 the recipient attorney believes that the attorney --

4 MR. McCALPIN: Well, yes, but the risk of
5 physical harm.

6 MS. PERLE: The problem, of course, is that
7 you may have a situation where you have co-counsel that
8 represents other clients who may also be at risk.

9 MR. McCALPIN: Yes.

10 MS. PERLE: And the language of the statute
11 does not allow you, the recipient attorney, to protect
12 that client's identity or their address. So that, I
13 think, there has to be a determination made by
14 co-counsel as to whether they are going to reveal that
15 information to you. And they need to know that as
16 well.

17 MS. GLASOW: Again, I think I mentioned that
18 earlier in the preamble which we would carry over to
19 the final rule. It says if our recipient cannot get
20 that information from the other parties and they can
21 show us that they made every attempt and they just
22 refused to reveal it, then --

1 CHAIRPERSON BATTLE: Then all you can do is
2 reveal what you have.

3 MS. GLASOW: That is right.

4 CHAIRPERSON BATTLE: As long as you can show
5 good faith efforts to get the information.

6 MS. GLASOW: That is right.

7 CHAIRPERSON BATTLE: Okay.

8 MR. TULL: This perhaps is a substantive
9 dimension that we haven't talked about. It certainly
10 is not out of the question that there might be
11 co-counseling with a case in which you do know the
12 whereabouts of the co-party to the lawsuit. And, in
13 fact, disclosure of that would put that person in
14 jeopardy.

15 And certainly I think there should be no
16 intent intended here, and perhaps the preamble should
17 say it, that this rule should ever be applied in a way
18 which causes the potential risk of harm to a party to a
19 lawsuit.

20 CHAIRPERSON BATTLE: For some reason, I
21 thought you could read that into the (A) and (B)
22 exceptions under (a)(1)(A) and (B). The recipient's

1 attorney believes that revealing it will put the
2 client, even if it is not my client --

3 MR. TULL: It says the client of the
4 recipient's. So perhaps it ought to say something that
5 is a party to the lawsuit at risk of physical harm.

6 MS. PERLE: Well, I would be happy if the
7 Corporation would consider it appropriate to read that
8 into the language of the statute, but the language of
9 the statute, just so you know what you are doing, is
10 that it says the client of the recipient. Now it may
11 be that the co-counsel would have to go -- unless the
12 Corporation is willing to sort of take that extra
13 step --

14 CHAIRPERSON BATTLE: Well, a protective order
15 is the other option. I mean, in other words, the
16 co-counsel can get a protective order from the court
17 saying, "I know they have got this requirement, but I
18 think it puts my client at risk," and get the court to
19 enter an order that says you don't have to do it. So
20 at least that is available. Okay.

21 MS. PERLE: Someone has suggested -- David
22 Dick just suggested that we might want to consider the

1 situation where you have the client or the client's
2 children. In other words, it is not just that the
3 client might at risk of physical harm, but what if
4 there is domestic abuse that takes the form of child
5 abuse, rather than spousal abuse, and that the children
6 of the recipient are at harm -- at risk of physical
7 harm because -- if their address is revealed. I think
8 that is a good point.

9 MR. ERLNBORN: Well, it may be just kind of a
10 flip answer, but if you are worried about that, you may
11 make the children parties to the lawsuit to get the
12 protection. Because the law itself does not seem to
13 address that.

14 CHAIRPERSON BATTLE: Contemplate all of --

15 MS. PERLE: The language doesn't contemplate
16 that. I mean, I think that --

17 CHAIRPERSON BATTLE: But if serious risk is an
18 issue, then I think we are going to have to address and
19 we are going to have to give some guidance to our
20 grantees about how to handle these issues because on
21 the one hand, we are going to be fairly strict about
22 requiring that all of the grantees meet the disclosure

1 requirements, but on the other hand, in no instance do
2 we want to put a party, a child to any of the lawsuits
3 at risk based on this disclosure requirement.

4 So there are a couple of ways to handle that.
5 I think the fact that you have got (A), which is
6 petitioning the court for a protective order, as an
7 option during its pendency, I don't think you have an
8 obligation to make that disclosure. If the court
9 doesn't award it, then you have got the secondary issue
10 as to whether it is covered by (B), and I think we may
11 just need to give guidance.

12 I don't think the congressional intent of this
13 was ever to put anyone in harm's way, but simply to
14 make sure that information about lawsuits that are
15 already public documents be made available. So if
16 making that information available puts a person at risk
17 of personal injury or harm, then I don't think that
18 that is intended, particularly because at least you
19 have this provision relating to the client of the
20 recipient being at risk of physical harm included.

21 I think you can read that that was the intent
22 of Congress from that statement, that it is not our

1 intent to put anybody at risk. And that might go in
2 the preamble, but we can't necessarily put it in the
3 rule because we don't have that as part of the statute.

4 MS. PERLE: I am actually not quite sure I
5 understand what your are suggesting, what you think the
6 outcome --

7 CHAIRPERSON BATTLE: What I am suggesting is
8 that if, in fact, a recipient finds themselves in a
9 situation where you have got someone who is not the
10 client, but that they believe might be at risk of
11 disclosure, that there be a protective order entered by
12 the court prohibiting disclosure of this information --
13 requesting it.

14 MR. ERLNBORN: Like at the time of filing the
15 action.

16 CHAIRPERSON BATTLE: Yes.

17 MS. GLASOW: I think in a guidance that we
18 sent out that if there is another person that is not
19 covered by the exact language of this rule whom the
20 recipient feels we have put at great risk, if
21 disclosure were made, that they should consult the
22 Corporation. And we would --

1 CHAIRPERSON BATTLE: Give some guidance.

2 MS. GLASOW: Yes, give some guidance and help
3 them with it.

4 CHAIRPERSON BATTLE: All right. I think that
5 addresses it. Are there any other comments or
6 questions that arise from the comments that we have
7 received? Bill?

8 MR. McCALPIN: Looking at 1644.4(a)(1), I
9 would suggest that in view of our now inclusion of (4),
10 we eliminate the word "only." I think it raises some
11 confusion to -- I would suggest take out the word
12 "only."

13 MS. GLASOW: That is fine.

14 MS. PERLE: Where are you? I am sorry.

15 MS. GLASOW: Section 4(a)(1). Get rid of the
16 word "only," which is the first word in (1). Okay.
17 Same with (2), Bill?

18 MR. McCALPIN: No, I don't think you have to
19 with (2) because I took out "only" because of the
20 inclusion of (4) where we are not talking about clients
21 and subgrants. I think "only" can stay in (2).

22 MS. GLASOW: Okay. Did I finish discussion

1 of --

2 MR. ERLLENBORN: Could I ask about that?

3 MS. GLASOW: Yes.

4 MR. ERLLENBORN: And I am just trying to form
5 some thought in my mind, but would this address the
6 counterclaim issue in any way? In other words, open
7 up? Because this says, "Only to actions filed on
8 behalf of plaintiffs or petitioners."

9 MS. GLASOW: I am sorry. I missed the --

10 MR. ERLLENBORN: Well, I am not certain whether
11 this -- one is giving protection to the filing of
12 counterclaims. It may not have addressed that at all.
13 I don't know.

14 MS. GLASOW: There was no comments on that
15 issue and so we were recommending staying with this
16 language.

17 CHAIRPERSON BATTLE: Okay. I think that makes
18 since.

19 MS. GLASOW: The preamble discussion of it
20 before, which clarified all that.

21 MR. TULL: Although was your question by
22 taking the word out "only" does it somehow open a door

1 that was intended to be kept closed.

2 MR. ERLNBORN: That was my concern. And I
3 didn't have a chance to really think it through.

4 MR. McCALPIN: Well, I think (2) takes care of
5 it, John, it is just only to the original filing.

6 MS. PERLE: No, but I don't think that is
7 really what they are --

8 MR. TULL: Yes, because the counterclaim is
9 not the original filing of the case.

10 MS. PERLE: Oh, I see. Okay.

11 MR. McCALPIN: So I think that takes care of
12 the counterclaim, cross-claim situation

13 MR. TULL: Okay. I think that is correct.

14 MR. ERLNBORN: I just didn't have a chance to
15 formulate this and I wanted to have it thought about.

16 CHAIRPERSON BATTLE: There has been a question
17 raised. When you say, "Judicial appeals of
18 administrative actions," are you talking about
19 instances where you have an administrative
20 determination and there is either a petition for a de
21 novo hearing in court or there might be a provision for
22 an appeal to a circuit court or to some federal court

1 of an administrative determination?

2 And in that instance, is it called a judicial
3 appeal or is it called an appeal from an administrative
4 action to a court of competent jurisdiction?

5 MR. McCALPIN: Actually, with us I think it
6 would be in the form of a writ of certiorari.

7 MS. PERLE: So it may be different from
8 jurisdiction to jurisdiction. So you need something
9 generic.

10 CHAIRPERSON BATTLE: Yes.

11 MS. GLASOW: So what was your language,
12 LaVeeda?

13 CHAIRPERSON BATTLE: I don't know. I said it
14 real well the first time. I don't have a clue right
15 now.

16 MR. TULL: Isn't it to a judicial --

17 CHAIRPERSON BATTLE: An appeal of an
18 administrative action into a court of competent
19 jurisdiction.

20 MR. TULL: Well, that doesn't get to the
21 appeal certiorari problem. Isn't it a judicial action
22 challenging an administrative decision that is at stake

1 jurisdiction.

2 CHAIRPERSON BATTLE: Oh, by. Well, it is to,
3 really.

4 MS. GLASOW: Okay. It is in the transcript.

5 MR. McCALPIN: Appeal would be by and review
6 would be to. No, the other way around. Appeal to and
7 review by.

8 CHAIRPERSON BATTLE: Yes. When such actions
9 are first filed.

10 MS. GLASOW: Did we finish? Did I clarify
11 that some of the comments wanted more discussion or
12 more in the rule about how to disclose information, and
13 we basically recommended that should only be done to
14 the program guidances?

15 CHAIRPERSON BATTLE: Yes.

16 MS. GLASOW: Okay. I think that is it.

17 CHAIRPERSON BATTLE: That is it? Okay. Any
18 other questions by any other members of the Committee
19 or Board members who are present? Let me recognize
20 Bucky Askew, who has been in and out with us this
21 afternoon, and has joined us for the remaining portion
22 of this proceeding, and Maria Mercado, who has just

1 come in as well. Any questions, comments by any of us?
2 If not, we are now considering the Part 1644 disclosure
3 of case information after it has been out for public
4 comment.

5 We have today deliberated on the comments,
6 made some changes to the rule in light of the comments,
7 and at least deliberated whether changes were made or
8 not on all of the comments that we received. And as a
9 result of that, come up with a final rule that we will
10 present to the Board tomorrow for publication as a
11 final rule implementing the section in 505 requiring a
12 disclosure of case information. Are there any
13 questions about what we have got?

14 MR. McCALPIN: Yes.

15 CHAIRPERSON BATTLE: Okay.

16 MR. McCALPIN: Do you contemplate that what we
17 have done today, in addition to requiring modification
18 of the proposed rule, will also include modifications
19 of the published comment?

20 MR. TULL: You mean the preamble?

21 MR. McCALPIN: Well, when we published this in
22 the Federal Register, we published -- well, we call it

1 the preamble, I guess -- section by section analysis,
2 whatever --

3 CHAIRPERSON BATTLE: Yes, there will be
4 changes to that.

5 MR. McCALPIN: There will be changes to that
6 as well.

7 CHAIRPERSON BATTLE: Yes.

8 MR. McCALPIN: And, you know, we don't publish
9 a preamble as such, we publish the section by section
10 of analysis. Is that the preamble?

11 MS. GLASOW: That is part of the preamble,
12 yes.

13 MR. McCALPIN: That is the preamble.

14 MS. GLASOW: The whole, everything up until
15 the text of the rule is the preamble under Federal
16 Register parlance.

17 MR. McCALPIN: Okay. Well, in view of some
18 fairly substantial changes, which have been made in the
19 rule itself and in the -- prospectively in the comments
20 or whatever is in the Federal Register, I would suggest
21 that we go back to my recollection of the way we -- the
22 process with which we started this whole thing, which

1 is that we recommend this to the Board, we give you the
2 authority to make the -- to approve the requisite
3 changes, but that we then circulate that document to
4 the Board with a 10-day response period before
5 publication.

6 And if any member of the Board sees something
7 in what has been reformulated in that 10-day period,
8 they can call it to the attention of the chair of the
9 Board, the chairman of the Operations and Regulations
10 Committee. It just seems to me that, you know, we have
11 taken out a big piece that was proposed in this. Well,
12 we have gone back to where it was.

13 CHAIRPERSON BATTLE: Now are you suggesting
14 then that we not present it to the Board tomorrow?

15 MR. McCALPIN: No. No-no.

16 CHAIRPERSON BATTLE: We circulate the
17 preamble, let them have 10 days before it goes out.
18 Okay.

19 MR. McCALPIN: Before it is published.

20 CHAIRPERSON BATTLE: Okay. That is fine. I
21 don't think there is a problem with that.

22 MR. McCALPIN: It seems to me that was the

1 original procedure.

2 CHAIRPERSON BATTLE: Okay. But I will work
3 along with the staff to get the preamble finalized
4 before it is circulated to the rest of the Board
5 members. And if I don't hear anything back, then we
6 can publish it in final form.

7 MR. McCALPIN: Right.

8 CHAIRPERSON BATTLE: Okay. With that proviso,
9 do I hear a motion for us to adopt, as final with the
10 changes made today, 1644, the rule portion, with a
11 provision that the preamble will be developed to
12 conform to the changes that have been made today by the
13 staff, reviewed by me, circulated to the Board for a
14 10-day period before the final is published in the
15 Federal Register?

16 MR. McCALPIN: I think our motion is that we
17 recommend to the Board for adoption 1644 as a final
18 regulation.

19 CHAIRPERSON BATTLE: Right.

20 M O T I O N

21 MR. ERLENBORN: So moved.

22 CHAIRPERSON BATTLE: Okay. So moved. Do I

1 have a second?

2 MR. McCALPIN: Second.

3 CHAIRPERSON BATTLE: It has been properly
4 moved and seconded. All in favor?

5 (Chorus of ayes.)

6 CHAIRPERSON BATTLE: All opposed?

7 (No response.)

8 CHAIRPERSON BATTLE: The motion carries.

9 Okay. We actually have worked at lightening speed. I
10 know that those of you sitting with us probably think,
11 "Is this lightening speed?" But for us, this is
12 lightening speed because we have considered today 1623,
13 1606, we have removed 1625, we have considered the
14 comments and public commentary on 1644, and we have
15 done it in great time.

16 We also had on our agenda today to consider
17 and act on proposed rule 45 CFR Part 1641, debarment,
18 suspension, and removal of recipient auditors. But I
19 understand from the Inspector General's office that
20 they intend to take this under careful advisement and
21 to continue to look at some issues before presenting it
22 to the Board. So it will not be presented to us today.

1 All of the Board members have received a copy
2 of this rule and so there may be some of the members of
3 this Committee that will want to get some comments to
4 the Inspector General about some ideas and concerns
5 that they have about what they have so far so that you
6 can consider that in your further deliberation over
7 what it is you are going to propose to this Committee,
8 but we will not take it up today.

9 We would suggest one point, I think, that
10 after discussing it with Committee members, the way
11 that we have numbered all of our regulations has been
12 quite consistent. And this regulation will appear
13 along with all the others. And we would expect that
14 the Inspector General would use the same numbering
15 sequence so that it will be consistent with all of the
16 other rules that are published as final.

17 Okay. Are there any other questions about
18 anything else that we have before us? Any further
19 business for this Committee by anyone? Any other
20 issues? Any other further public comment? We have
21 members of the public that are present that might have
22 some comments about the procedure or the process today.

1 And hearing none --

2 MR. McCALPIN: What are we going to do until
3 4:00 o'clock?

4 MS. MERCADO: Enjoy.

5 CHAIRPERSON BATTLE: We will have a wonderful
6 time. If there is nothing else -- I think, Bill, you
7 will figure out what to do until 4:00 o'clock. Hearing
8 nothing else, I will entertain a motion to adjourn this
9 Committee.

10 M O T I O N

11 MS. WATLINGTON: So moved.

12 MR. ERLNBORN: Second.

13 CHAIRPERSON BATTLE: Okay. All in favor?

14 (Chorus of ayes.)

15 CHAIRPERSON BATTLE: All opposed?

16 (No response.)

17 CHAIRPERSON BATTLE: The motion carries. This
18 Committee is adjourned. Thank you very much to all of
19 the members of this Committee.

20 (Whereupon, at 12:00 p.m., the meeting was
21 adjourned.)

22 * * * * *