LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS & REGULATIONS COMMITTEE

Saturday, May 1, 2004
10:25 A.M.

University of Maryland
School of Law
500 West Baltimore Street
Baltimore, Maryland
Moot Court Room

BOARD MEMBERS PRESENT:
Thomas R. Meites, Chair
Frank B. Strickland
Lillian R. BeVier
Robert J. Dieter
David Hall
Herbert S. Garten
Michael D. McKay
Maria Luisa Mercado
Florentino Subia
Thomas A. Fuentes
Ernestine Watlington

STAFF AND PUBLIC PRESENT:
Helaine M. Barnett, President
Victor M. Fortuno, Vice-President for Legal Affairs
John Eidleman, Acting Vice-President for Compliance and Administration
Lynn A. Bulan, Senior Assistant General Counsel
Mattie Condray, Senior Assistant General Counsel
Leonard Koczur, Acting Inspector General
Laurie Tarantowicz, Counsel & Assistant Inspector General
David Maddox, Assistant Inspector General for Resource Management
Karen Dozier, Executive Assistant to the President
Patricia Batie, Manager of Board Operations
David Richardson, Treasurer/Comptroller
Lisa Rosenberg, Congressional Liaison
Bernice Phillips (Nominee)
William Whitehurst, Jr. (Advisory Member)
Don Saunders, National Legal Aid & Defender Association
Hannah Lieberman, Legal Aid Bureau

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P R O C E E D I N G S

MR. MEITES: Okay. I will call to order the meeting of the Operations and Regulations Committee. First of all, I'd ask for a Motion to Approve the Agenda.

M O T I O N

MS. BeVIER: So move.

MR. MEITES: Second?

MR. SUBIA: Second

MR. MEITES: And the Motion is adopted.

Second, I would ask for approval of the Minutes of our Committee on January 30th, 2004.

M 0 T I O N

MR. SUBIA: So moved.

MS. BeVIER: Second?

MR. MEITES: And the Motion is adopted.

(Off-record discussion between the Chairman and the President.)

MR. MEITES: Yeah. Actually, the Minutes are correct, but I'd like to point out that the heading on the page is wrong. It says, Board of Directors Minutes. In fact, it's Committee Minutes.

That's also true in the first, second line of the Minutes say Search Committee. In fact, it is the Operations and Regulations Committee. But the substance of the Minutes are adopted, as drafted.

Before we begin our formal Agenda I, I'd ask Vic to come forward. We, our Committee has a question for him. And we, our Committee has found that it, its operations have been somewhat hamstrung, by my understanding of the, I call the Open Meetings Act. Probably has a different name. That I have been operating under the understanding that the only communications that I could have with fellow members of my Committee before our meeting was with regard to the Agenda and has been my practice to send out a copy of the proposed Agenda, and then call the, contact the members of my Committee separately. I have been operating under the understanding that I could not discuss with either member of my Committee, and nor they could discuss with each other, any substantive matters regarding items that would come before us.

This is proved to be a very cumbersome understanding of what can be done, particularly now that we are getting into substantive areas such as we're going to hear about today. Put another way, everybody in the world can talk about these, except the three people who really should be talking about them. Now, I hope Victor can tell me that I have misunderstood his directions. And, in fact, we can -- we are able to have more discussions than I have believed till now.

MR. FORTUNO: I'm actually pleased to be able to report that the Sunshine Act -- and ^5its ^ it's the Federal Government -- and the Sunshine Act that has open meeting provisions in it. And it does require that -- I think you said something about the, everyone can discuss this except for the three folks who need to be discussing it. I think the distinction there is, is that you're the decision-makers. And the open Government provision, the open meeting provision in the Sunshine Act requires that when a quorum of the Board or some official subdivision of the Board -- in this case, the Operations-Regulations Committee -- has a gathering either in-person, or by phone, some other means of communication of a majority of ^its ^ it's members so that a quorum is present.

The, there are some limitations. The Sunshine Act is not intended to proscribe informal gatherings, even of a quorum of the Board or some self-division thereof. It permits the gathering of, or discussion amongst a quorum of the Board, or a Committee, of matters before you. You may engage in background discussion; you may engage in the gathering of information, developing of expertise and can even go so far as to expose the gatherings views. I think that what you can't do that, under Sunshine is to engage in a comparison of the relative merits so that what essentially occurs is a

predetermination of official agency action.

So that you can discuss the issues that are coming before you; you can discuss some of the background involved; you can discuss some of the competing views. What you can't do, though, is get into a discussion of the relative merits because what would then likely happen is you would form a fairly firm position as to what the outcome should be as a group. And, then, that is essentially a predetermination of LAC action, and that's what's supposed to occur in public.

But I think that what I would like to leave you with is an understanding that the Sunshine Act is not proscribing formal discussions, even among a quorum of the Committee, and that those discussions can actually be fairly substantive -- acquiring information, developing expertise, discussing background and, as I said, even exposing competing views. You just need to exercise caution once you start to discuss those competing views that what doesn't occur is a comparison of the relative merits of those.

MR. MEITES: All right. Thank you. Lillian? Please.

MR. McKAY: What is a quorum?

MR. FORTUNO: Simple majority.

MR. McKAY: Simple majority.

MR. FORTUNO: Yeah.

MR. McKAY: So, for instance, if we had --

MR. FORTUNO: Either -- if it's an equal number, then it's half, and if it's an odd number, then it's a majority.

MR. McKAY: Okay. So including -- increasing the size of our Committee won't really solve this problem --

MR. FORTUNO: Not be --

MR. McKAY: -- to four because we still have a problem with two --

MR. MEITES: Yeah.

MR. McKAY: -- discussing?

MR. FORTUNO: I think that it's awkward when it's a Committee of three, because any time that two of you have a discussion you have to be mindful of this constraint. If you were to have a committee of five, for example, you still need to be careful, because if there was a series of communications with interchanging members so that if the Chair spoke with a member of the Committee, then that member of the Committee spoke with the different member and the Chair spoke with a different member still, it may be that while you're not all coming together at the same time, or on a conference call at the same time that you're, in a sense, accomplishing the same thing, which is to predetermine to seek action. I think that in that case

it doesn't matter how large a committee is.

MR. McKAY: Right.

MR. FORTUNO: Although, certainly, it does make it a little easier if two folks are having a discussion. You don't have to be as mindful of the constraint.

MR. McKAY: I could just follow up.

MR. FORTUNO: Yes.

MR. McKAY: Just so I can understand, your answer was much more sophisticted than what I was searching for, but I still need to make sure that I understand.

So if, for instance, we were a committee of five --

MR. FORTUNO: Yes.

MR. McKAY: -- two of us can gather and talk about anything.

MR. FORTUNO: Yes.

MR. McKAY: I mean, right down to the bottom line.

MR. FORTUNO: That's right.

MR. McKAY: If it be three, then we have to be mindful of the concerns that you just expressed.

MR. FORTUNO: Yes. And what I would add is a caveat. That if it's two having that discussion, you have to be careful not to then extend --

MR. McKAY: Right.

MR. FORTUNO: -- that discussion to a third, even if ^it's ^ its not at that same time. Even if it's just a, one of the two of you later calling a third and saying we've discussed this, our thinking is and, in a sense, bringing that ^93rd ^ third person into the predetermination.

MR. McKAY: And the, just, if I could just finish.

So, then, if any one of us on the Committee, or any two of us on the Committee can talk about background, talk about agenda --

MR. FORTUNO: (Nodding head yes.)

MR. McKAY: -- could even talk about competing views in terms of understanding --

MR. FORTUNO: Well, these folks are saying this and management's saying this, just to understand from each other --

MR. FORTUNO: That's right.

MR. McKAY: -- in form of collective wisdom the line is, well, geez, I feel much more comfortable with this than -- how do you feel? That's when you cross the line, and that's inappropriate?

MR. FORTUNO: Yes. And I think that if ^it's ^ its less than a quorum, you can probably go even that far, that is, to discuss --

MR. McKAY: I mean --

MR. FORTUNO: -- the relative merits.

MR. McKAY: Indeed, of course, in this Committee, we -- unless we're talking to ourselves --

MR. FORTUNO: That's right.

MR. McKAY: -- in fact, that might even be a problem.

Okay. Thank you.

MS. BeVIER: But does it have to be limited to that quorum? I mean, couldn't it be all three of us talking together --

MR. FORTUNO: Yes.

MS. BeVIER: -- if we're just exchanging?

So it's not just two; it could be the whole Committee?

MR. FORTUNO: Exactly.

MR. MEITES: Maria Luisa?

MS. MERCADO: Yes.

MR. MEITES: I'm sorry.

MS. MERCADO: But I guess the easiest way in -- I mean, obviously, I haven't been on this Board for the last 10 years -- we eventually, I think pretty fast, our legal Counsel always tells us, no, you're going to go into Sunshine at that point. And it really is the philosophy that anything that is governmentally done in this country ought to be before the public, because we are stewards of

the public.

And, so, consequently the whole issue -- you can see it is a matter of saying that, when you are deliberating and given the pros and cons of an issue that you're going to ultimately make a decision on; that the public is entitled to know how it is that we arrive, then, why it is that we decided to do that; whereas the gathering of information, to then come and deliberate at this table to make the decision about a particular issue, is before the public. Because, then if everything gets done behind closed doors -- and I'm sure we've all seen it and you know, not to relegate it to small communities but, boy, everybody already knows what's going to happen by the time they show up at the city council meeting, or the county commissioner's meeting, or what have you, and there's that distrust of the public of governing bodies, of which we are. And, in this case, with Legal Services that while we're allowed even to have a whole task force meeting of the full Board all day long to gather information, expertise, just like we got from the Deans -- let's say, we were doing the LRAP issue, we could get information from all kinds of sources and points of view to get the necessary background to make a decision -- but once we start deliberating as to what I think, or you think or how it ought to go, then we're into Sunshine.

And, so, we don't want to back-door do -- if we two talk, and then he talks to him, you are indirectly doing what you are not allowed to do directly.

So if it's a constant thing, that we are a governing body and we are relegated to acting before the public, and not behind closed doors, to make those decisions then that works a little better. But, I mean, I understand the frustration of saying I can't discuss or prepare for this meeting. You can prepare for it. And we have memos back and forth from different experts on different issues or positions. We get memos from the ABA; we get memos from, you know, local congressman or local organizations about different issues that are coming up before us. But, again, it is gathering information, rather than deliberating on it.

MR. MEITES: Anyone else? Thank you, Victor. I think that helps us to proceed.

All right. The next item on the Agenda is to consider and act on Retainer Agreements and Group Representation Issues relating to LSC Open Rule-Making and Financial Eligibility. And this is, actually, specifically with respect to our existing regulation 45 CFR, Part 1611.

We have a number of meetings talked about, talking about these issues, but we're finally going to

talk about the issues. ^we'd ^ weed asked the staff to make a presentation to us, not on the proposed wording of a regulation, but on what the issues are, and the, and what issues have been developed over time with regard to both our existing rule-making, or existing regulation on retainers, and our existing regulation on group representation. There's quite a bit of history behind this, and hopefully the staff can remind or inform not only our Committee, but the Board as a whole of the history and what the competing views, and views are we should now consider.

Go ahead.

MR. FORTUNO: If I may. For the record, I am Victor Fortuno, General Counsel of LSC. And with me is Mattie Condray, Senior Assistant General Counsel and our rule-making specialist. I, Mattie has been living and breathing rule-making for many years, and certainly LSC rule-making for several years now, and Mattie will actually make the presentation today. But we'll both be here, available to answer any questions you might have.

MS. CONDRAY: Good morning, Mr. Chair, Members of the Committee and Members of the Board. First, I will beg your pardon. Ask me -- to bear with me. It is high tree pollen season, and I am quite an allergic person, so I'm a little congested this morning. But if I go over to

coughing, I'll be back.

Yes, as it turns out, ^we've ^ weave ^ we've been working on this 1611 rule-making for about two years now, half of my tenure since today is my four-year anniversary at LSC.

With respect to retainer agreements. The current regulation requires that our programs execute retainer agreements with their clients. And what the regulation says is that retainer agreements must be executed, unless the only service being provided is brief advice or the consultation. In this case that would tend to lead you to believe that when, and except if, there's a brief advice in consultation an ex- , a retainer agreement must be executed in all cases. In practice, however, what has developed is that retainer agreements are required when the program is providing extended service, extended representation to the client.

In cases where the program is provided brief service, such as, you know, a letter to landlord or an employee, a couple of phone calls of fairly, you know, brief representation, in that case the corporation has not been requiring retainer agreements.

And, indeed, in cases where the only service that's being provided is advice and consultation, obviously, the appropriation has not been requiring retainer agreements.

When the rule-making, the negotiated rule-making to address changes to 1611 opened up, one of the requests that came from the field was that the corporation eliminate the retainer agreement requirement entirely. The position from the field was that while retainer agreements are a fine idea, they are not statutorily mandated and, therefore, the corporation does not have to require them by rule-making, and that the corporation should not require them by rule-making. That should be matter of discretion in local practice.

At the time the management representatives to the Committee and the LSC management disagreed with that position; we never came to consensus about it. And the draft notice of proposed rule-making that was presented to the Committee retained a retainer agreement requirement in the same situation in which a, retainer agreements are currently being required, that is, extended service instances.

We also came to the Committee at the time with a recommendation that, in brief advice and consultation -- sorry -- in advice and consultation situations -- I'll use slightly different language -- that, as in the current situation, no retainer agreement would be required. What was new at the time was a proposal in cases of brief service. Instead of having fully executed retainer

agreement, that the program would be required to provide a client service notice to the client. It would contain much the same information as the retainer agreement but would be a one-way communication and would not have not have to be executed by the client. That idea came about because we were given to understand that the major administrative burden of having an executed retainer agreement in brief service cases would be that the service would be over, essentially, before you could chase down the client in many situations to get them to execute and return the retainer agreement. And we thought that that was a valid point but, at the same time, we were concerned even in brief service situations that the value of the communication between the, and the written record of the communication between the program and the client about what service -- what the legal problem was and what the legal service to be provided was was still valuable, hence the client's notice.

At the time, the then presiding Operations and Regulations Committee and the Board disagreed with that position and directed LSC staff and management to take out the retainer agreement requirement entirely, and the notice of proposed rule-making that was proposed for comment did not contain a retainer agreement requirement at all. And that's, that's procedurally kind of where,

getting to where we are at the moment.

The Committee asked for management's recommendation on this issue. And the management recommendation on this issue is that we should retain, the corporation should retain a retainer agreement requirement in the situations in which one is expected now:

That in extended service situations, a fully executed retainer agreement should be required. Similarly, as in the current situation, where the only service to be provided is advice and consultation no retainer agreement and no client service notice should be provided -- should have to be provided, I should say. Obviously, it remains within the program's province and -- to do that if they want.

In services, brief services situations, the management recommendation is that clients' service notices should be required. Again, these would be one-way notices, but in writing to the client summarizing the legal problem, the rights and responsibility on the client, and the services to be provided.

Very -- so our recommendation is very similar to the recommendation that was originally presented to the Committee. I think there's one major difference from what was originally presented to the Committee back in 2002, which was at that time, the recommendation included a

provision that would allow a program that was providing service to a client where, if it turned out that a different provider needed to do some work -- this happens oftentimes in family law and custody cases where one parent is in one jurisdiction and another one is in a separate jurisdiction where the remote program might be providing some legal services that if there was originally an executed retainer agreement between the first program and the client, that the second program would not have to retain -- obtain an executed retainer agreement.

Management is reconsidered this issue and is now proposing that that not be, that we not add that change to the regulation. The current situation is that in such cases there would still be -- if ^18their ^ there, the second program is providing representation to the client, an executed retainer agreement would have to be provided.

And, ^18final ^ finally, the other aspect of the retainer agreement requirement that we are looking at is the current policy, although it's not ^written ^ wherein in the regulation, but the current policy of the corporation is that in cases that are being handled by private attorneys through programs, private attorney involvement program, that the private attorney must execute a retainer agreement with the client and that the program is responsible for insuring that that happens, and having a

copy of the retainer agreement.

(Off-record discussion between Mr. Fortuno and Ms. Condray.)

MS. CONDRAY: Okay. The, in the course of the working group, the field asked us to eliminate that requirement altogether. Again, this sort of competing interest between understanding the administrative burden on the program to try ^19too ^ to get the private attorney to make sure that gets executed versus it, the value of having the client having some sort of written documentation and the program having a written documentation of the services being provided.

What we had proposed, then, and what management is still proposing is a referral notice. When a program is referring a client to a private attorney through its private attorney involvement program, that the program provide a one-way communication client service -- sorry -- referral notice to the client saying your case is being handled by such and such private attorney. We understand this is the issue. And these are your rights or responsibilities.

There's one other change to the current regulation that I forgot to mention that was proposed and management is continuing to support. That, under the current regulation, programs are required to provide LSC

with a copy of their retainer agreement for prior approval. This, in practice, has not really been particularly necessary or helpful for anybody, so we are willing to propose doing away with that aspect of the requirement, such that programs would not have to provide their retainer agreements to the corporation for prior approval. Rather, the regulation would set forth the minimum information that is required to be in the retainer agreement, but programs would be at their disposal to develop a locally appropriate retainer agreement, or more than one, really, as appropriate for their situation as long as it had minimum pieces of information required in the regulation.

MR. MEITES: Thank you. I have -- let me -- I have a couple questions, then I'm sure my colleagues have some others. Can you, if you would --

MS. CONDRAY: Excuse me?

MR. MEITES: -- summarize the reasons why our predecessors on this Committee rejected the management recommendation with regard to retainers and instead recommended to the Board that the retainer requirement be dropped in its entirety?

MS. CONDRAY: I -- well, without totally speaking for them, I can surmise from what they said --

MR. MEITES: Maria Luisa was on the Board. She

can --

MS. CONDRAY: Yes.

MR. MEITES: -- perhaps help.

MS. CONDRAY: That it was my understanding that they, although they agreed with management that there's certainly a value in having retainer agreements, they disagreed that it was something that the corporation needed to require. That they felt that in situations, since it's a, in so many cases it's a good idea for the programs to have them -- the either local Rules of Professional Responsibility and/or the prevailing needs of the program -- would tend to dictate that the program would have them when its useful and necessary, and that the administrative burdens in having to have them and having to comply with another regulation of the corporation did not outweigh -- that those considerations outweighed the considerations of the appropriateness of having a retainer agreement requirement, which is why they instructed us to delete it altogether. Although they, ^many ^ mm of the Committees members expressed that they thought retainer agreements were a fine idea. ^21its ^ it's just that they weighed the balance differently than the management proposal.

MR. MEITES: Yeah. Next question. That after the Committee recommended that to the Board -- since we

haven't gone this far, I'm hazy about what happened -- the Board then adopted that recommendation; is what -- the next step?

MS. CONDRAY: That's correct. The Board adopted the recommendation of the Committee. And in approving what, in the Board's act of approving what was the draft notice of proposed rule-making for publication for comment, the Board directed us to remove the provisions on retainer agreement thereby proposing to eliminate the existing retainer agreement requirement.

MR. MEITES: Thanks. Right. Lillian?

MS. BeVIER: I wonder if I ^could go ^ cog back to basics and just see if you can -- retainer agreements are for the protection of, as I understand it, both parties.

MS. CONDRAY: That's correct.

MS. BeVIER: And, in addition, the absence of retainer agreements makes, it would make it more difficult for the corporation, I would think, to exercise its function of making certain that, in fact, the funds are being used appropriately.

MS. CONDRAY: (Nodding head yes.)

MS. BeVIER: So in some ways this is a -- I mean, it's a sort of no brainer that they would have them --

MS. CONDRAY: (Nodding head yes.)

MS. BeVIER: -- right?

MS. CONDRAY: (Nodding head yes.)

MS. BeVIER: And, so, what we're talking about, it seems, because ^it's ^ its in the Grantees' interest, I would think, to have retainer agreements --

MS. CONDRAY: (Nodding head yes.)

MS. BeVIER: -- in cases of extended representation, so I'm just -- ^23its ^ it's just kind of at a loss to understand the worry about or how big a worry it is --

MS. CONDRAY: (Nodding head yes.)

MS. BeVIER: -- with respect to the administrative burden. In particular, if now our removing the requirement that they submit their retainer agreements for pre-approval and our giving them a checklist of things that they need to --

MS. CONDRAY: Obviously, the management agrees with you on that point.

MS. BeVIER: Yeah.

MR. MEITES: Well, Miss Perle's going to speak later on the agreement. Perhaps she can help us with that. Mike?

MR. McKAY: So why is it that management believes that it should be required? ^it's ^ its, you know, a -- retainer agreements do make a lot of sense. What I am sensing from the field, as Lillian just observed, is that it is a no brainer that it is appropriate to be employed. Why is it

that management is recommending that it be in the form of a rule?

MS. CONDRAY: Partially to, since the corporation has a responsibility to ensure that the highest quality legal services being provided, we believe that having it in the rule will help the Corporation and the Grantees fulfill that statutory mandate.

In addition, the Corporation's experience has been that although one would think that retainer agreements should be executed in any number of cases, that they are not necessarily, in fact, executed.

MR. McKAY: And if they're not, there's nothing LSC could do when they're looking for compliance because it's not their in the regulation.

MS. CONDRAY: If it was not in the regulation, that's correct.

MR. McKAY It's a no brainer, but ^it's ^ its not in the regulation, so it's nothing LSC could do if a particular Grantee or Recipient was not, did not have a good practice of executing retainer agreements, or client services notices or whatever would be appropriate.

MS. CONDRAY: That's essentially correct --

MR. McKAY: Yeah.

MS. CONDRAY: -- we would not have a regulatory hook to say, you need to be doing this.

MR. McKAY: Mm-hmm.

MS. CONDRAY: I mean, there are general quality reviews. And if there was a real problem I think it comes up with, when complaints come in it makes it more difficult for our compliance staff to get at the root of what the issue was and what the disagreement is. If there's no record of the relationship between the parties -- and I think that's part of the thinking, in fact, there with the client service notices. 'Cause right now, where you have a brief service situation, a, an, a retainer agreement is not required; an executed retainer agreement is not required. And the Corporation is comfortable, management is comfortable permitting that situation to endure, but we think for the same reasons, then, executed retainer agreement is useful in extended service cases. At least the one-way client service notice in these, in brief service cases would be useful to have the documentation of that relationship for just that reason.

MR. McKAY: The proposal by management, I think it's pretty clear from the language -- I just want it on the record, though -- is that there would be nothing required in those lot line cases where someone calls in, there's a chat on the on the phone, some advice about the landlord-tenant issue, whatever it is, end of

conversation. Nothing needs to be completed pursuant to this proposal --

MS. CONDRAY: (Nodding head yes.)

MR. McKAY: -- not even a client information form or --

MS. CONDRAY: That's correct.

MR. McKAY: Okay.

MS. CONDRAY: Now , we would all --

MR. FORTUNO: I think it would depend on what the services provided in response to the hotline call.

MS. CONDRAY: If it's just --

MR. McKAY: Yeah, but it depend --

MS. CONDRAY: It's just -- I was just taking his question being just simply advice.

MR. McKAY: -- then -- I didn't make my client -- my hypothetical clear, was that telephone conversation, which some advice was given over the telephone, and then it ended that conversation .

MS. CONDRAY: Yeah.

MR. McKAY: Certainly if it goes on, it's something else.

Well, let me just get back to this then. When compliance -- if I may, Mr. Chairman.

MR. MEITES: Please.

MR. McKAY: -- when compliance, when our comply,

conversation. Nothing needs to be completed pursuant to this proposal --

MS. CONDRAY: (Nodding head yes.)

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MS. CONDRAY: That's correct.

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MS. CONDRAY: Yeah.

MR. McKAY: Certainly if it goes on, it's something else.

Well, let me just get back to this then. When compliance -- if I may, Mr. Chairman.

MR. MEITES: Please.

MR. McKAY: -- when compliance, when our comply,

when is our compliance shop found they're going out and looked at recipients? Have there been significant occasions where there have been a significant violations of the current regulation where retainer agreements are required? Has that been a problem?

MS. CONDRAY: I'm not the best person to answer that. There's one with better information.

MR. EIDLEMAN: For the record, John Eidleman. There have been intermittent problems. Usually what we'll find is a program may not have retainer agreements in a certain number of cases, but they have good intentions. But we haven't had a wholesale problem where an entire program has just refused to do retainers.

MR. MEITES: Let me follow up on that. You always go back to your own experience in judging how reasonable somebody else's ideas are. In our practice, we sometimes represent large groups of people. ^maybe ^ may be we shouldn't, but we do. And if we have a group of 100 plaintiffs, I can guarantee you we are not going to get signed retainer agreements back from all 100. There are those who just chronically don't fill out anything; there are those who want to see -- sit on the fence and see how it comes out, and there are those who, simply for better/ worse, don't really understand what the retainer agreement is committing themselves to, no matter how clearly you

write it. I would hope that any regulation we are asked to consider would not require 100 percent, or anything approaching that, as far as obtaining retainer agreements. But that there's some notion that consistent program -- consistently applied with good faith efforts is what we expect a recipient to achieve.

Is that what management has in mind, or is it some kind of a higher standard?

MR. EIDLEMAN: Well, we've certainly -- in the past we haven't taken any action against the program because of their failure to have less than 100 percent compliance for a retainer agreement.

Generally speaking, what happens if a person comes into an office, an applicant comes into, and is qualified, as part of the introductory action, there's a retainer agreement that is presented -- and the applicant becomes a client, looks at it and signs the retainer agreement -- there are, sometimes if it's an emergency situation, for example, there's an exception made and the retainer isn't signed. On occasion, it's just an oversight on the part of the program because they're interested in moving forward with the case. And I think that is not the, usually what happens, but it happens on occasion.

MR. MEITES: Well, I, I'm more concerned about

the group representation when you have, like we heard yesterday, that they represented the tenants in this --

MS. BeVIER: Right, the tenants.

MR. MEITES: -- in this housing thing in Annapolis, and there was 50 or 80 different tenants. Now, I could see --

MR. EIDLEMAN: Well, but they're --

MR. MEITES: Now, I could see that they could having a meeting where many of the people attended, and they were enthusiastic, or some left earlier or some put it in their purse and didn't sign it -- and it's a devil of task to get those signed retainers back.

MR. FORTUNO: But I think there's a distinction to be drawn between representation of 100 individual plaintiffs and the representation of a group which happens to consist of 100 tenants. The client is not the 100 individuals, but the organization. And, so, we will be discussing -- Mattie will be discussing determination of eligibility of the group, the organization for representation. But that we treat as distinct from representation of 20, 25 individuals.

MR. MEITES: So if the group is represented, there's not an additional need that each member of the group sign the retainer agreement; is that correct?

MR. FORTUNO: That's right.

MR. MEITES: Okay. Thank you. Lillian?

MS. BeVIER: I take it that there has been, that the reason for this new category of --

MR. FORTUNO: Client service notice.

MS. BeVIER: Brief service where you -- yeah, client service notice is that, although there isn't, apparently, deliberate abuse of the policy, there is a tendency to interpret it in a way in which fewer records are kept -- let me put it that way -- with respect to services that are less than extended service. In other words, the Grantees interpret the lack of a requirement to get a retainer agreement with it's, with brief service very much in their own, you know, in their own favor, if you will. I mean, I don't mean to suggest there's any bad faith. It's a perfectly natural thing to do. This is brief service. Okay. One phone call. One -- you know, that sort of thing. ^I don't ^ I won't need to get a retainer agreement for that because it falls in the category.

So I take it that the reason for this recommendation from staff, from management, for this third category is precisely because there's a sort of recordkeeping gap there.

MR. FORTUNO: Well, I think what you will hear, or may hear from the field in discussing this issue is this notion of volume. Because of the high volume nature

of our operation, every additional piece of paper that you require -- it may be that one individual piece of paper, in and of itself, isn't terribly burdensome -- but because of the high volume nature of the operation you're imposing a requirement which does prove to be burdensome. I think that management is, has considered that, and is sensitive to it, but has on balance come out in favor of what is, essentially, a compromise.

We're understanding that we understand there's a high volume operation at issue here. We understand that in the limited service context it may be difficult to track down and get the individual executed retainer agreement and get it back, and I think Tom has already alluded to some of the experiences that they've had at his firm. So this is a compromise which says, you don't have to go the full distance, but we think there is a benefit to the client. We frankly think there's a benefit to the program for, to the program to determine and, frankly, there's also a benefit to LSC, because LSC has an oversight function with which it is statutorily charged and it does enable LSC to better and more effectively discharge its oversight function when there is a piece of paper that says you came to see us on this date; ask that we provide these services; we agreed to do so. We made a phone call on your behalf, or we sent a letter to your

landlord or whatever it may be. So that, from the management standpoint, it seemed that this was an appropriate compromise. Not asking for the entire, for the ^33if you will ^ full-fledged retainer agreement, but asking that a record -- even if only a one-sided -- and, presumably, if this letter, this notice is sent out tothe client, the client disagrees with -- no, I didn't ask you to represent me in a suit against General Motors; I went, to ask you to help me to stay in my home -- that that will be called to their attention and the discrepancy clarified.

MS. CONDRAY: Right. It also seems as though it might help in just this quality initiative --

MR. FORTUNO: Yes.

MS. CONDRAY: -- that we are presently engaged in as a sort of --

MR. FORTUNO: Best practices.

MS. CONDRAY: -- getting best practices, data collection --

MS. BeVIER: Exactly.

MS. CONDRAY: -- that sort of thing. That was the point I was going to make in following up exactly on that. Our program side shop has told us that as a best practices matter that is what they recommend. That if there's brief service that the program already follow, you know, basically do that, that the program provides some

confirmation in writing of what the issue is and what they're doing, just as a best practices matter, so that the proposal is in line with what the program side of the shop has been recommending as a best practice for quality purposes.

MR. MEITES: Maria Luisa?

MR. EIDLEMAN: There's also the programs that are doing the hotlines, are using that as a best practice. That they follow-up once they've given people the advice --

MS. BeVIER: Yeah, I notice that.

MR. EIDLEMAN: -- and done a brief service, a phone calls -- and then they send a letter off automatically to confirm what the action was.

MR. MEITES: Maria Luisa?

MS. MERCADO: I guess, like everything, you have to sort of take it in context, and the context from which the recommendation from the field comes from. I mean, I know what has been talked about as far as the volume, but the whole context that you have to understand is that I think we spent the first four years writing new regulations from all the different restrictions that Congress made.

And like the point that the Director of the Maryland Legal Services said yesterday, was that Congress,

unfortunately, and a lot of state legislatures are doing a lot of mandates, but they're not funding them in order to carry out the different requirements that they want. And there's certainly a lot of requirements that were brought to bear with Legal Services. And we cut the funding in half for legal services nationwide and, at the same time, we inundated them, through Congress, with an armload of additional regulations. They have more paperwork than they can do. I'm sure that we've destroyed all the fours by now. But it comes from that position that the Board took after four years of writing new regulations for all the different restrictions that the Congress brought to bear and the constant thought that legal services programs around this country must be committing fraud; they must not be doing what we told them to do; they must not be representing clients. And yet all the field investigations that were done, the thousands of dollars, hundreds of thousands of dollars that were spent investigating indicate that there's little to none of that. Some oversights and some mistakes by negligence, and very little at that.

But the fact is that our Grantees are out there doing their work, representing their client with very little money, very little resources, and very little people, and we are asking them to do 100 times the

paperwork that they were doing with half the staff. And, so, that the point of the speaker that was ^here ^ hear yesterday, Miss Erlish (sic).

MR. GARTEN: Erlichman.

MS. MERCADO: What? Erlich - -- I'm sorry -- Miss Erlichman, was that in looking and balancing our need for oversight to make sure that we do, as Board members, have a fiduciary obligation that the tax dollars are being a appropriately used, that in governing that in, since we are the ones that draft the regulations, that in governing that we not impose even more burden on the field to do more paperwork, and more reporting and less actual representation of clients in the field because we still don't trust that they're doing the work that they're supposed to be doing. Even though we hear every time we go into the ^field ^ feeled, some of them work seven days a week to try and represent their clients at, obviously, very low pay.

MR. MEITES: Let me pick up on --

MS. MERCADO: But the thing is, though, is that the reason the Board did not say that it should be a requirement, because there seemed to be a double, or a collateral move to invest and, if you will, look at our budgets that we have, when we first, at least 10 years ago to now, the side shop of compliance is much greater than

that it was before when we started.

So we've done more of the mission, rather than more of the developing of quality and training our field programs and providing them resources to be better lawyers and better staff people to represent people out there in the field. And so that our position was, you already do an intake. When a client is brought into the program they have to fill out an intake form that either tells us whether, that we can only represent eligible clients. And, so, all the issues that Congress put in, restrictions, they're incorporated into that intake. So we are not representing clients that we're not supposed to represent. And their problem that they came in to -- whether it was a divorce, whether it was a consumer problem or a landlord-tenant problem -- it is in the intake sheet. There's a fact summary about why they came to us for services. If we need to know why we're representing clients it is in their intake application, which they sign and they swear under perjury that they can later be prosecuted for if they lied about any of that.

If we have a discomfort level that our staff is not representing appropriate clients, all you have to do is look at the intake forms. Why are we doing additional paperwork for them to do, trying to hire additional data people to do that work?

As far as the brief services is concerned, they all have records of the hotline calls where there was a consumer call, whether it was a consumer call, whether it was, again, a landlord-tenant call or if the brief service -- they have, also, little summary reports, monthly or quarterly that they do, of the different kinds of brief services that they did to the community so you're getting some documentation of how much people it is that we're servicing. But to ask them to again detail and spend more time on doing other paperwork -- yes, we can recommend that, as a best practice, is to have a retainer agreement, but to mandate it under regulation, then you're setting them up to come back and say, you see, uh-huh, we caught you, incompliance. And, so, then -- and there's even recommendations of a 5 percent cut of their funds if they're not in compliance with something or the other. And, so, if there are programs that we're not necessarily thinking they're doing the work they ought to be doing, this is how we're going to do punishment.

And, so, the philosophy of the Board, after many years of going through all those regulations was, that we cannot require any more paperwork that is unnecessary when we already have thrugh the intake process, and that we know we're representing financially-eligible and program-eligible clients already and that that should

suffice, rather than doing other. That's not to say that if programs choose to do it that they should do it, but they shouldn't be penalized to do it.

MR. MEITES: Let me pick up a little different slant on that.

You know, we have an Operations and Regulations Committee, and we have people on staff whose job it is to review and propose regulations, so there's kind of a built-in mechanism that we should do something. I'm not sure the three members of our Committee, however, initially start with that assumption.

Can you tell us why we should change the existing landscape? Why, perhaps for some of the reasons Maria Luisa said, but maybe just because if ^it's ^ its not broke don't fix it, why we should address this problem at all?

MS. CONDRAY: Well, I would say, first, the existing landscape is that retainer agreements are required by the regulation.

MR. MEITES: Exactly. There is a, Rule 1611 already governs this area --

MS. CONDRAY: Yeah.

MR. MEITES: -- 1611-8. We already have a regulation. Why can't we just leave it and move on?

MS. CONDRAY: I mean that's obviously an option. But part of the reason that the management recommendation

does include some changes to the regulation is because we think there are aspects about the current regulation that are not optimum. For one thing, the current regulation requires private -- prior approval of retainer agreements, which management agrees is an unnecessary administrative burden. And we believe that can be changed without any negative impact in client service or Corporation oversight ability.

And then, with respect to, since we're essentially proposing to leave the current regulations with respect to extended service cases and advice and consultation cases, that we're really proposing to -- the other proposal that we're changing client service notice. And that again, I think we agreed that is appropriate even though it's not currently in the regulation, because right now there is a category of cases, which is not, I'd say reaping the benefits of the policy choice behind the retainer agreement requirement.

In an ideal world, if there were not administrative burdens to consider, I think those cases would be an, perhaps better served by a fully executed retainer agreement. But we're in acknowledgement that we don't live in that ideal world where administrative burdens don't have an impact.

MR. MEITES: Yeah. The existing retainer

agreement also doesn't cover the PAI situation at all.

MS. CONDRAY: That's the other situation. And the current regulation does not address PAI. But the current practice at the Corporation has been that do -- and I'll back up a little bit about why that, why that's true -- is that cases, the PAI regulations, Part 1614 specifies that these are services to eligible clients. And, generally -- so, generally, the corporation has imposed the same restrictions and requirements to PAI cases as they have to the programs with a number of specific exceptions for very specific policy reasons. But the prevailing policy has been that the PAI attorney has to get the executed retainer agreement and the, and that the program is responsible for ensuring that that happens.

Again, this was one of those cases where management was able to look at it and say, we agree that this is an unnecessary administrative burden. It -- as hard it can be for the program to track down its own client to get an executed retainer agreement, we understand that it can be that much harder to get a private attorney to do so and that the effort of making that happen can have an, a negative impact in getting a private attorney involvement. So, mindful of that administrative burden, the management proposal for the referral notice was to eliminate the retainer agreement

burden that is imposed currently but still receive -- have the program and the client, the program and LSC received the benefit of the written record of some sort of communication about what is happening, so --

MR. MEITES: Can you point me to where in 1614, existing regulation involving private attorney involvement, there is consideration of --

MS. CONDRAY: I believe --

MR. FORTUNO: I think while Mattie looks that up, I think that the salient point to keep in mind is that what management is recommending is a refined, sophisticated approach which actually lessens the current burden on Grantees. What it does not do is go as far as I think some Grantees would like, which is the elimination of the retainer agreement requirement. So that the proposed action, by and large, actually lessens the burden; it just doesn't go as far as I think the, when the prior Committee and Board took it up were thinking of going.

MR. MEITES: Mattie, do you have the --

MS. CONDRAY: Yeah. Section 1614.1, Purpose, (a), the very first sentence:

This part is designed to ensure that recipients of Legal Services Corporation funds involve private attorneys in the delivery of legal

assistance to eligible clients.

MR. MEITES: And for the eligible client idea is the notion that the recipient had an obligation to chase the private attorney to get a copy of the retainer agreement?

MS. CONDRAY: Yeah. That the retainer agreement requirements, simply it would apply if the Cor- -- if the program was providing the service directly. If the --

MR. MEITES: Oh.

MS. CONDRAY: -- PAI attorney is providing a service through the PAI program --

MR. MEITES: It's the same idea.

MS. CONDRAY: -- for which the program is getting the PAI credit --

MR. MEITES: I got you.

MS. CONDRAY: -- the retainer agreement would apply.

MR. MEITES: Lillian?

MS. MERCADO: You're saying that statute says that?

MS. CONDRAY: No, the statute does not say that, and the regulation does not say that. That's been a longstanding interpretation of the Corporation.

MR. MEITES: So what you're saying is that the recipient has to get retainer agreement for all eligible

clients. If the agent of the recipient for that service is the PAI, then the obligation still retain -- remains on the recipient to get the retainer. Although their agent, the PAI --

MS. BeVIER: Is rendering --

MR. MEITES: -- is supposed to do it, but isn't going to do it; is that logical?

MS. CONDRAY: That's correct. And I would only refine that by saying that, of course, applies in extended service cases.

MR. MEITES: Yeah.

MS. CONDRAY: If the, to the extent that the corporate -- that the program would not have to provide, get an executed retained agreement, the PAI attorney does not have to do so.

MR. MEITES: Right. Lillian?

MS. BeVIER: I guess I'd like to sort of distance myself from the idea that this requirement, if we decide to impose it -- at least from my point of view -- is designed to, to uncover what, you know, a notion that there's widespread fraud. It has nothing to do with that. It's, basically, as I view it, it's a best practices idea. And for all the limitations on the resource, which I appreciate -- and I think Maria Luisa makes some very good points -- that the difficulty is getting this balance

between. I mean, I think our first job is -- well, we have too many first jobs -- but we can't sacrifice, I mean, quality is something that I don't think we should sacrifice. And sort of -- so that's kind of just a general direction I'm thinking about.

But I would like to understand the difference between the retainer agreement and intake. I mean, retainer agreements don't have to do with eligibility, do they?

MS. CONDRAY: ^no ^ know, they didn't.

MS. BeVIER: They just assume that you are eligible because that's been taken care of in elig- -- in intake. And then -- so this is not about eligibility.

MS. CONDRAY: ^no ^ know, that's correct. The eligibility screen has already been concluded. By the time you're executing the, a retainer agreement, the program has already determined that the applicant is eligible, and that the applicant is within their priorities and will be accepted as a client.

MS. BeVIER: Okay.

MS. CONDRAY: The sort of information that's currently in retainer agreements that were, we would be proposing be in the retainer agreements is kind of the statement identifying the relationship between the client and the recipient, a statement of the legal problem for

which legal representation is being provided, the nature of legal service to be provided, including any limitations on the scope of representation, and the rights and responsibilities of a client with respect to the attorney-client relationship.

So ^it's ^ its, in fact, not necessarily the same information that you're going to find. I mean, some of that information you might find in an intake form --

MS. BeVIER: Right , but differently.

MS. CONDRAY: -- in terms of the legal problem for which representation is being provided, but not these other things. And it's the notion of the written documentation of the shared understanding of the relationship between the attorney and the client.

MR. MEITES: Well, let's take a step back here. We are -- it's already 11:15, and we are, our Committee is forecast to be done at 12. We haven't even begun to discuss the group presentation yet, and I don't think we're going to get to it today, which is too bad. But those things happen.

What I'd like to do is, when we finish our questions to management, that we ask the, for public comment on the retainer part now. And if we start group representation, we do otherwise, we can delay that until we get to Omaha. So let's finish the management comments.

Yes.

MR. HALL: I guess my question goes to the enforcement issue. Because if we presently have this landscape where it is required -- and I assume that there are individuals who do this on their own -- how serious is a problem, how serious a problem is this that it presents from an, from a compliance standpoint and is our fear that if we went to a new landscape where it wasn't required, that we would have some more serious problems from an enforcement standpoint, or even from a quality standpoint? 'Cause my assumption is that most people are, you know, complying with this, or we wouldn't --

MR. FORTUNO: Well, ^maybe ^ may be I can start with a stab, that I think that something we need to be mindful of is that the Corporation is charged with oversight and, a joint compliance. And one of the things that we hear and, in fact, did hear, not at the Oversight Hearing, but at the Appropriations Hearing, I believe it was the Chairman of the Appropriations Committee who asked for information to be provided after the hearing to the effect that there are no compliance problems. That ^we've ^ weave ^ we've got things under control, and that if it comes out on the floor, that they, the subcommittee, will be able to respond to any suggestions. That there might be problems out there, and I think that part of what enables you to say there are no

problems, or there are no serious problems, is being able to say we haven't placed mechanisms which, if there were problems, would disclose those or allow us to uncover them, and with these mechanisms in place we have found no problems.

Therefore, when you say things are in order, it's a much more credible assertion than if you don't have the safeguards in place. I don't know if that's clear, but I think it's a significant point to keep in mind.

MR. HALL: Yeah. No, I understand that. But I ^guess ^ guest, you know, another way of looking at that same issue -- and I assume from an oversight standpoint one of the approaches you raise is, you know, what sort of complaints are we getting from clients who are saying: I told him one thing, that that's what I came in here for, and they provided me with some other different types of service -- I mean, because --

MR. FORTUNO: Yeah.

MR. HALL: -- one of the focal points of the retainer agreement, as others have said, is to have clear understanding about what your expectations are and what I am delivering. And, so, if we're getting -- even in the landscape where it is required, a lot of clients are saying this was my expectation and they didn't match it.

MR. FORTUNO: I suspect that --

MR. HALL: Or, if we're in a different landscape where that's not coming up --

MR. FORTUNO: I --

MR. HALL: -- then it's, it says something else to me.

MR. FORTUNO: I suspect that in a program as large as ours there are going to be some of those. I also suspect that, in fact, ^49their ^ there are very few of those. Remarkably few. But I think that that's something to which John Eidleman, in his capacity as the Vice-President who overseas compliance, may be able to better respond. But I think that no one, certainly at this table, means to suggest that there's a perception of widespread abuse or problem.

MS. CONDRAY: No.

MR. FORTUNO: On the contrary, I don't think any of us think there's widespread abuse. I think that you will see, from time to time, an instance arise where a client has a disagreement with the attorney as to what they asked the attorney to do, what the scope of the representations would be. But, frankly, I suspect that those are very few and far between.

And to the extent that anyone is suggesting that the retainer agreement requirement should be retained -- and we're not talking about imposing a new requirement;

we're talking about the perception of an existing requirement -- I think it's for other reasons and not because there widespread problems that have been detected or that are even suspected.

But, again, I think John is probably better able to address that, specifically.

MR. EIDLEMAN: Well, excuse me. We're getting a significant number of complaints every month. Most of them have to do, however, with applicant not getting service because they don't have a case that falls within priority. But we also get a number of cases where there was some confusion about what exactly was going to be done for the client. It certainly makes our job a lot easier if there's a retainer agreement, because that specifically says what the legal work will be, and we can then, by getting the paper documents, close that case. So it's, it makes your job easier, and I think it's much better for the recipient, also, and for the client.

MR. HALL: And that information, going back to Maria's point, isn't included in the intake form that is written when the person comes in. They don't, we don't take information that says I'm here because I want a divorce, or I'm here because I want custody. And, so, if you didn't have the retainer agreement, is there no way you could answer that particular question as to what the

client really came in for?

MR. EIDLEMAN: Well, the application form indicates what the client wanted. But the retainer agreement says what the program agrees to do. The client may want a divorce, and the program may say we can't do a divorce but we might able to get some maintenance for you --

MR. HALL: Mm-hmm.

MR. EIDLEMAN: -- and that clarifies it.

MR. HALL: Mm-hmm. Okay. Thank you.

MR. DIETER: I had a couple of questions. I'm curious why you think that putting forth the minimum requirements in a regulation is less burdensome than, you know, reviewing the retainer agreement. And I think I'm wondering if you put the information in the regulation and then you decide you need to add something or subtract something, you know, do you have to go through a expensive process to do that, number one? And then, number two, the -- it seems we have 57 jurisdictions, basically 50 states and seven territorial operations. I was curious, in terms of the review, you know, how often somebody would be wanting to reach, you know, change a retainer agreement and then, you know, why would there be, you know, eastern Maryland have a different retainer agreement than Baltimore City, for example, or something and, you know,

wouldn't be easier to just review them. But --

MS. CONDRAY: Well, I'll start with the first part of the question, although, if you, if the Corporation decides it did want to change the essential pieces of information that had to be in the retainer agreement, it would need to go through rule-making.

What's proposed here is what the Corporation has been requiring to be in retainer agreements that ^it's ^ its going to approve, anyway. And there's a certain value. If this is what we're going to be requiring in actually having it be discussed in the right -- through the regulatory process and adopted that it's clearly understood as this is what we think is really the important aspects of the regulation. And that's balanced off against -- the prior approval is, again, an administrative step that the Grantee would have to submit their retainer agreement to us. And particularly and -- if they changed it. And there may be situations in which they change their retainer agreement because the retainer agreement incorporates stuff that has nothing do with what we're looking for --

MR. DIETER: Mm-hmm.

MS. CONDRAY: -- yet if they would be, then be required to send it to us for approval, anyway, that they , it was an administrative burden that the field was

MS. CONDRAY: -- to the extent that they're provided is a use of Corporation resources, as well --

MR. DIETER: Mm -hmm.

MS. CONDRAY: -- in the review of the retainer agreement. That balancing that off the Corporation would focus on saying these are the item -- the elements of the retainer agreement that we believe are particularly important to fulfill the objective that we are setting out with the retainer agreement requirement.

MR. DIETER: But, then, the grant application requirement or not?

MS. CONDRAY: I'm not sure I understand.

MR. DIETER: Well, I mean, to apply for a grant through Legal Services, you have to have, use retainer agreements that meet these minimum standards and that would certainly- solve the problem of getting no responses.

MR. MEITES: Well, the Grantee has to agree, or recipient has to agree to abide by all our regulations, so the substantive standards of the regulations in what the retainer agreement has to provide.

MR. FORTUNO: Also something you may want to be mindful of is, in terms of the, if you put it into the regulation, a requirement that there needs to be a pre-approval by the Corporation, then in the instance

where a Grantee neglects to do so, forgets to do so, maybe does so, but there's no documentation to support it, it may be that you, at that point, have, in theory -- well, more than theory, in fact, a violation, albeit, a technical violation -- of a requirement in our regulations. So is there a need to do that? Because if you impose a requirement and they don't do it, then that, in and of itself, is a violation.

MR. DIETER: The other question I had on the client, what is called, the client service notice --

MS. CONDRAY: Mm-hmm.

MR. DIETER: -- in the limited contact. There was mention, I think, of the danger to the client in, say, a divorce or abusive spouse situation. And how would that be handled or exempted?

MS. CONDRAY: Oh. Well, the original proposal that I -- that management is still, that management continues to support is that we talked about the situation, like a domestic violence situation, where a client may be getting representation and having a letter show up at the house where this, the client is still living with an abusive spouse could present a danger to that person. And we obviously don't want to impose the requirement that's going to have that sort of serious negative consequence on the clients, so we would propose

to include an ability for a program to provide notice that, provide that, basically have the conversation of what would be in the written client service notice with the client and make a note in the file explaining why it was necessary to not provide the written documentation, and have a summary in the file, at least, of what the discussion was. You know, every time you have -- if you have a documentation requirement, anytime you make an exception to that you lose the benefit of the documentation.

MR. DIETER: Mm-hmm.

MS. CONDRAY: But, in this particular case, the Corporation management is mindful of the competing interest on the other side which, of course -- and for these cases, you know, the, if it's going to be a danger to the client to have somebody else in the household aware that the client is seeking legal representation, then you've outweighed your benefit.

MR. MEITES: Let me ask if we can at least defer further questions to management so we can hear comments from the ^field ^ feeled.

I have one last question. I think, Mike, subject to your agreement, given our time constraints, my idea is to defer the group representation and the 5 percent until our next meeting and just continue to focus on --

MR. McKAY: I agree.

MR. MEITES: All right. Fine. If I could ask for field comments now, comments from the public on, just on the retainer portion of the Agenda item. There's another Chair. We can --

LINDA PERLE: I think Bill Whitehurst, I think Bill Whitehurst from the ABA is also going to come up at some point while I just wait my turn.

MR. MEITES: All right. Please identify yourselves when you're speaking.

MS. PERLE: My name's, for the record, my name is Linda Perle, P-e-r-l-e, from the Center for Law and Social Policy, and I represent the National Legal Aid and Defender Civil Service.

I must say this has been a very interesting discussion, and I think that members of the Committee and the Board have raised a lot of the points that the field has raised. And I thank Mattie and Vic for being honest brokers.

I think in discussing most of these issues I wanted to respond to one thing that Miss BeVier suggested. That because we don't have the, currently don't have a retainer agreement, that there's a tendency, a requirement for advice and consultation which includes brief services; there's a tendency to sort of shove things into the

category where you don't have -- and I don't think that's true. I think that the categories where you need the retainer agreement under the current rule, and those where you don't, there's a, quite a clear break between those, and I think the programs are -- I don't think that there is that tendency.

MS. BeVIER: ^57its ^ it's just that there's a third category that that doesn't take account of; is that right? I mean, is that --

MS. PERLE: Well, currently the language of the regulation was that you don't say that you don't need a retainer agreement. And I think Bill might have something to say about the use of the word *retainer agreement,* because it's probably not really technically an appropriate term.

MS. BeVIER: Okay.

MS. PERLE: But you don't need a retainer agreement in advice, brief advice and consultation. And that is not consistent with the current categories of case closure that we have under the CSR, the Case Service Reporting system. And, so, over the years, the interpretation by the Corporation has been that there are three CSR categories are that are included.

MS. BeVIER: Three?

MS. PERLE: Three included in brief advice and

consultation, which are what are now advice and counsel, brief service and then a category called referred after legal assessment, which is not used very much; it's, basically is a situation where a program gives advice and then refers to someone else. But in most situations I think programs actually close those as advice cases. So ^it's ^ its basically two -- advice and counsel, which is A in the CSR system --

MS. BeVIER: Mm-hmm.

MS. PERLE: -- and brief service, which is B in that system.

MS. CONDRAY: And then extended.

MS. PERLE: Pardon?

MS. CONDRAY: And then extended.

MS. PERLE: And extended are all other categories, and then retainer agreement is required for all those other categories under the current rule.

I talked to lot of people over the last couple of days about what this -- well, first of all, the position of the field has always been and remains that the retainer agreement requirement should not be a regulation. I mean, I think there is, there was a lot of discussion about best practices here, and I think that most of us agree that in many situations, many circumstances, having some sort of an agreement -- I'm not going to call it a retainer

agreement, because it doesn't deal with money -- but some kind of a client service agreement is a good thing, is advisable and may, in fact, be a best practice.

But there are a lot of things that legal services programs do that are best practices. And we talked yesterday about program on evaluation. Well, I think many of us think that's a best practice. There are -- I got an e-mail from one of the project directors who said there are lots of others in that category sending to letters, sending letters to clients. And when an important decision is made sending, opening and closing the letters to clients, sending clients copies of pleadings, et cetera, LSC should not necessarily be mandating every best practice. That really is something that programs can decide based on the needs of the client, the needs of the programs, the resources of the programs, the kind of representation that they're undertaking and the Rules of Professional Responsibility in the particular jurisdiction.

So that's the, our general view on why we should not be requiring retainers in this situation, although it may, everybody agrees that it may be a good practice in certain situations. Excuse me.

With regard to the brief service situation, that's never been required before, and I think that

there's nothing that I've heard from the staff that suggests there's really any real purpose in doing this. And, again, on -- you know, we're sort of sliding over the administrative burden. This same project director indicated to me that he has -- he doesn't want a hotline, but that he has 2000 brief service cases a year. Just the amount of money that we're talking about in postage is a significant amount for a program, for a legal services program. That's -- excuse me ; I think everybody's, I'm not allergic, but I think everybody's reacting to this pollen -- for a brief, for a legal services program that's strapped for funds. And they're all are.

And that's not at all counting the burden that, on the staff to send out, to prepare -- to send them out to make sure they're in the file, so that when LSC does come out and does then make that a compliance issue, that they'll be in compliance, to prepare the file so that their, when their auditors do the audits of the programs that they find them in the files. You know, it's -- it sounds like a simple thing, but it's really a major burden.

And the other thing is that many programs do many things now that meet the sort of goals that this client service letter -- but they may do it in an entirely different form that meets the needs of their program and

their clients.

Hannah Lieberman, who you heard from yesterday several times -- she was a little worried that you'd be sick of her by now, but I think that, I told, I assured her that wasn't going to be true --

MR. MEITES: No.

MS. BeVIER: No.

MR. MEITES: Please. Go ahead.

MS. CONDRAY: -- I think has some additional comments, and I might jump back in. And then I hope Bill will just come down and talk about it, as well.

MR. MEITES: Bill, would you you want to?

MR. WHITEHURST: Okay.

MS. LIEBERMAN: Thank you. For the record, my name is Hannah Lieberman. I'm the Director of Advocacy for the Legal Aid Bureau.

Good morning. I would urge you not to require Grantees to obtain retainers in brief service cases, and I would also urge you to reject the proposed substitute of client notices because, as I'll describe, I don't think it fulfills any of the legitimate concerns that have been mentioned today. And I actually think, as I sat and listened to the discussion, that it could have some unintended consequences that would actually undercut some of the purposes and the quality control concerns that were

mentioned. And I'll tell you why in a minute, but I'd like to first go back to the issue of retainers in brief service cases.

It was suggested in one of the comments that the reason that it, none of the reasons, perhaps, that they're not currently required, is because of the administrative burden. But I'd submit it's more than that. As you heard a lot about yesterday, and have heard in other contexts, we do a tremendous amount of work over the phone. And there are many, many cases in which we will actually never see a client. The volume of those cases is truly extraordinary. Thousands of people get direct, immediate and very valuable service without even coming into an office. That's particularly important, as I know you understand, in rural areas, with people who have disabilities, who lack transportation, who are caring for kids and who are trying to hold down jobs. And if we can jump on their issue immediately without waiting for a mail transaction of getting a retainer agreement, getting it back, we can resolve their problem often avoiding very serious harms -- lockouts by landlords, cutting off benefits, cutting off of utilities, getting back the check from an employer that's due them. So it is not just an administrative burden; you're relieving us of, by not having retainers in these cases, you are actually making

sure that harm to clients is avoided.

I'd like to talk about this client notice issue. It would, indeed, be highly burdensome and voluminous, Mr. Fortuno correctly noted. It would be a serious concern. But there is little, if any, additional value that such an after-the-fact communication would provide.

First of all, in terms of best practices, in cases that are not the absolutely most straightforward, the client will get a communication from a program that will probably provide more information than a client notice would ever have. It would, for example, summarize what we had been asked to do, what we had achieved, perhaps what the client should do next, some additional advice and indicate that our services were now over. A closing letter. It might contain some documentation that we had obtained in the course of our brief service. It would certainly, we would certainly send a copy of any letter we sent out to an employer, to a landlord, we would copy the client on that and the client would have an actual record of the work that was performed.

If the client service notice requirement were to go into effect, my prediction is that what programs would do to deal with the volume issue would be to develop a form, the best form we could, but a form that would fill in the explanation that would have a little space that

said: This is what you asked us to do; this is what we did. And we would send it out in a kind of formulaic way, and it would wind up having a, less information in it than what we now do in cases that warrant it. And our tickets to practice law are riding on our decisions about whether and when to communicate with clients. There are some very major incentives for us to make sure that clients understand the scope of the services we provide and get documentation for them.

I fear that by having this requirement it would actually dilute the information clients would get, rather than enhance it.

I also don't see how it would really avoid any client disappointment or dissatisfaction with the scope of service they received. It -- because it is after the fact, because it is our view of the service we provide, the, it doesn't prevent or reduce the likelihood that a client's going to ^64comeback ^ come back and say, wait a minute, I wanted more. So to the extent that's a problem, and I can't say on the basis of our program's experience that it is one, but ^I don't ^ I won't see the experience of programs across the country. I really don't see how it really effectively would respond to that kind of a concern.

If the client has that concern, then the -- or a concern about the adequacy of what ^we've ^ weave ^ we've done, we have our

notes in the file to document what ^we've ^ weave ^ we've done. We've had the question of whether or not we've sent information to the client, and we can, we have, we can produce that information. There are better indicia of services than a, this additional restriction, or requirement, rather. So I would urge you, really, in this case, this is where the burden far outweighs the benefit and may even erode best practices inadvertently.

MR. MEITES: Bill?

MR. WHITEHURST: You'll have to excuse me. I'm suffering from your same pollen.

I want to back up and maybe talk a little bit broader, if I might. I think this consideration of this rule, the first rule, or reg., Perhaps, that this Board will, perhaps, make a determination on, is very, very important. More so than just the one rule. But I think we all need to appreciate that when you pass your first rule that may very well define your approach, or at least a perceived approach, from those who had been addressing this Board on many rules and regulations, perhaps, over the years.

So I think how this particular rule is approached is very important for broader reasons than just the rule. I think that is especially so because one of the focuses, and the admirable focus of this Board already stated, is

quality and best practices. But I fear that if quality equals rule, or best practices equals rule, for which there are sanctions, for which there are penalties and for which there are lengthy interpretations, we defeat the very burden of proof of what we're going to try to do with quality and with best practices.

I think this regulation falls in that category. I would encourage this Committee and the Board to give some thought to the approach on this rule in the conceptual. We start with the proposition that there is no Federal law or Federal rule which mandates what we're talking about here today. But, more importantly, we're talking about an area of practice which has been considered by many, many other entities in much more detail than this body will ever have an opportunity to do. ABA has talked about retainer agreements throughout the history of that, of their ethical rules, and Rules of Procedure and Rules of Practice. Every state, every state bar, every state ethics committee, every state practice committee has had an opportunity to discuss retainer agreements and make rules which differ from state to state. I see no reason why we want to create a new animal at the Federal level when we already have in place rules regarding retainer agreements that are particular to a state or particular to an area of practice. That doesn't

mean it can't be talked of in terms of quality, in terms of best practices. We -- I think those are always important. But to raise it to the level of a rule, of a requirement, we get what we have really got here, something that has been discussed by an administrative Board for, now for two years, which will be discussed, perhaps, for another year, and then will be a source of interpretation and concern and, perhaps, sanctions for years to come.

I do think these are the types -- and I hesitate to use this word, irritant, because I know it's more than that -- but those who practice out in the field do not need this kind of regulation. And we have learned that just in what we've seen in New York, and ^here ^ hear, and certainly what I have seen in Texas, is that lawyers who practice in our area, poverty law, do look for best practices; they do look for quality. Many, many have their retainer agreements, and these are agreements that may be tailored to a particular client base. We know that the rural poverty law is different than urban poverty law. We know that ^it's ^ its -- differs from state to state. It may differ with regards to a particular court or a particular area. I just think we are creating another monster, a bureaucratic monster that does not need to be.

That doesn't mean we can't have Guidelines and

standards, which we even recommend and talk about as seminars and talk about as continuing legal education programs. But if we -- and I think that's why this is important -- if we do this for retainer agreements, where do we stop? Are going to have an LSC bar program? Are we going to mandate how many depositions ought to be taken? Now, that's absurd, but I'm just saying that those fall into the areas of quality practice and procedure.

Reporting is another thing. And I certainly appreciate, and I think the field appreciates, the need for you all to have information in which to report to Congress to determine whether your rate, your administration, your administrative oversight is working, ^whether ^ weather ^ whether there's compliance with congressional restrictions. Those are not issues today. ^we've ^ weave ^ we've gone past that, everybody understands. But we don't need, I think, to start creating, and hopefully not with this, with the new Board, to send the signal that we're going to start now issuing rules pertaining to quality and to best practices.

So I, my comment is really broader, and I do hope that you will at least discuss that. The concept, I think, ought to be that if we have an area that is already regulated within the legal profession or the legal administration of a particular state, let's don't create

another level of Federal bureaucracies in the ask law.

And, so, I would urge you to approach it in that way.

Thank you.

MR. MEITES: Let me ask Victor a question as to what our Committee's choices are. If we were to determine that we wanted to recommend to the Board that there be formal consideration of a rule, we would ask the Board to direct the staff to publish the rule for comment; is that the next step?

MR. FORTUNO: Yes.

MS. CONDRAY: Yes.

MR. MEITES: Okay. Let's, let me, let's -- before we ask for questions, I -- we're kind of running out of time. Let me tell you my thoughts, Lillian, Mike, and ^69here ^ hear what your thoughts are.

First of all, we're not going to get to the group representation of 5 percent. We'll just defer that to the next meeting, if that makes sense to the two of you. My sense is that, I've heard strong comments on both sides of this today, and I think it might be helpful if we ask management to reflect on some of the comments from our Board and from the field before the next meeting before we ask anything to be published.

MS. BeVIER: Mm-hmm.

MR. MEITES: And they might want to think, at

least reflect on some of the things that we heard today. And, so, what I would suggest we do is, rather than ask the Board to take any action today, that we defer this to the next meeting for further thought by us and by the management. Does it make sense?

MS. BeVIER: It does to me. I guess I would sort of, I guess I want to kind of indicate where I'm headed, because I'm, I have not reached any sort of firm decision.

But I think sort of tentatively I don't want to sort of answer the claims that have been made one by one, but I believe we should retain the retainer agreement requirement. This is not creating a monster; it's just failing to slay one. And I, but I guess I'm really kind of -- and I think the parts of the reg. that would eliminate some of the burdens on Grantees are appropriate. I mean, I think that not requiring them ever to send you the retainer agreements , not requiring them to get retainer agreements from the private attorneys, those make good sense to me. And the one I'm really concerned about is the, you know, the, what the brief, the --

MS. CONDRAY: Client service.

MS. BeVIER: -- the client service notice. Which makes so much sense in principle. But I guess, you know, when someone comes up, you know, you do think $2,000 and the postage. Well, not to mention -- so, and that with

strained budgets. And, so, then I need to know what, really, what the benefits you think of that are likely to be and the notion that they're, that would provide substantially more information, a better compliance check -- what it is about that that you think would really justify this cost. Because I think both Linda and --

MR. WHITEHURST: Hannah.

MS. BeVIER: -- Hannah -- I'm sorry -- made really persuasive powerful arguments about the burdensome and potentially damaging nature of that requirement.

MR. MEITES: Mike?

MR. McKAY: Well, I found this discussion very helpful, as I told Tom before our meeting. My God, I hope I didn't violate the law. I was hoping that discussion today would be as fruitful as it was because as helpful as Mattie's memo was, I just feet like, geez, I need some more information. So I received it today, not just in the oral presentations on behalf of management, but from the other witnesses and found it very helpful.

Let me just give an indication where I'm leaning on this, as well. And I would like to have, I'd like to have more time to think about it because I've just now gotten my arms around this. And, so, not only -- I think your suggestion, Tom, that you, as management, to go back and think this through, is a good one. I'd like to think

it through. But I am, speaking from my own experience and my own practice, we feel very strongly about having the agreements. And Bill is right, the Bar Association requires it and there are a lot of good practical reasons to have them.

I actually like the proposal that's coming from management. What I'm wrestling with is whether or not we should be requiring it and that's, obviously, the crux of the issue here: Should we be requiring it? And that's something I'd like to think about because I'm not a big regulations guy. And a regulation should be there if there's a real reason, and I'm not sure if I hear that there's a real reason and that's what I want to think more about. So thank you.

MR. MEITES: Wait. Also to say where I'm at, I was taken by Hannah's comment that we're going to substitute a reasoned presentation; we're going to give them a forum. I am -- we do a lot of employment discrimination work and we get forms from the EEOC, which is exactly what you're describing. They check the box of the three reasons that you failed to meet their standards. And now I don't want anything more from the EEOC than I get. I am sympathetic with the idea that this might not be a step back but might be more in the nature of really just covering the posterior of the recipient, rather than

helping the client very much but, see, are we in agreement, then, that we will defer this until the next meeting?

MS. BeVIER: (Nodding head yes.)

MR. MEITES: But let me ask. Does the Board have any questions?

MR. GARTEN: Yeah. I would like to have information of a historical nature.

First, is why Congress didn't include the requirement in the legislation. There must have been some discussion, either at the committee level or elsewhere.

Second piece of historical information I'd like to have, is why our prior Board Members came up with the requirement, the leading -- this requirement to begin with? There must have been a lot of discussion in connection with that. So could we have that background information?

MS. MERCADO: Sure. And just to add to his point --

MR. MEITES: Please.

MS. MERCADO: -- I think it's helpful as a Board Member in trying to make these important decisions, because we are ultimately -- everything that we do comes down to that client that we represent in the field, and the lawyers and the paralegals and the secretaries that

carry out that work for them. So ^it's ^ its not in a vacuum that we're working. And ^74its ^ it's real important, when we're looking at all the information that we have, that we have information from our interested stakeholders from the field -- ^whether ^ weather ^ whether it's the NLADA, or the ABA, or class, or law schools, other organizations -- that could give us some feedback and input on what we think looks fine here but, in practicum, we didn't think of the points that Hannah talked about. And, so, because she's there day-to-day dealing with this, with the thousands of clients that want service and can't get service and won't get service -- 'cause we know we don't even represent 20 percent of the poor people that could be serviced in this country -- that we need to have that information. And I would hope that ^we'd ^ weed have some kind of, you know, memo or thoughts or other information that's already been provided in the former regulatory discussions, that working group had before, that could be provided to the Board so that we could look at all those pieces to decide what makes better sense.

MR. MEITES: David, did you have a comment?

MR. HALL: No, I didn't.

MR. MEITES: Rob?

MR. DIETER: I just had one. I guess I was interested in whether or not Bill is going to talk about

the terminology, because as I look at this --

MR. WHITEHURST: Yeah.

MR. DIETER: -- proposal with the three groups, you know, being a criminal practitioner, you know, you're sort of, you're either pregnant or you're not in terms --

MR. WHITEHURST: True.

MR. DIETER: -- terms of our representation. And our lines are very clear, but I was curious whether or not -- I explained to my students that it's very important to understand how the attorney-client relationship arises, what it, is your responsibility as the client and how it terminates.

MR. WHITEHURST: (Nodding head yes.)

MR. DIETER: And the three categories, here is that middle category that I'm kind of, I guess I'm having trouble conceptualizing, because it's sort of in between these two. I can understand why, on brief service, you know, telephone call, you probably take a note. But there's a, no real need to follow up with a letter. But in our practice oftentimes, you know, people come in, but that's -- they've got a criminal case, but they want to sue the Police, as well, for misconduct. But we don't take those cases, so we have to write them a letter explaining that and explaining that there's a statute of limitations and that -- and our advice to them to seek

counsel right away. And it seems that, you know, the best practice is what Hannah describes, in the sense of you document your engagement, and you document your withdrawal or termination. So that's sort of where I'm having some trouble conceptualizing the proposal, 'cause I don't have much working knowledge in that gray area.

MR. WHITEHURST: But if I might just quickly say I do. I -- that's a very good point and, becau-, and that's why I say retainer agreements are an, is an element of practicing law.

MR. DIETER: Mm-hmm.

MR. WHITEHURST: And that's why I worry about us getting into mandating rules on how we practice law.

Terminology bothers me 'cause I, you know, I think retainer agreement is somebody's paying money.

MR. DIETER: Is money.

MR. WHITEHURST: And, so -- I know it's not, but, I'm just saying that that's a general thought when you hear a retainer agreement. And, but, clearly, the states have addressed that and addressed that, and ^it's ^ its not just for money, but it is an element of practicing law. It is a decision as to where you use it and when you don't, where it may be mandated by your state ethics rules and where it's not, but where you still think it's a good thing to do from a best practices standpoint.

MR. DIETER: Hmm.

MR. WHITEHURST: And that's my, that's really my point.

MR. MEITES: If ^77their ^ there no further comments, I'll accept a Motion to Adjourn our Committee meeting.

MS. CONDRAY: Mr. Chairman, if I, can I make one final comment?

MR. MEITES: Please.

MS. CONDRAY: I just wanted to make a clarification of the proposal with respect to client service notices. And we will go back and revisit all of these issues and come back with --

MR. MEITES: Yeah.

MS. CONDRAY: -- further thinking and recommendations, obviously. But to the extent that there is a suggestion that, perhaps, the client service notice would substitute for a closing letter, that's not the proposal. The proposal would be that the client service notice would be kind of contemporaneous with the acceptance of the client the same way the retainer agreement is. The retainer agreement is not signed at the back end of the representation saying, by the way, we were going to take your landlord to court, and we took him to court and we won. The client service notice would be that same sort of prospective, you know, this what is we

planned to do for you; you came in with an employment issue and we are going to try to resolve this by working with your employer. That, that's just a clarification.

We will take this up with greater detail at the next meeting.

MR. MEITES: Miss Perle?

MS. PERLE: Can I just clarify the clarification? When I -- I mean, I think it goes back to something that Hannah said, as well; which is, that on ^many ^ mm of these brief service situations, which is what we're talking about for these clients services, the service takes, you know, a few minutes to do, or at the most a day to do, so that in almost every instance you're talking about sending the, this notice after the service is actually completed. I mean, the definition in the rules on what we've -- services is something, I think it says service that can be completed within few weeks. Think it even says a few days.

So, in other words, it's, it is akin to a closing memo or a notice to the client that we close the case, because these are things that happen very quickly, and oftentimes the notice will go after, go out after the service is already complete.

MR. MEITES: Thank you. Before we accept a Motion to Adjourn, I want to note that at our last meeting